



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

CIVIL APPEAL NO. E 212 OF 2020

TANJAL INVESTMENTS.....1ST APPLICANT

DISMAS KIPRUTO.....2ND APPLICANT

VERSUS

NANCY NALIAKA

EDWARD GIKUNJU WANJOHI (Suing as the

Administrators of estate of the late **PETER NGUGI WANJOHI**).....**RESPONDENTS**

RULING

1. The application dated 12th October, 2020 seeks the following orders:

1. Spent

2. Spent

3. That pending the hearing and determination of this Appeal that the period granted for complying with the consent order recorded on 6th June, 2019 in Misc. Application No.168 of 2019 – Nancy Naliaka & Edward Gikunju Wanjohi (suing as the Administrators of the Estate of the late Peter Ngugi Wanjohi) v Tanjal Investments and Dismas Kipruto be varied/enlarged and/or extended in and that the security furnished in civil Appeal No. 568 of 2019 Directline Assurance company Limited v Nancy Naliaka & Edward Gikunju Wanjohi (suing as the Administrators of the Estate of the late Peter Ngugi Wanjohi) be deemed as sufficient security for purposes of granting stay pending appeal.

4. That an order do issue consolidating this appeal and Civil Appeal No. 568 of 2019 Directline Assurance Company Limited v Nancy Naliaka & Edward Gikunji Wanjohi (suing as the Administrators of the Estate of the late Peter Ngugi Wanjohi) as they arise from the same subject matter.

5. That the Appellants/Applicants be deemed to have complied with the stay conditions pending the hearing and determination of this appeal.

6. That this honourable court do make any such further orders and issue any other relief it may deem just to grant in the interest of justice.

7. That the costs of this application be in the cause.

2. The application is premised on the grounds stated therein and the supporting affidavit sworn by Pauline Waruhiu, the Head Claims and Legal, Directline Assurance Co Ltd. It is stated that judgment was delivered in Milimani CMCC No.4166 of 2017. The Applicants are aggrieved by the said judgment and filed an application dated 20th February, 2019 for leave to appeal out of time in Misc. Appl. No.168 of 2019. That on 23rd May, 2019 the parties recorded a consent therein for the deposit of half of decretal sum of Ksh.5,495,207.85 and the other half to be deposited in a joint interest earning account.

3. It is further averred that on 30th November, 2018 the Respondent filed a declaratory suit against the Applicants' insurance and judgment was entered for the decretal sum. That the Respondents commenced the execution process and a Garnishee Order Nisi was issued. That the Applicants appealed against the said order in HCCA 568/19 and a stay of the Garnishee Order Nisi order was issued on 3rd October, 2019 on condition that the decretal sum be deposited in court within 30 days. That the said orders were complied with.

4. The court was urged to vary/enlarge and /or extend the period for compliance with the consent order recorded on 6th June, 2019 to enable the Applicants to prosecute their Appeal. The court was further urged to consolidate Appeal No.E212/20 with HCCA 568/19 to avoid duplication as the subject matter of the Appeal is the same. It is further contended that the application herein has been filed without unreasonable delay.

5. The application is opposed. It is stated in the replying affidavit that the application is aimed at delaying the Respondents from enjoying the fruits of the judgment. That the Respondents filed the declaratory suit after Applicants failed to comply with the consent orders in Misc. Appl. 168/19 for payment of half of the decretal sum to the Respondent and to deposit the balance in a joint account.

6. That the declaratory suit culminated into the issuance of Garnishee Order Nisi then the Applicants moved to this court on appeal in HCCA 568/19 and sought stay orders leading to stay orders being issued for the deposit of the entire decretal sum in court. That both the consent order and the order for the deposit of the entire sum in court were not complied with and that the Applicants are taking the court in circles.

7. It is abundantly clear from the affidavit evidence of both parties that the parties recorded a consent in Misc. Appl. 168/2019 on 6th June, 2019 for payment of half of the decretal sum to the Respondent and the deposit of the other half in a joint interest earning account.

8. In the case of **Samuel Mbugua Ikumbu v Barclays bank of Kenya Limited [2015] eKLR** the Court of Appeal set the law relating to the setting aside or review of consent orders or judgment as follows:

“The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, and agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.”

9. The conditions for the variation of the consent order have not been met in the case at hand. It does not come out clearly from the Applicants why the consent orders should be varied. Although the security deposited in court can be deemed to be sufficient security for the due performance of the decree, it is contrary to the consent recorded by the parties. Consequently, this court's view is that the security deposited in court should be released to the parties for compliance with the terms of the consent orders recorded and the matter to proceed on appeal on merits.

10. With the foregoing, I allow the application in terms of prayer No. 3 & 5 on condition that 50% of the money deposited in court is released to the Respondents and the balance deposited in a joint interest earning bank account of the Advocates for the parties herein. This file and HCCA No. 568/19 to be given a mention date for purposes of considering consolidation of the files after directions have been given under Section 79 B Civil Procedure Act. Costs to the Respondents.

Dated, signed and delivered at Nairobi this 11th day of March 2021

B. THURANIRA JADEN

JUDGE