



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 28 OF 2016

ATHI RIVER STEEL PLANT LIMITED.....APPELLANT

VERSUS

PHILIP MUKULA MOKI.....RESPONDENT

RULING

1. Before the court for determination is a motion dated 13th November, 2020 seeking a solo prayer: -

“That in view of the Appellant’s failure to comply with the court order of 17th October, 2019, the deposit held as security in KCB A/C no. 118xxxxxxx in the joint names of the counsels on record be released to the Respondent’s counsel.”

2. The motion is expressed to be brought under section 1A, 1B, 3A & 63E of the Civil Procedure Act, on grounds *inter alia* the money held in KCB A/C no. [...] was security deposited by **Athi River Steel Plant Limited** (the Appellant) in respect of the consent order for stay of execution pending appeal; that this court had on 17th October, 2019 struck out the Respondents’ record of appeal and granted it fourteen (14) days to file a fresh record of appeal; and that it has failed to do so with the resulting effect that the court and Respondent have been held at ransom.

3. The affidavit in support of the motion is sworn by **Philip Mukula Moki**, the Respondent. To the effect that the Appellant lodged its record of appeal herein on 19th November, 2018 but despite the same being expunged from the record by order of the court of 17th October, 2019, the Appellant has not filed a fresh record of appeal as ordered. Finally, the Respondent asserted that despite this court’s earlier orders the Appellant has not demonstrated any willingness to prosecute the appeal and its indolence is working injustice against the Respondent though he is entitled to the reasonable disposal of the appeal and/or enjoyment of the fruits of successful litigation. That the ends of justice in the circumstances dictate that the security be released to allow the Appellant to prosecute the appeal at its desired pace.

4. The motion was opposed by way of a replying affidavit dated 25th January, 2021 sworn by **Ms. Mulwa**, Counsel for the Appellant. She deposes that failure to comply with the court orders issued on 17th October, 2019 was occasioned by difficulties in extracting the final decree despite several attempts; and that despite the Appellant’s failures, the court should not release the funds as such eventuality would defeat the appeal without granting the Appellant an opportunity to have its day in court. It was further deposed that there had been attempts to reach an out-of-court settlement and the court should exercise its broad discretion in favour of the Appellant and grant it thirty (30) days to put its house in order.

5. On 22nd February, 2021 parties took directions on the matter and agreed to dispose of the motion by way of written submissions. The parties duly complied.

6. For the Respondent, the material in the supporting affidavit was reiterated, counsel arguing that the Respondent’s assertions are not supported by evidence. Counsel argued that. Finally, it was submitted the under the inherent powers of the court, it is in the interest of justice that the motion be allowed, as the Respondent entitled to enjoy the fruits of his successful litigation.

7. Counsel for the Appellant, relying on the decision in **MWK v JDK [2020] eKLR** submitted that allowing the motion would work prejudice against the Appellant, as it would deny the said Appellant the opportunity to be heard thereby contravening the principles of natural justice. It was restated that the parties had embarked on negotiations on an out of settlement in line with the overriding objective in section 1A of the Civil Procedure Act; that it would be in the interest of justice that the court allows the negotiations to be finalized. Finally, it was reiterated that the Appellant had made all reasonable attempts to extract the decree without success, thus the court should exercise its inherent powers under section 3A of the Civil Procedure Act and grant the Appellant thirty (30) days to put its house in order. Counsel relied on the Court of Appeal decision in **Kenya Power & Lighting Co. Ltd v Benzene Holdings t/a Wyco Paints [2016] eKLR**.

8. The court has considered the motion in light of the parties' respective material and submissions. In addition, the court has perused the record of proceedings herein. This appeal was filed on 29th January 2016 in respect of a judgment delivered on 10th December 2015 in **Milimani Chief Magistrates Civil Suit No. 789 of 2012**. There is no dispute that the monies which are the subject of this motion were deposited into a joint account in the name of both parties' counsels as security pursuant to the consent order dated 17th March, 2016 to stay execution of the decree of the lower court. Under the consent, the Appellant was to file the record of appeal within 90 days. The record shows that the record was not filed in the stipulated period and no steps were taken to prosecute the appeal for two years, prompting the Respondent's motion dated 19th October 2018 seeking to have the appeal dismissed for want of prosecution. The motion was heard and determined *vide* the ruling of **Kamau J.** delivered 17th October 2019. Although the dismissal motion was disallowed, the Court ordered to be expunged from the record, the record of appeal that had been filed on 19th November 2018 some 8 months outside the 90-day period agreed in the parties' consent. However, **Kamau J.** granted the Appellant 14 days to file a fresh record of appeal. To date, the order has not been complied with and the Appellant took no steps thereafter in progressing the appeal in the following one year. Once more, the Respondent was compelled to move the Court by filing the instant motion in November 2020.

