



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 3532 of 1995

NTIN PROPERTIES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

JAGJIT SINGH KALSI.....1ST DEFENDANT/RESPONDENT

KALDEEP KAUR KALSI.....2ND DEFENDANT/RESPONDENT

R U L I N G

1. This case has been heard and completed. On the 16/01/2009, the court (Aganyanya, JA) dismissed the Applicant's suit and ordered each party to bear its own costs. The Applicant being aggrieved by the judgment instructed its advocates to prefer an appeal therefrom and to immediately file an application for stay of execution of the decree in order to maintain the status quo of the suit property pending the hearing and determination of the intended appeal.
2. That application for stay was heard and on 18/09/2009, the court, (Nambuye J) gave a conditional stay for a period of 90 days from the 18/09/2009 within which time the Applicant was expected to process the appeal and then seek stay from the Court of Appeal which would be in a position to assess the arguability of the appeal and then make appropriate orders.
3. By the Applicant's Notice of Motion application dated 16/12/2009, brought under Sections 3A and 63(e) of the CPA Cap 21 Laws of Kenya and Order 49 Rule 5 of the Civil Procedure Rules, the Applicant prays for ORDERS that this Honourable Court be pleased to extend the 90-day conditional stay of execution of decree herein granted on 18/09/2009. That conditional stay expired on 17/12/2009, the very day on which the instant application was filed.
4. The application is premised on the grounds that the Applicant has been unable to process, prepare and lodge the appeal because it has been unable to obtain typed proceedings and judgment despite the Applicant's numerous requests to the Deputy Registrar of this Hon. Court to be supplied with the same. The Applicant also says that it is not in a position to apply for stay of execution of the decree from the Court of Appeal for the reason that, on the terms of the stay order of 18/09/2009, such a step can only be taken after lodging of the appeal. The application is also supported by the affidavit of **Neena Handa** dated 16/12/2010.
5. The application is resisted. There is a Replying Affidavit sworn by **Jagjit Singh Kalsi** the 1st Defendant/Respondent on the 13/01/2010. The Respondent's case is that the Applicant ought to have filed its application for stay of execution before the Court of Appeal, and to have done so, without undue delay. Further,

that the Applicant's explanation for the delay is untenable, namely that the grounds given for the Applicant's failure to move to the Court of Appeal are insufficient. It is also the Respondents' contention that the Applicant's application is intended to circumvent the making of an application to the Court of Appeal in compliance with this court's orders dated 18/09/2009.

6. This application proceeded by way of both written and oral submissions. The Applicant's submissions are dated 3/02/2010 and filed in court on the same day, while the Respondents' submissions are dated 10/02/2010 and filed in court on the same day. The Applicant reiterates the averments on the face of the application and in the supporting affidavit sworn by Neena Handa. The Applicant submits that according to the reasoning given by Nambuye J for the granting of the 90 day conditional stay, the status quo of the suit premises was not to be disturbed until the right of appeal is exhausted. The learned Judge made the following findings at numbers 5 and 6 at pages 14 and 15 of her ruling thus:-

“5. As regards ensuring that the successful party is not unreasonably withheld from the enjoyment of the fruits of his judgment, stands at par with the ensuring that the resultant appeal is not rendered nugatory in the first instance, and in the second instance to ensure that unnecessary barricades are not put in the path of the applicant to barricade the exercise of the undoubted right of appeal, and in the 3rd instance to ensure that the court, does not give relief with one hand and take it away with another. This ground is relevant to the argument herein in view of the fact that the applicant is hanging on adverse possession, and once the status quo is disturbed, it will be difficult to restore it as the continuity would have been brought to an end, thus extinguishing the right and there will be nothing to pursue.

6. Jurisdiction exists to grant a conditional stay or refer the applicant to seek the relief from the court appealed to.

7. On the basis of the above, counsel for the Applicant submits that the delay in proceeding to the Court of Appeal was not a fault of the Applicant. The Applicant also argues that Section 1A of the Civil Procedure Act envisages situations such as the one in which the Applicant finds itself and that the court should look with favour upon the Applicant by applying the overriding objective of the Civil Procedure Act which is to facilitate the just, expeditious proportionate and affordable resolution of the dispute between the parties herein.
8. The Respondents' position is that this court has no jurisdiction to interpret the ruling given by Nambuye J on 18/09/2009 since this and that court are of concurrent jurisdiction; and that in the absence of any plausible explanation for the Applicant's failure to move to the Court of Appeal within the 90 days that were granted to it by Nambuye J on 18/09/2009, this application should be dismissed.
9. The Respondents also argue that since an uncertified copy of the judgment of Aganyanya JA dated 16/01/2009 has always been in the possession of the Applicant, there is no reason why the Applicant could not draw the Memorandum of Appeal, following the filing of the Notice of Appeal on 28/01/2009. The Respondents also argue that this application is res judicata in view of the orders given by the court on 18/09/2009 on a similar application. The Respondents also say that this litigation which has been in court for a period of 25 years should surely come to an end so that the Respondents can proceed with their intended project of constructing mainsonettes on the suit property.
10. Order 49 Rule 5 of the Civil Procedure Rules under which the instant application is brought reads:-

“5. Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

11. Section 3A of the Civil Procedure Act gives this court unlimited inherent power to “*make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court*”, while section 63(e) of the Civil Procedure Act empowers this court to “*make such interlocutory orders as may appear to the court to be just and convenient*”.
12. The question that now arises for determination is whether this court has the jurisdiction and the power to make the order sought or whether, as submitted by counsel for the Respondents, its hands are tied behind its back. Upon reading the above provisions, I do not think that this court is in any way barred from making the orders sought by the Applicant. Rule 5 of Order 49 envisages that situations will arise when a party is unable to comply with the times limited for the doing of certain acts, either as provided by the Act and or the rules or by an order of the court. The real issue here is whether the circumstances of this case dictate that the order sought be granted. If this application was one by which the Applicant was been one seeking extension of time for the filing of an application in the Court of Appeal to lodge a notice of appeal, this court would have had no power to do so. See **Standard Ltd. –vs- Gatonga & Others [2005] KLR 211**. As it were in this case, the Notice of Appeal was filed more than a year ago now. Should the court grant the orders sought?
13. The answer to the above question is yes. The Applicant herein has shown that it is interested in appealing the judgment of Aganyanya JA dated 16/01/2009 and has infact already filed the Notice of Appeal on 28/01/2009. There is also ample evidence on record showing that that the Applicant, through its counsel has persistently asked the Deputy Registrar of this honourable court to avail typed and certified copies of proceedings and judgment to enable the Applicant lodge an appeal. There are letters dated 21/01/2009; 16/06/2009; 21/07/2009, 24/09/2009, 5/11/2009 and 11/12/2009. The Respondent has not alleged that the Deputy Registrar complied with any of the Applicant’s requests;
14. I am thus satisfied that sufficient reason has been shown as to why the Applicant could not process the appeal and then seek stay from the Court of Appeal within the 90 days allowed by order of the court on the 18/09/2009. In any case, I find that the Applicant brought this application timeously and even if the application had been brought after the expiry of the 90 days, this court would still have had the power to grant the order sought upon such terms as the court would deem fit and as the justice of the case may require. It is not true as alleged by the Respondents that if the order sought is granted, then this court would be interpreting the orders of Nambuye J made on 18/09/2009. Far from it.
15. I am aware that this litigation has taken a long time. I am also aware that the Applicants have now had almost five months since the orders of 18/09/2009 were given. I am also aware that the Respondents should not be denied the fruits of their judgment for unnecessarily long periods. Accordingly, I allow the Applicants’ application dated 16/12/2009 by extending the 90 day period granted to the Applicant on 18/09/2009 by a further 30 (thirty) days from the date of this ruling during which time the Applicant shall, if the desire to appeal is still there, process the appeal and then seek stay from the Court of Appeal pending the hearing and determination of the intended appeal.
16. The costs of this application to be agreed or taxed shall be paid to the Respondents within 30 (thirty) days from the date of this ruling.

It is so ordered

Dated and delivered at Nairobi this 26th day of March, 2010.

R.N. SITATI
JUDGE

Read and delivered in the presence of:

Mr. Kuliko for Athuok (present) For the Plaintiff/Applicant

Mr. Amil Joshi (present) For the Defendants/Respondents

Weche - Court clerk