



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 95 OF 2020**

**KWACHA GROUP OF COMPANIES.....APPELLANT/APPLICANT**

**-VERSUS-**

**PINDORIA HLDINGS LIMITED.....RESPONDENT**

**RULING**

1) The subject matter of this ruling are two applications. One is dated 9<sup>th</sup> December 2020 taken out by the appellant/applicant whereof it seeks for following orders:

*i. THAT this honourable court be pleased to certify the application herein as urgent and fit to be heard ex parte in the first instance.*

*ii. THAT this honourable court be pleased to order that the status quo and/or the conditional stay of execution orders given on 18<sup>th</sup> September 2020 by honourable Justice J. K. Serگون be extended and/or do remain in force pending the inter partes hearing and determination of the application herein.*

*iii. THAT this honourable court be pleased to review the orders given on 18<sup>th</sup> September 2020 by Honourable Justice J. K. Serگون by granting the applicant unconditional stay of execution.*

*iv. THAT as an alternative to prayer 3 above this Honourable court be pleased to review/vary and/or extend by one hundred and twenty (120) days the period it was given on 18<sup>th</sup> September 2020 by Honourable Justice J. K. Serگون ordering it to deposit the decretal amount in an interest earning account in the joint names of the parties' advocates.*

*v. The costs of the application be awarded to the appellant.*

2) The appellant filed the affidavit sworn by Boniface Nginyo Mwaura in support of the motion.

3) When served with the application, the respondent filed a notice of preliminary objection dated 15.12.2020 to oppose the same. It is argued that the application is resjudicata. The respondent also filed the motion dated 16<sup>th</sup> December 2020 whereof it sought for the following orders:

*i. THAT this application be certified urgent and heard ex-parte in the first instance in respect of prayer 2.*

*ii. THAT the ex-parte orders granted by Honourable Justice Said Chitembwe on 9<sup>th</sup> December 2020 be set aside in the interest of preservation of justice.*

*iii. THAT the appellant's notice of motion dated 9<sup>th</sup> December 2020 be struck out for being an abuse of court process.*

*iv. THAT the costs of this application be awarded to the respondent.*

4) This court directed the two applications to be heard together.

This court also directed the motions to be disposed of by written submissions.

5) I have considered the grounds stated on the motions and the facts deponed in the rival affidavits. I have also considered the written submissions. It is apparent from the motion dated 9<sup>th</sup> December 2020 that the appellant/applicant is seeking for an order of review of this court's orders issued on 18<sup>th</sup> September 2020 with a view of granting the appellant unconditional order for stay of execution of the decree of

the trial court pending appeal.

6) The appellant has further sought for the alternative order to extend the period given to the appellant to deposit the decretal sum by four (4) months. The main arguments put forward by the appellant is that its cash flow has not improved due to the effect of covid – 19 pandemic. It stated that it requires more time to resume operations and comply with the condition to deposit the decretal sum.

7) The respondent on its part has urged this court to dismiss the motion for being resjudicata thus amounting to an abuse of the court order. The respondent pointed out that the law did not envisage a situation where the court is being invited to entertain a second application for review.

8) The respondent stated that the appellant had made a similar application whereof it successfully sought to review this court's order issued on 3<sup>rd</sup> July 2020 vide its ruling delivered on 18<sup>th</sup> December 2020. This court was urged not to grant the order so that the court is not exposed to ridicule and spite. This court was beseeched to set aside the orders issued by Justice Chitembwe at the ex parte stage.

9) It is not in dispute that on 3<sup>rd</sup> July 2020, this court delivered a ruling whereof it granted the appellant an order for stay of execution pending appeal on condition that it deposits the decretal sum in an interest earning account in the joint names of advocates appearing in this matter within 45 days. The record shows that the appellant did not make a deposit of the decretal sum as directed by this court but it instead filed the motion dated 11<sup>th</sup> August 2020 whereof the applicant sought for a review of the orders issued on 3<sup>rd</sup> July 2020 so that the appellant is given unconditional order for stay of execution pending appeal. In fact, in the aforesaid application the appellant sought for an alternative prayer to deposit the decretal sum extended for 120 days.

10) In its ruling delivered on 18<sup>th</sup> September 2020, this court granted the appellant an extension of 90 days to enable it deposit the decretal sum of ksh.15,547,950/18. This court further went ahead to admit the appeal to hearing.

11) The appellant is now before this court seeking for the orders issued on 18<sup>th</sup> September 2020 reviewed. The appellant has further sought for an alternative order of extension of time by 120 days to enable the appellant/applicant comply with the order of deposit.

12) It is apparent from the court record that in the instant motion the appellant seeks for near similar orders as those sought in the motion dated 11<sup>th</sup> August 2020. This court has been beseeched to find the aforesaid motion to be resjudicata.

13) The question therefore which commends itself for determination is whether the instant motion can be regarded as resjudicata? In prayer 4 of the motion dated 11<sup>th</sup> August 2020, the applicant sought for the following order inter alia:

*“That as an alternative to prayer 3 above, this honourable court be pleased to review, vary and or extend by 120 days the period it was given on 3<sup>rd</sup> July 2020.....”*

14) I have already stated this court allowed the motion and extended the period fixed by court by 90 days. In the instant motion the applicant in prayer 4 seeks to have the period fixed vide the ruling of 18<sup>th</sup> September 2020 further extended by 120 days.

15) The two applications are coached in a manner that they may not seriously be regarded as applications for review. This court is urged to either review, vary and or extend the time fixed for the appellant to deposit the decretal sum. It is important to note that the appellant/applicant was initially given 45 days to deposit the decretal sum from 3<sup>rd</sup> July 2020. The aforesaid period was extended by 90 days vide the ruling delivered on 18.9.2020.

16) The appellant/applicant has stated that due to the outbreak of covid-19 pandemic it now requires a further extension of 120 days to comply.

17) The respondent avers that the appellant has not provided any evidence to show that it stopped its operations or that its business activities have been frustrated by the outbreak of covid 19 pandemic. This is a second time the appellant is seeking for extension of time to comply.

18) In my view, it cannot be said that the appellant's application is resjudicata. The appellant is merely seeking for accommodation of extension of time to deposit the decretal sum in order to continue enjoying the order for stay. It is noted that the appellant sought for extension of time by 120 days on 9<sup>th</sup> December 2020.

19) It is apparent that about 180 days have lapsed since the order was sought. If it is true that the appellant required 120 days by December 2020 to raise the decretal sum, then it is expected that the appellant has with it the decretal amount to make a deposit. For this reason, I will instead grant the appellant an extension of 60 days to make the deposit.

20) In the end, I find the respondent's motion dated 16<sup>th</sup> December 2020 to be without merit, the same is dismissed with no order as to costs. However, the motion dated 9<sup>th</sup> December 2020 is found to be meritorious hence it is allowed.

21) Consequently, the order for stay pending appeal is granted and ordered to subsist on condition that the appellant deposits the decretal sum of kshs.15,547,950/18 in an interest earning account in the joint names of the advocates and or firms of advocates appearing in this appeal within 60 days from the date of this ruling. Costs of the motion to abide by the outcome of this appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 11<sup>TH</sup> DAY OF JUNE, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent