



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 407 OF 2005

NYANZA SPINNING & WEAVING MILLS LIMITED..... PLAINTIFF

VS

CREDIT BANK LIMITED..... 1ST DEFENDANT

VIPUL SHAH.....2ND DEFENDANT

KAMAL SHAH.....3RD DEFENDANT

RULING

1. The application before me dated 1st March 2012 is brought by the Plaintiff/Applicant under Order 45 of the Civil Procedure Rules. The Applicant seeks the following orders:

1) That the order of stay pending appeal be varied and or vacated to enable the Plaintiff to obtain Title to L.R. No. 2787/517 situate 1.5 Kilometres to the North West of Nanyuki Town duly discharged by the 1st Defendant and;

2) That the order of stay pending appeal be varied and/or vacated so as to order the 1st Defendant to release the debentures to the Plaintiff the value of such debenture being nil now.

2. The application is based on grounds set out in the face of the application and is supported by the affidavit of Mitesh Fulchand Shah, a director of the company sworn on 2nd March 2012.

3. The application is opposed by the 1st Defendant through an affidavit sworn by Wainaina F. Nguruiya, a Legal Officer with the 1st Defendant on 12th April 2012.

4. The 2nd and 3rd Defendants oppose the application on points of law.

5. The background to the application is that on 7th December 2010, Hon. Justice Muga Apondi delivered a ruling in which he confirmed a consent judgment dated 23rd January 2007 and lodged in court on 30th January 2007 as satisfied but allowed the Plaintiff liberty to take such action as it deemed fit to recover its losses suffered as a result of theft and vandalism of the Plaintiff's property whilst in the hands of Receiver/Managers appointed by the Plaintiff. The court further ordered release to the Plaintiff of all the charges and debenture in respect of the said property duly discharged and ordered that the defendants cede possession of the property to the Plaintiff.

6. Following the above ruling the 1st Defendant lodged an appeal in the Court of Appeal being *Civil Appeal No. Nai. 233 of 2011* and thereafter made an application for stay of execution pending the hearing and determination of the appeal. This application was heard and a ruling delivered by Hon. MugaApondi on 11th May 2011 through which stay of execution was granted on condition that the 1st Defendant would deposit security in the sum of Kshs. 5 Million. The 1st Defendant has since complied and furnished the security as ordered.

7. The gist of the Plaintiff's present application is that the 1st Defendant has partially resiled from the orders of stay aforesaid by requesting the Plaintiff to take over possession of the suit property whilst retaining the title documents and charges thereon. The Plaintiff further contends that there is nothing left on the said premises to warrant the 1st Defendant holding on to the debentures as the assets covered by the debentures have been vandalized to the extent of becoming worthless. The 1st Defendant had also done away with the services of the 2nd and 3rd Defendants who it had appointed as Receivers and Managers of the suit property. The Plaintiff's case is therefore that these developments are new and important matters that merit review of the orders of **Hon. MugaApondi J** aforesaid.

8. In reply, the 1st Defendant contends that the application is misconceived and an abuse of the court process as the prayers now sought are similar to prayers sought in an application dated 22nd September 2010 and which was dismissed by the court in a ruling delivered on 31st January 2012. The present is, in other words, *res judicata*. The application was also incompetent for being brought after an inordinate period of time and when no explanation for the delay had been given to the court. Further, the issues raised in the application and the suit were the subject of the pending appeal, *Civil Appeal No. 233 of 2011* aforesaid. As regards the alleged vandalism and theft of assets, the 1st Defendant avers that the issue is the subject of another suit *HCCC No. 28 of 2012*, which is pending before this court.

9. The 2nd and 3rd Defendants fully associate themselves with the position of the 1st Defendant.

10. Counsel for the parties filed written submissions and made oral highlights on 18th June 2012.

11. I have carefully considered the application, the court record and the written and submissions by the respective counsel for the parties.

12. Order 45 Rule 1(a) of the Civil Procedure Rules allows a person aggrieved with a decree or order from which an appeal is allowed but from which no appeal has been preferred to apply for review in the following instances:

- i. Where there is discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced at the time the decree was passed;
- ii. Where there is a mistake or error apparent on the face of the record; and,
- iii. For any other sufficient reason.

13. In the instant application before me, it is not contested that an appeal has been preferred within the meaning of Order 45 Rule 1(1)(a) of the Civil Procedure Rules. Similarly, Section 80 (a) of the Civil Procedure Act bars the bringing of an application for review where an appeal has been preferred. Without more, the present application should fail.

14. Further, it is not lost to this court that the effect of the orders sought in the present application is to essentially vacate the stay orders granted by Hon. MugaApondi J when it is clear that the 1st Defendant has fully abided by the terms under which the orders of stay of execution pending appeal were granted. That being the case, I am not certain that by entertaining the application I will not be sitting on appeal as regards my learned brother **MugaApondi J's** said orders. This fear tallies with the fear expressed by my brother **Havelock J** in his ruling of 31st January 2012.

15. I need not delve deep into analyzing the argument that the application before me is *res judicata* for the reasons already rendered above on the fate of the present application. However, I note that at paragraph 16 of this ruling of 31st January 2012, Mr. Justice Havelock made the following determination:

“What does the Plaintiff’s application really amount to? Although it does not say so, I am persuaded by counsel that what it really amounts to is an application for review of the stay order granted by MugaApondi J on 11th May 2011. It specifically prays for that order to be vacated. The grounds in support of the application even detail what to my mind amounts to “the discovery of new and important matter or evidence...”

16. My take on the above finding is that the court determined that the correct procedure for the Plaintiff was to come to court by way of an application for review. The court did not then consider the merits of an application for review of the orders hence the present application whilst similar would not pass as being *res judicata*. Nevertheless, **Justice Havelock**, just like me, expressed the apprehension that granting orders which would effectively overturn **Hon. MugaApondi’s** stay orders would amount to sitting on appeal against the said orders, a jurisdiction this court lacked. In the end, the application still meets headwinds which it cannot surmount.

17. For the above reasons, the Plaintiff/Applicant’s Notice of Motion dated 1st March 2012 fails and is hereby dismissed with costs.

IT IS SO ORDERED.

DATED, SIGNED and DELIVERED in Nairobi this 19th day of July 2012.

J. M. MUTAVA
JUDGE