SAMMY K MWAITA. …….. 1ST APPLICANT

TAIWA HOLDINGS LIMITED. …… 2ND APPLICANT

VERSUS

STEPHEN GITIHA MBUGUA. ……RESPONDENT

R U L I N G

The application before this court is the Notice of Motion dated 22nd September, 2011. It seeks, inter alia, an order of stay of execution of the honourable learned trial magistrate's ruling and orders delivered on 27th August 2009.

It is important to note from the onset, that the trial magistrate had, in the said ruling of 27th August 2009, dismissed the present applicant's prayers to set aside or halt orders issuing a warrant of arrest issued by court on 7th August 2008 in execution of a money decree obtained in Nairobi CMCC No. 2791 of 2004. The trial magistrate's said ruling of was however, not annexed to this application to inform the court of what it's proper contents are.

From the careful reading of the documents in support or opposition of this application, the Respondent's case was that the original money decree under CMCC No. 2791 of 2009 still validly exists and is for a sum of Ksh.332,972/-, probably still attracting interests at court rates. Also, as far as this court can gather from the glimpses made or appearing in this file record, the decree arose from a claim by the Respondent against the applicant herein for a refund of a land purchase price sum, originally paid by the Respondent to the applicant which land sale deal, failed because the land sold turned out to be public land. The court also learnt from the file that the Applicant had already refunded the balance of the purchase price except the sum claimed in the original lower court suit aforestated.

There is no evidence on this record that the Applicant herein at any stage disputed the original lower court claim by the Respondent against him. That, perhaps, is why the Applicant herein in his application to set aside the order for personal arrest in execution of the original decree for Ksh.332,972/-, did not at the same time seek to set aside the judgment and decree itself. Understanding the above background history, is in my view, important as it may have a bearing to this court's approach to this application. To the same end the court notes that the advocate or firm of Advocates, who argued and took the lower court's ruling on 27th August, 2009, is still the same advocate who acts for him in this application and who as well, all along, advised the Applicant in respect to this matter.

It was further deponed by the Applicant himself that when the application for setting aside the personal warrant issuance order was dismissed by the lower court on 27th August, 2009, the Applicant's advocates, properly explained to him, the import of the order and the need to file an appeal. The Applicant also deponed accordingly, that he thereupon instructed his said advocates, to immediately file an appeal to this court. The result was the Applicant herein filed the High Court Civil Appeal No. 519 of 2009, and under it, he obtained a stay of execution of the lower court's said order until the appeal would be heard and finally determined.

On 18th May 2011, this High Court however dismissed the above appeal for being incompetent because it

had been filed without leave of the lower court which had dismissed the application seeking the setting aside of the setting aside of the warrant order. The effect of the dismissal was that all incidental orders including the stay order, were discharged.

The applicant immediately filed an application before the trial lower court, this time seeking leave to appeal against the said order of dismissal dated 27th August, 2009 and the same was granted. However, no appeal would be an enlargement of time. It is to obtain such enlargement of time to appeal, that this application now before me was filed on 22nd September, 2011. In the same application, the Applicant seeks a stay of execution of the original trial magistrate's order dismissing the prayer to set aside the orders for a warrant of personal arrest of the Applicant.

The Applicant's grounds in support of this application are that his intended appeal has strong chances of success. He also says that the cause of delay to file the intended appeal is that his advocates messed him up by filing HCC Appeal No. 519 of 2009 without first seeking leave of court as the law required. On this point he argued that the mistake of his counsel should not be visited on him but should be tolerated and excused by this court. Otherwise he will be punished and will suffer because of a mistake he did not himself commit. Finally, the applicant argues that if the stay is not granted, the pending execution will proceed and the sum still due under the decree of Ksh.332,972/-, now deposited in court, will be released to the Respondent. He might also be arrested and sent to civil jail which will embarrass him as a Member of Parliament and which will destroy his name and reputation.

I have carefully considered the grounds upon which this application is based and all the relevant circumstances surrounding the application. I am first persuaded that there was an inordinate delay in filing this application. A period of over 2½ years need not have passed before this application was filed. To argue that the delay caused by the Applicant's advocate through filing an incompetent appeal is a good excuse and is adequate enough to persuade this court to ignore it, is not convincing. The court observes that the Applicant went ahead to defend the appeal even when the advocate's attention to such incompetency was drawn. As if that was not enough, it was the applicant who had also failed to seek and obtain consent through the same advocate, before filing the appeal. He waited until the appeal and related applications were dismissed before seeking this extension of time to appeal. In my view, all the above errors smack of a deliberate parody in which the focus was to gain as much delay as could possibly be extracted against the Respondent, using a legal facade. It is, with great respect, rare to see a party who through a counsel of great repute, is all at once entangled in such a parody of errors. In conclusion on this point, the delay herein was clearly, but inordinate, was also self-inflicted. The applicant whose concern about a possible denting of his reputation and embarrassment, could not have missed being in touch with his counsel constantly and must have advised and instructed his counsel from time to time. The court does not in these circumstances accept the argument that the mistakes made by counsel as revealed herein, were made without the applicant's participation.

While the law is quite clear that an honest mistake of counsel should not be left to punish a party, the discretion of court will always be exercised in the best interests of justice. This is a case where the mistake will be let to lie where it was deliberately fixed by counsel and his client. If party will eventually be hurt, he should know where to turn to for relief. The conclusion I make then is that the applicant's delay was inordinate and inexcusable.

I turn now to the issue that the intended appeal would have high chances of success and therefore failure to grant stay will render the intended success a nugatory. I do not accede to that persuasion. The existing decree is a money decree. The judgment money is really a refund by the appellant, the same being part of purchase price money after the rest had been refunded. The Applicant did not, on the record, oppose the original judgment entered against him and the decree therefore exists and is unlikely at this stage to be set aside. Why then should the trial Magistrate have set aside or interfered with execution process to recover the decretal amount still unrefunded, merely because the decree-holder chose to recover the money by notice to show cause why the Applicant should not go to civil jail. Had he not adamantly refused to clear the debt? How also would recovery of the decretal sum of merely Kshs.332,972/- through a legal court process prejudice the Applicant if the sought stay is not granted?

I have carefully considered this ground and find that the said execution will not prejudice the Applicant. Nor do the grounds of intended appeal, without at this stage reflecting them on merit, appear so impressive.

The third issue raised is that the stay should be granted to preserve the intended appeal. This ground also holds no water. There is no existing appeal whose result should be protected. Even if this court were to allow extension of time to enable the intended appeal to be filed, its chances of success as already prima facie, assessed are indeed low. So the Applicant has failed to persuade this court to grant an extension of time to appeal. He has also failed to persuade the court that there are proper grounds to grant any stay orders to stop the Respondent from concluding the execution to recover the remaining balance now conveniently deposited in court. The result is that both remaining prayers in the application fail. The application is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 29th day of February, 2012

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D A ONYANCHA
JUDGE