REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 189 of 2008

NEW KENYA CO-OPERATIVE CREAMERIESLTD….PLAINTIFF/APPLICANT
VERSUS

EDWARD MURIU KAMAU……..….1ST DEFENDANT/RESPONDENT

NJOROGE NANI MUNGAI…….……..2ND DEFENDANT/RESPONDENT

PETER MUNGE MURAGE……3RD DEFENDANT/RESPONDENT

ESTHER NJIRU OMULELE…….……..…4TH DEFENDANT/RESPONDENT

ALL TRADING AS MURIU MUNGAI & CO. ADVOCATES

RULING

By a Notice of Motion dated 18th July 2012 expressed to be brought under the provisions of Section 1A and 3A of the Civil Procedure Act and Order 42 rule 6(2)(b) and Order 51 Rule 1 of the Civil Procedure Rules, the applicant/plaintiff seeks the following orders:

1. That this matter be and is hereby certified as urgent and be heard ex-parte in the first instance.

2. That this Honourable Court be pleased to stay part of the Orders of Justice Rawal of 7th of April 2011 ordering the conditional release of the remaining documents in possession of the Defendants/Respondents on condition that Kshs 14 million be paid by the Applicant to the Respondents.

3. That the Honourable do order that the Defendant/Respondent do release all the remaining documents in their possession upon the Plaintiff/Applicant depositing the amount of Kshs. 14 million in the joint account of the Plaintiff's Advocates and Respondent's Advocates and pending the hearing of the Appeal in this matter.

4. That the costs of this application be, in the cause.

The application is premised on the following grounds:

1. That the Advocates continue holding documents in their possession as lien on their fees as ordered by Justice Rawal on 7th April 2011.

2. That the client being dissatisfied with that ruling, filed a Notice of Appeal on 18th April 2011

and duly notified the Advocates.

3. That the Client operations are being hindered because of unavailability of documents being held by the Advocates more particularly the 79 log books and is therefore unable to properly conduct its affairs.

4. That the plaintiff is ready and willing to provide security on the "fees" by depositing the amount of Kshs. 14 million in the name of the parties advocates in a joint interest earning account pending the hearing and disposal of the appeal.

5. That no prejudice will be occasioned on the Defendants if the Orders sought are granted.

The application is supported by the affidavit of **Milcah Mugo,** the applicant's Company Secretary. This suit according to the deponent involves an application by the applicant for the delivery of the clients documents held by the respondents. On 7th April 2011 the Court delivered a ruling in which it was ordered that the defendants do release the remaining documents in their possession to the Plaintiff on condition that the Plaintiff shall pay Kshs. 14,000,000.00 to the defendants. Being dissatisfied with the said decision the applicants instructed their advocates to appeal and a Notice of Appeal was duly filed and proceedings requested for. The respondents in the meantime continue holding several documents as lien of the said sum of Kshs 14,000,000 including trade certificates, motor vehicle log books, annual returns, cautions and caveats, deed of assignments, vesting orders and various agreements. With respect to the log books, it is the applicant's contention that without the same it is increasingly and logistically difficult to manage the fleet of 79 vehicles as the applicant is disabled from seeking for compensation in cases of accidents. Further the applicant, being a public institution is unable to secure its assets fully. Accordingly, as an appeal is pending the applicant has resolved to deposit the sums of Kshs. 14 million in a joint account between the advocates. The intended appeal, according to the applicant has high chances of success and the sum of Kshs. 14 million is adequate security for the purposes of appeal and is payable with interest accrued were the appeal to succeed. In the deponent's view, no prejudice will be occasioned by the grant of the orders sought.

