

DAVID GEORGE BELL 1ST PLAINTIFF

ESTHER GLORIA MWIHAKI BELL 2ND PLAINTIFF

VERSUS

ASHUTOSH BHASIN 1ST DEFENDANT

GIRO COMMERCIAL BANK LIMITED 2ND DEFENDANT

RULING

On 31st July 2009 Warsame J delivered a judgment in this matter. On the same day, the defendants applied for stay of execution, according to the proceedings, the Judge made an order in the following terms:-

“Having considered the arguments by Mr. James Singh Gitau Advocates counsel for the defendant and Mr. Gatheru for the plaintiff, it is my decision that I should grant a stay of execution of my judgment for 45 days within which the defendant shall be able to obtain an order of stay from the court of appeal. And in the event the defendant fails to secure an order from the court of appeal, they shall not be entitled to make an application before the High Court for stay of execution”

On 10th September 2009 the defendants applied for the order by Warsame J of 31st July 2009 restraining the defendants from applying for a stay of execution of his judgment in the High Court be reviewed and set aside. Alternatively the orders of Warsame J, staying the judgment for 45 days are extended for a further 45 days or whatever time the court will think appropriate in the circumstances.

This application was opposed by the plaintiffs who filed a preliminary objection on points of law on the grounds that this application is an abuse of the court process and ought to be struck off. Counsel for the plaintiff submitted that an application for stay of execution was made orally after the judgment was delivered and the defendants were granted an order for stay of execution for 45 days. Counsel submitted that this court is *functus officio*, the defendant was supposed to move to the Court of Appeal. The applicant should pursue the application for stay of execution in the court of appeal.

The defendants are also seeking for enlargement of time which according to the provisions of section 95 of the Civil Procedure Act and order 49 of the Civil Procedure Rules should be made by way of notice of motion and not by way of chamber summons. Further it was submitted that on 28th January 2008 the law firm of Majaja & Luseno Advocates entered on record for the defendants. The firm of Singh Gitau & Co. Advocates did not file a notice of change before judgment was entered therefore they cannot file the present application without first obtaining the leave of the court. Counsel urged the court to strike the application which is an abuse of the court process. The judgment of the court also notes a persistent pattern by the defendants to circumvent the court process which is also continued in this application.

Counsel for the defendant opposed this preliminary objection as being vexatious because the firm of Singh Gitau and Company has been on record for defendants during the hearing of the substantive suit. They filed submissions before the trial judge. There was also an order that some money be deposited in the joint names of the advocates, as they are the advocates for the defendants. The plaintiffs having dealt with Mr. Singh Gitau in this matter without raising an objection are now estopped from raising the objection. It was further submitted that the firm of Majaja & Luseno never served Mr. Singh Gitau with a notice of appointment, they have remained on record as representing the defendants through out the

proceedings.

Counsel for the defendants further submitted that the judgment was first delivered on 31st July 2009, due to the High court vacation, he was not able to get copies of the proceedings until 28th July 2009. It also took time for the file to be transferred from High Court Central Registry to Milimani Commercial and Tax Division. The court cannot be functus officio as any order which purports to take away the jurisdiction of the court should be considered seriously. Since the defendants were not able to process the application to be filed in the Court of Appeal within 45 days it became necessary for the defendants to seek for the extension of time.

I have considered the rival submissions, and the application before me. It is evident from the order by Warsame J that he considered the application for stay of execution which he granted on terms. The discretion of a Judge to impose conditions against the order of stay cannot be faulted, at least not in this court.

This application as I understand it is brought under section 95 of the Civil Procedure Act and orders 49 and 34 of the civil procedure Rules which deal with extension or enlargement of time. In that case this application ought to have been brought by way of notice of motion and not by way of chamber summons. Although the applicant is seeking for the review for the order by Warsame J, the application has not invoked the provisions of order 44 of the Civil Procedure Rules which generally deals with review. It is also instructive that an application for review should be way of notice of motion.

Accordingly I find this application is fatally defective. Moreover the applicant was given 45 days from 31st July 2009 by the time of this ruling the applicant will have enjoyed a further 45 days within which to file the appeal in the court of appeal.

The application is dismissed with costs to the plaintiff respondent.

RULING READ AND SIGNED ON 30TH OCTOBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE