



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NUMBER 697 OF 2008

SPIN KNIT DAIRY LIMITED APPELLANT

VERSUS

JOSEPHINE NJERI KIMANI. 1ST RESPONDENT

REV. MOSES KINUTHIA. 2ND RESPONDENT

R U L I N G

This appeal was filed by a Memorandum of Appeal dated 15th December 2008. The Appellant who was the Defendant in the lower court was in the decree of the lower court ordered to pay damages of Ksh.826,104/- to the Respondent, arising from a running down case.

Under a Ruling of this court dated 29th May 2009, by Okwengu, J, (as she then was) the Appellant obtained a stay of execution until the appeal is heard and determined on the condition that he deposited into an interest earning account the whole judgment sum of Ksh.826,104/- within a prescribed period and a further order that the stay granted would stand discharged at the expiry of 12 months thereof if the appeal would not have been disposed of. The Appellant deposited the judgment sum within the prescribed time as well as filed and served the Record of appeal as ordered. The Appellant, however, failed to dispose of the appeal within the 12 months prescribed.

Under a Notice of Motion dated 27th May 2010 seeking for extension of time of stay and prosecution of the Appeal, this court once again extended stay and time to prosecute the appeal. The relevant orders made were as follows: -

“(i) The period of 12 months granted herein on 29th May 2009 within which the Appellant was to dispose of the appeal herein is extended by a further 12 months from the date of this order.

(ii) This shall be the last extension granted to the Appellant.”

These orders were made on 10th December 2010 and the prescribed period of 12 months was clearly to expire on 9th December 2011. Under court notice signed by the Deputy Registrar, dated 27th October, 2011, parties were summoned to attend court and take directions on 18th October, 2011.

On the 18th November, 2011 only the Appellant attended court and the court having fixed the Appeal for another mention on 16th December 2011, made an order that the Appellant was under obligation to comply with the orders of 10th December 2010 made by Sitati, J. The court also ordered that further directions be taken in the file.

On 16th December 2011 both sides appeared before court and the two respondents in the appeal took up the preliminary point that this appeal stood dismissed as per the orders of 10th December, 2010. The Appellant on the other hand orally sought that the court, in its discretion, gives an extension of time within which to prosecute the appeal.

I have carefully perused the relevant material and orders. While fixing the period within which the appeal was to be disposed of, this court through Okwengu, J, gave a period of 12 months within which to do so. The matter which was before her was not the prosecution or disposal of the appeal but rather, whether or not there was to be a stay of execution. In my view, the period within which an appeal is or should be disposed of, is not an issue usually controlled by court orders, unless of course it is directly in issue. Such period is ordinarily controlled by statute or by Civil Procedure Rules.

It seems clear to me, therefore, that the only reason why Okwengu, J, introduced the issue of the period of time within which to prosecute the appeal, was really to control the period of the stay of execution that she was granting that day. This is why in my further view, the honourable judge proceeded to declare the sanction to apply if the appellant failed to dispose of the appeal within the period she granted. She had ordered that the order of stay pending appeal would stand discharged **unless otherwise extended**. That court did not, therefore, and rightly so, make any orders relating to the issue of dismissal of the appeal on any event occurring or not occurring. The court also gave room for a possible extension of the stay of execution order.

By an order dated 10th December, 2010, Sitati, J extended orders of Okwengu, J now under discussion. The relevant orders she made are as follows: -

“i) The period of 12 months granted herein on the 29th May 2009 within which the Appellant was to dispose of the appeal herein is extended by a further 12 months from the date of this order.

ii) This shall be the last extension granted to Appellant.”

Sitati, J’s above order, was without doubt, an extension of 12 months of Okwengu, J’s order already discussed. Although the manner the order was recorded would tend to emphasize **“the disposal”** of the appeal within the additional 12 months which she granted, it would be correct and proper to understand that the court was simply extending an earlier order of stay of execution. It, therefore, means that the consequence of non-compliance of the second order i.e. the Order of Sitati, J, would and should be understood to be the same as the earlier one sanctioned by Okwengu, J’s order. That would be that the stay would automatically **“stand discharged unless otherwise extended by court”**.

Sitati, J, however, added a further condition to the earlier one. Her Ladyship limited the discretion given to the court to expand or extend the time. She said expressly, that her extension of the period, was the last one. She eliminated the discretion of this court to extend the period probably on the ground that the Appellant who had earlier been given a favourable exercise of court discretion had abused it in the first 12 months in failing to prosecute the appeal as ordered by the court.

The court simply was telling the Appellant not to come back to court begging for more time in case it does not again make sure of the extended period of the further 12 months given to him. In my view, this court has power and discretion to exercise its original discretion in any particular way. In this case, it decided to limit or remove its power to extend time for good reasons.

Turning once more to the issue before me, it is my view for the reasons stated above that Sitati, J would not consider it viable to extend an order to dismiss the appeal unless the appellant disposed of it within 12 months which order was not before. I have also presently been requested to extend the order of disposing of the appeal for the purpose of extending the stay of execution. While I have under Order 50, power to extend the stay, the same was curtailed by this court when Sitati, J ordered that the time for disposal of the appeal or indeed stay of execution, cannot again be extended beyond the 12 months she gave. In those circumstances, I have no power to extend the stay of execution order for a second time. I also think that doing so would be sitting on appeal on orders made by a court having a jurisdiction similar to mine.

Let me add, without hesitation, that if I am wrong in stating that my jurisdiction was taken away by this court by the orders of Sitati J, aforesaid, and if indeed I still have discretion to override the earlier order, I nevertheless emphasize that I will, using such discretion, refuse to extend the period sought. That is because the appellants appear prone to abusing favourable discretion given to them, probably for the purpose of gaining some advantage over the Respondents.

For the above reasons oral application for extension of time or extension of orders of stay, is hereby refused with costs to the Respondents. This appeal should however, be prosecuted within six months from today's orders or automatically stand dismissed. Orders accordingly.

Dated and delivered at Nairobi this 8th day of February 2012.

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D A ONYANCHA

JUDGE