In opposition to the application, the respondent filed a replying affidavit sworn by **Peter Munge Murage** on 27th July 2012. According to the deponent, arising from client/advocate relationship, the respondent filed their bill of costs in which some consents were recorded such as Miscellaneous Application No. 799 of 2007 in which the respondents' costs were taxed in the sum of Kshs. Kshs. 2,958,909.00. It is further deposed that in several matters the taxations filed by the respondents against the applicant have been finalized and fees taxed in the sum of Kshs. 22,649,251.00. Following the withdrawal of the suit against the 5th and 6th respondents, their costs were taxed in the sum of Kshs. 10,038,088.00 which sum the applicant has failed to pay. The order for deposit of the said sum of Kshs. 14 million was as a result of the realization by the court that the taxed costs amounted to Kshs. 13,248,048.63 which currently stand at Kshs. 32,000,000.00. The decree herein for the said sum of Kshs. 14,000,000.00 according to the respondents is valid and despite demands the same has not been settled. Further the present application has been brought after an inordinate and unexplained delay of one year. In order to save judicial time and avoid multiplicity of suits, it is the respondents' view that the parties ought to take accounts taking into account that there are more bills filed pending determination. Despite the good faith borne out of respect for the applicant's advocate's seniority the respondents agreed to release the titles to immovable properties but the plaintiff changed goal posts and frustrated any further negotiations by going back on its words a manifestation that the plaintiff had no intention to negotiate an amicable compromise of the dispute but with intentions to hoodwink the respondents into releasing the said titles. Despite attempts on the part of the respondents to negotiate an amicable settlement, the applicant has frustrated the respondents' efforts and the settlement has been made complex and untidy by the fact that some of the respondents are former employees in the applicant's advocate's firm and there are unresolved personal issues. It is the deponent's view that a party should not use the Court process and personal vendetta to avoid paying for legal services offered professionally. Further the respondents have an existing Professional Indemnity Cover for Kshs. 100 Million with Chartis Kenya Insurance Co. Ltd hence the applicants will not suffer any prejudice by complying with the decree issued. The application is therefore unmerited and ought to be dismissed.

In a further affidavit erroneously entitled "replying affidavit" sworn on 16th August 2012 by **Peter K Ombati**, the applicant's Legal Officer, it is deposed that the issues raised by the applicant with respect to the deposit of Kshs. 14,000,000.00 have not been addressed. Instead the respondents have chosen to introduce irrelevant cases and matters. In the applicant's view this matter ought to be looked at on stand-alone basis. While denying the existence of any vendetta, the deponent avers that the respondents have been in the habit of sending threats to the applicants. According to the deponent no prejudice will be caused to the respondents if the application is granted. With respect to accounts, it is his view that in light of the large amount of taxations and High Court decisions, it would be next to impossible for the parties take accounts.

In his submissions, **Mr Mereka**, learned counsel for the applicant reiterated the contents of the supporting affidavit and stated that the order that the applicant seeks for deposit of the said sum of Kshs. 14,000,000.00 will not prejudice anyone because whoever wins will get the money with interest. However, the plaintiff continues to suffer for lack of the documentation yet the plaintiff is a parastatal. According to counsel, the respondent has instead of dealing with the issues raised resorted to give the history of the matter between the parties without recognizing that several rulings have been made some in favour of the applicant. On the issue of the respondent's having been misled into releasing the title documents, it is contended that the instructions were received from the client and the fact that the titles were released does not mean that all is lost since once there is a valid decree passed there will be no problem with payment. This being a separate matter any attempts to introduce irrelevant matters is not in order. The replying affidavit according to counsel instead of addressing the issues only amounts to a statement of complaints and ought to be disregarded.

On his part **Mr. Njoroge**, learned counsel for the respondents submitted that the order sought to be stayed was issued on 7th April 2011 and the present application filed 3 months later without an explanation being offered for the inordinate delay. Secondly, whereas the application purports to be an application for stay it is in actual fact an application for review since what is sought is the severance of the order made on 7th April 2011 which no provision of the law allows. In arriving at the decision the learned judge took into account the fact that the respondent had taxed their costs in the sum of Kshs. 13,248,048 and the order for payment of Kshs. 14,000,000.00 was a recognition that the said sum was owed and since then the respondent has taxed further bills amounting to Kshs. 32 million. Accordingly there is no basis to delay the respondent of the hard earned fees when there are decrees entitling them to the fees. To grant the stay orders sought would occasion hardship to the respondents. If the applicants are suffering it is out of their own making since it is not contended that the respondents will be unable to tender the said sum of Kshs. 14,000,000.00 if paid to them. Lastly it was submitted that the applicants and their counsel have demonstrated lack of good faith and where an exercise of discretion is sought the conduct of the applicant ought to be investigated. In this case after the release of titles to the applicant on certain undertaking to pay the taxed costs the applicant on receipt of the titles responded by stating that the matter should be litigated. Consequently, it is the respondents' view that the application ought to be dismissed.

In his reply, **Mr. Mereka** submitted that taking into account the nature of the dispute involving motor vehicles and annual returns, one year and 3 months cannot be said to be inordinate delay since the delay was occasioned by the nature of the applicant's business.

I have carefully considered the application, the affidavits filed, submissions made as well as authorities cited by counsel for both parties. Order 42 rule 6(1) and (2) of the Civil Procedure Rules provides as follows:

(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

However, in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is nolonger restricted in any matter brought under the Civil Procedure Act and the Rules made thereunder to the "traditional" pre-overriding objective guidelines. The courts, to the contrary, are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA** on 20/11/09 held *inter alia* that:

"the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".

