



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 141 OF 2019

MOYALE LINER BUS SERVICES.....RESPONDENT/APPLICANT

VERSUS

GACHU IBRAHIM.....PLAINTIFF/RESPONDENT

RULING

1. Judgment against the Applicant was entered *ex parte* on 30th April 2019. An application seeking to set aside the *ex parte* judgment was dismissed, prompting the Applicant to file the instant appeal. The Applicant also filed an application dated 4th November 2019 seeking stay of execution pending hearing of the appeal. The said application was allowed on the condition that the Applicant deposits Ksh 3,000,000/= in a joint interest earning account in the names of the parties' Advocates within 30 days of the Ruling. The Applicant failed to comply with the said conditions and claims that the Respondent is the one that frustrated the attempts at complying by refusing to execute the forms necessary for opening the joint account. Subsequently, the Respondent made attempts at executing, and the Applicant now seeks this Court's relief to avert the execution.

2. Vide the application dated 7th April 2021, the Applicant seeks the following orders: -

i. Spent

ii. Spent

iii. Spent

iv. THAT this Honourable Court be pleased to vary and/or alter the order on deposit of Ksh 3,000,000/= being the decretal sum in a joint interest accruing account in the name of the Advocates of both parties and in its place accept a Bank Guarantee from a reputable Bank within the Republic of Kenya for the decretal sum of Ksh.3,000,000/= as adequate security pending the hearing and determination of the suit at the lower Court.

v. THAT this Honourable Court be pleased to issue any other order and/or direction it deems fit to grant in the circumstances.

vi. THAT costs of this Application be provided for and the same be borne by the Plaintiff/Respondent.

3. The application is opposed by the Respondent vide the replying affidavit sworn by Kinyanjui Theuri, the Advocate for the Respondent on 21st April 2021. A substantial part of the Respondent's affidavit contains averments made to indicate that the non-compliance on the part of the Applicant was not out of any omission on their part; and that they duly forwarded the signed account opening forms as required. It is averred that the Applicant deliberately failed to comply with the order to deposit the Ksh 3,000,000/= despite having had more than 15 months to comply. The other contents of the Respondent's replying affidavit will be discussed as the Court gives its determination as hereunder.

4. The issues for determination arising from the affidavits on record are as follows: -

i. Whether the Court is functus officio.

ii. Whether the Court can vary the terms of the security as earlier ordered.

iii. Whether the Court can extend the time for compliance.

Whether the Court is functus officio

5. The Respondents have urged that the application before the Court is *functus officio*. The Applicant admittedly filed an application dated 4th November 2019 seeking stay of execution and the Court indeed allowed the same. The Court (Gikonjo J) on 5th December 2019 held as follows: -

“The Court has unfettered discretion to set aside *ex parte* judgment in order to provide a party a chance to canvas his defence and it be determined on merits. The offer to deposit Ksh 3,000,000/= by the Appellant is quite apt. I therefore set aside the *ex parte* judgment in the trial court upon these terms:

a. The Appellant shall deposit a sum of Ksh 3,000,000/= in an interest earning account in the joint names of Counsel for parties within 30 days.

b. The Appellant shall file defence within 14 days of today in default these orders lapse.

The Appeal and application is concluded. These orders to apply *mutatis mutandis* to Meru HCCA No.142 of 2019.”

6. The Court (Gikonyo J.) was categorical that the appeal and application had been concluded. The effect of allowing the appeal was that the *ex parte* Judgment had been set aside and the effect of allowing the application is that stay of execution pending hearing of the main suit was granted on the condition that the decretal sum be deposited in a joint account.

7. Although the fact that the Court already pronounced itself on the issue of stay of execution, this Court observes that the instant application is similarly one touching on stay of execution. When a Court has already pronounced itself on a matter, it is deemed to have performed all its duties in the case and it becomes *functus officio*. This Court would, therefore, not allow any attempts to re-open the matter for stay of execution, which will have the Court re-hear the application again. The essence of the doctrine of *functus officio* is to give finality to the adjudication of matters.

8. In the case of *Jersey Evening Post Limited v Al Thani (2002) JLR*, which case was cited by the Supreme Court in the case of *Raila Odinga & 2 Others Vs Independent Electoral and Boundaries Commission & 3 Others 2013 eKLR* the Court held as follows: -

“...A court is *functus officio* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus* when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available...”

9. In the the Court of Appeal decision of *Telkom Kenya Limited Vs John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) 2014 eKLR*, cited by L A Achode J. in the other case of *Re Estate of Kinuthia Mahuti (Deceased) Miscellaneous Application P&A No. 158 of 2017, 2018 eKLR*, the Court of Appeal (Githinji, Karanja and Kiage JJA) observed as follows: -

“...*Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th Century...”

10. Based on the above authorities, this Court finds that it cannot re-open the matter for an application for stay of execution, which the court has finally determined and is *res judicata*, and for which the court is, therefore, *functus officio*. The only exception is if the Applicant is seeking review in accordance with the parameters set under Order 45 of the Civil Procedure Rules or extension of time under order 50 of the Civil Procedure Rules considered below.

Whether the Court can vary the terms of the security as earlier ordered.

11. As pointed out above, this Court will only vary the terms of the order for stay of execution if the Applicant satisfies any of the grounds for application for review. The grounds upon which an application for review may be premised, are found under Order 45 of the Civil Procedure Rules, 2010 and they are as follows: -

- i. Where there is a 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 by him at the time when the decree was passed or the order was made.
- ii. On account of some mistake or error apparent on the face of the record.
- iii. For any other sufficient reason.

12. The Applicant merely states that the Respondent failed to execute and return the account opening forms for it to complete the account opening process and it thus prays for the Court to vary its orders granted on 5th December 2019 and in its place accept a Bank Guarantee from a reputable Bank in Kenya for the sum of Ksh 3,000,000/=.

13. This Court does not find that the Applicant’s case fits any of the 3 grounds of review aforementioned. Further, if at all the Respondent

had indeed frustrated the account opening process, the prudent thing for the Applicant to do would have to report back to this Court at the earliest opportunity and seek the Court's intervention. Furthermore, the Respondent is on record that they duly filled the forms and returned them.

14. Additionally, this Court finds that for purposes of securing the Respondent's interests, the nature of security offered matters as much. Security in the nature cash deposit in a bank is of much more value than a mere Bank Guarantee whose honouring is dependent on many other factors including the health and status of the Bank. The latter comes with a lot of uncertainties. This Court is alive to the news of banks sudden collapse and restructure. This Court therefore declines to vary the terms of the security.

Whether the Court can extend the time for compliance

15. The Respondent has argued that there is no application for extension of time before the Court. Indeed, no such prayer has been made. This Court is however aware that the main suit is currently pending before the lower Court. The Respondent has also urged in its replying affidavit that the Applicant should be ordered to deposit the entire decretal sum before a stay is issued. By ordering for the deposit, the Court will in effect have extended the time earlier issued.

16. The provisions of law on extension of time are found in Order 51 Rule 6 of the Civil Procedure Rules, 2010. The same provides as follows:

"Power to enlarge time [Order 50, rule 6.]

6. 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."

Section 95 of the Civil Procedure Act, Cap 21 Laws of Kenya provides as follows: -

95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

17. In the interest of justice, this Court finds that for purposes of finality once Judgment is delivered by the trial Court, though it be *functus officio* with respect to the application for stay of execution and the appeal from the trial court's ex parte judgment, the court may properly extend the time within which the Applicant may comply with the orders of the Court issued on 5th December 2019 upon determination of the appeal.

Conclusion

18. In view of the fact that the Court had already pronounced itself on the application for stay of execution in the final order on the appeal, this Court will not vary the terms of the order including its terms with respect to the nature of the security. The Court is *functus officio* on the issue of stay of execution and its terms. This Court will, however, extend the time to comply. In addition, this Court finds it appropriate pursuant to Order 50 Rule (6) Proviso of the Civil Procedure Rules to punish the Applicants by way of payment of costs of the application and thrown away costs with regards to the application for execution by warrants of attachment from the Court.

ORDERS

19. Accordingly, for the reasons set out above, this Court makes the following orders: -

1. The time within which the Applicant is allowed to comply with the Court's orders of 5th December 2019 is hereby extended for a further fourteen (14) days from the date of this order.

2. The Applicant shall within fourteen (14) days from the date this order deposit the sum of Ksh.3,000,000/= in a joint interest earning account opened in the names of the parties' Advocates.

3. For the avoidance of doubt, this Court hereby stays the execution of the Warrants of Attachment and Sale dated 31st March 2021, proclamation and/or any form of advertisement of the Applicant's proclaimed properties pending hearing and determination of the suit pending at the lower Court.

4. In default of the deposit in Order No. (2) above, the orders for stay of execution shall lapse and be of no effect.

5. For their apparent delay and indolence, the Applicant shall pay the Respondent thrown away costs to be agreed between the parties or assessed in default of agreement.

Order accordingly.

DATED AND DELIVERED ON THIS 6TH DAY OF MAY, 2021.

EDWARD M. MURIITHI

JUDGE

M/S Kimondo Gachoka & Co. Advocates for the Applicants

M/S Kinyanjui Njuguna & Co. Advocates for the Respondent.