



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 430 of 2011

SAMUEL NDIBA ALIAS SENIOR & ANOTHER.....APPELLANTS

VERSUS

JOHN GACHOKA KIHARA & 2 OTHERS.....RESPONDENTS

RULING

On 14th November 2012, the appellants herein filed a Notice of Motion dated 2nd November 2012 seeking the following orders:

- 1. That the Original of the Performance Bond in the nature of a Bank Guarantee given by Equity Bank Limited pursuant to the order of this Court of 6th October 2011 and deposited in Court on 27th October 2011 be released to the Appellants forthwith.**
- 2. That costs of this application be met by the Appellants.**

The applicants' case as appears from the supporting affidavit sworn by **Samuel Ndiba Kihara**, is that on 6th October 2011 this Court ordered the appellants to give a performance bond as a form of security for mortuary charges for the preservation of the remains of the late **Esther Wangari Gathoga** (the deceased) whose burial was the subject of this appeal. In compliance with the said order the deponent secured a Bank Guarantee from Equity Bank in the sum of Kshs 800,000.00 which he deposited in Court on 27th October 2011. The appeal was heard and judgement delivered on 28th March 2012 after which the remains of the deceased were interred. It is deposed that while the body was preserved at **Mukoe Funeral Home**, the deponent made all the payments thereof. As the Bank Guarantee was valid up to 25th October 2012, it is contended that the same has expired and cannot be enforced. However, when the deponent sought release of the Original Guarantee to return to his Bank he was advised to make a formal application hence the instant application. The Bank on the other hand requires the said Original letter of Guarantee before they can release the deponent from his obligations and access the money he deposited with the Bank in order to secure the said Guarantee.

The application was opposed through an affidavit sworn by **John Gachoka Kihara** on 15th November 2012. According to him, the appeal that was filed by the appellants was dismissed on 28th March 2012 with costs both of the appeal and the original suit to the respondents herein. According to the deponent, the performance bond in form of bank guarantee given by the appellants ought not to be released as the appellants have not paid the said costs and there exist other related cases between the same parties in which costs have been awarded to the respondents and the respondents have not been paid.

In prosecution of the application the parties filed written submissions which I have considered.

By her ruling dated 6th October 2011 (erroneously indicated in the typed ruling as 6th September 2011) **Lady Justice Ang'awa** ordered the applicants to “provide security of Kshs. 800,000/= in the form of bond insurance or bank or cash deposited in the account of both advocates pending the determination of this appeal. That the applicants are to pay the mortuary fees day to day till the finalisation of this appeal”. The applicants now contend that the said bond was meant for mortuary charges for the preservation of the remains of the deceased which charges they have settled. Nothing could be further from the truth. If the said bond was meant for security charges, there would have been no reason whatsoever for the learned Judge to have gone further and ordered the applicants to pay the mortuary charges on a day to day till the finalisation of the appeal. The bond, in my view was meant to act as security for other expenses and/or charges other than the said mortuary charges which the applicants were bound to meet over and above the bond. From the ruling of the learned Judge the applicants expressed their willingness to furnish security for orders to be granted pending appeal. They cannot now turn round and contend that the bond was only in respect of the mortuary charges.

On 28th March 2012, the learned Judge dismissed the appeal and upheld the orders issued by the subordinate court. The Court proceeded to award the costs of the appeal to the respondent.

It is therefore my view and I so hold that the respondents are properly entitled to recover their costs from the said security since the said costs are costs which arise as a result of the said appeal.

The applicants however, contend that the bond was not capable of being assigned and as the same has expired, the respondents cannot lay any claim in respect thereof.

Section 1A(1) of the Civil Procedure Act, Cap 21 Laws of Kenya provides that “the overriding objective of this Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act”. Subsection (2) on the other hand provides that “the Court shall, in exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1)”. Section 1B on the other hand provides “For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims-

- (a) the just determination of the proceedings;**
- (b) the efficient disposal of the business of the court;**
- (c) the efficient use of the available judicial and administrative resources;**
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**
- (e) the use of suitable technology.**

In interpreting the foregoing provisions, the court of appeal in **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** held *inter alia* that the “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice and that this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.

Accordingly this Court while declining to grant the orders sought by the appellants must make orders that are designed towards the attainment of justice. No use will be served by the retention of the bond by this Court taking into account the fact that the said bond has expired.

Accordingly, the order that commends itself to me is that the said Bond be released to Equity Bank Limited to enable the Bank release the sums held in respect of the said Guarantee. The said sum shall be deposited in Court pending the taxation of the respondents' costs. The respondents to file their Bill of Costs within 30 days from the date hereof. The Deputy Registrar of this Court to ensure compliance with this order. There be liberty to apply.

Dated at Nairobi this 15th day of January 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kingara for the appellants

No Appearance for the respondents