In my view where there is a conflict between the overriding objective principle and the past precedents, the overriding objective must prevail since the overriding objective is not there to fulfil the precedents but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case. See **Kenya Commercial Bank Limited Vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010.**

In **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** the Court of Appeal expressed itself as follows:

"the applicant's submissions…would have had no answer to them if they were made before the enactment of section 3A and 3B of the Appellate Jurisdiction Act...**The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.*****In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives".**

It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective.

The first issue for determination is whether the applicant stands to suffer substantial loss if the Court declines to grant the stay sought. According to the applicant it is unable to manage its affairs properly due to the fact that the registration books (otherwise known as logbooks) for its vehicles are held by the respondents thus denying it opportunity to lodge claims for compensation arising out of accident claims.

Further it is unable to make annual returns as its books are in the custody of the respondent.

In an application for stay the Court must consider the overriding objective and balance the interest of the parties to the suit since the court is enjoined place the parties on equal footing. Since the overriding objective aims, *inter alia*, to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, the balancing of the parties' interest is paramount in an application for stay of execution pending appeal. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal, and in the event it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100.**

Still on the issue of the overriding objective, the principle of proportionality requires the Court to take into account the amount of money involved; the importance of the case; the complexity of the issues; and the financial position of each party. See **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63.**

It is with this in mind that the Court of Appeal in **Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005** while citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. Therefore where there is a large sum of money involved the Court may take that in consideration in an application for stay of execution. Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes a central issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. In other words the court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of his judgement. **See Attorney General vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008; Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410; Mukuma vs. Abuoga [1988] KLR 645.**

It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* would remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another [1986] KLR 410; 1 KAR 1018; [1986-1989] EA 266.**

Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that allegation to the satisfaction of the Court. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

It is appreciated that it may not be possible for the applicant to know the respondent's financial means and therefore all an applicant can reasonably be expected to do, is to swear, ***upon reasonable grounds***, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed. The applicant is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there since the property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them.

However, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum. **See Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

The legal burden obliges the applicant to lay a basis for forming a belief that the respondent will not be able to refund the decretal sum and whether or not the applicant is able to satisfy this requirement depends on the facts of a particular case.

In this case there is no allegation at all that the respondent will be unable to refund the said sum of Kshs. 14,000,000.00. The respondents aver that they are in fact in a position to do so. On the other hand it is not alleged that if the applicant is made to part with the said sum it will be placed in a position of financial embarrassment with respect to its ability to meet its financial obligations. To the contrary, the applicant is willing to part with the said sum, only that it is not willing to channel it towards the respondents' direction. In the foregoing circumstances the applicant has not satisfied me that it stands to suffer substantial loss. The substantial loss it stands to suffer is with respect to its inability or unwillingness to comply with the Court order and not one that it will suffer if it were to comply. In other words the applicant has disabled itself from performing its obligations by its own failure to comply with the Court order.

It must also be pointed out that this suit was not a challenge on the taxation of the respondents' costs. That issue is a matter for a different forum. What the Court did in this suit was in fact to decree in favour of the applicant save that it took into account the applicant's liabilities to the respondents. Accordingly, the principle of proportionality does not augur favourably to the applicant.

It is also true that the applicants have taken 1 year and 3 months to bring this application. By any standards that delay is inordinate unless there is an explanation proffered. None appears in the supporting affidavit and the submissions of counsel to the effect that the circumstances of the case merited the said delay are, with respect, unconvincing.

The last issue that I wish to deal with is whether the present application is in actual fact an application for stay. According to ***A Concise Law Dictionary*** 5th Edition by P G Osborne, "stay of execution" is "the suspension of the operation of a judgement or order". "Review" on the other hand is defined by ***Ballentines Law Dictionary*** by Jack G Handler as "re-evaluation or re-examination of anything". What the applicant seeks is not that I suspend the judgement. What it seeks is that I should modify the judgement so that instead of payment being made to the respondent, the same be deposited. The other order for release of the documents is not to be interfered with. In my view to grant the orders sought herein will amount to a re-evaluation or re-examination of the judgement of **Rawal, J** (as she then was) and that I am only entitled to do in an application for review. I am therefore in agreement with the respondents that what is before the Court is an application for review packaged as an application for stay of execution.

In the result I have no hesitation in dismissing the application dated 18th July 2012 which I hereby do with costs to the respondents.

Dated at Nairobi this 23rd day of October 2012

G V ODUNGA
JUDGE

Delivered in the presence of

Ms Kimengich for Mr Mereka for Applicant
Mr Mushweshwe for the Respondent