9. Before this court, the Appellant alleges difficulties in obtaining the decree as the reason for non-compliance with the court order issued on 17th October, 2019 and claimed without any proof that the parties had been negotiating with a view to an out of court settlement. With respect, these are mere excuses. There is no explanation why the Appellant could not file a within the time given by the court a copy of the already assembled record of appeal that was expunged by Kamau J. while awaiting the issuance of the decree. Besides, the lower court file has been forwarded hence is available. The only request on the file concerning the alleged decree was written to this Court's registry on 9th February 2021. Not a single letter to the lower court in that regard has been exhibited by the Appellant. And allegations of attempts at negotiations while unproven are neither here nor there as the Respondent is clearly moving in a different direction going by his motion.

10. It is pertinent to reproduce Sections 1A and 1B of the Civil Procedure Act encapsulating the overriding objective and this Court's inherent power as captured in Section 3A of Civil Procedure Act:

“1A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology...

3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

11. The Court of Appeal in **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** stated as follows regarding the overriding objective:

“On the applicability of the overriding objective principle in the appellate jurisdiction, we wish to draw guidance from case law. The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made there under. (See the case of Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008). The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it (See the case of Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009); that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness (See the case of Kariuki (Supra); that in applying or interpreting the law or rules made there under, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals (See the case of Deepak Manlal Kamami and another versus Kenya Anti-Corruption and 3 others Civil Application No. 152 of 2009); that there is a mandatory requirement that the Court of Appeal rules of procedure should also be construed in a manner which facilitates the just, expeditious, proportionate or affordable resolution of appeals (See the case of Dorcas Indombi Wasike versus Benson Wamalwa Eldoret Civil Application No. 87 of 2004); that the overriding

objective principle is intended to re-energize the process of the court, to encourage good management of cases and appeals, and ensure that interpretation of any of the provisions of the Act and the rules made thereunder are “O2” compliant (see the case of *Hunker Trading Company limited versus ELF Oil Kenya Limited Civil Application No. Nai 6 of 2010 (UR3 (2010))*; that the principal aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective (See the case of *Caltex Oil Limited versus Evanson Wanjihia Civil Application No. Nai 190 of 2009 (UR)*). And, lastly, that the “O2” principle does not cover situations aimed at subverting the expeditious disposal of cases or appeals, mistakes or lapses of counsel, or negligent acts, or dilatory tactics or acts constituting abuse of the court process (See the case of *Kenya Commercial Bank vs. Kenya Planters Co-operative Union Nai Civil Application No.85 of 2010 (UR) 62 of 2010*)”.

12. The present appeal was filed way back in 2016 and more than four (4) years later the Appellant is yet to prosecute it let alone comply with the orders of the court issued almost two years ago. It appears that having filed the appeal and obtained an order to stay execution, the Appellant fell into slumber only moving intermittently to resist any attempts by the Respondent to interrupt or bring their slumber to an end. They cannot be heard to plead that they will not have been accorded a hearing if the appeal is dismissed when they have shown scant interest in availing themselves of such opportunity by perfecting the appeal for hearing. Claims being made at this stage about an elusive decree and alleged negotiations are red herrings, in my considered view. The Court cannot allow the Appellants to continue dragging their feet in the manner they have done in the past, and which amounts to an abuse of the process of the Court.

13. This is what the Court of Appeal said in *Hunker Trading Company limited versus Elf Oil Kenya Limited Civil Application No. Nai 6 of 2010 (UR3 (2010))* where a party had failed to obey an earlier order of the Court:

“As stated above, no notice of appeal has been lodged in this Court against the order of stay of execution on terms given by (Koome, J) which order although granted on different grounds to those applicable to an application for stay of execution in this Court and the order has since lapsed, this is a factor which this Court cannot fail to take into account because the non-compliance with the order has a bearing on the provisions of Section 3A of the Appellate Jurisdiction Act. Moreover, the disobedience of the order in our view has an impact on the management of the Court resources.

Sections 3A and 3B of the Appellate Jurisdiction Act and also in the context of the High Court section 1A and 1B of the Civil Procedure Act, have in the recent past generated what appears to have the markings of enlightened jurisprudence touching on the management of civil cases and appeals and therefore as the sections have been extensively reproduced in many recent decisions we need not reproduce them here except the material part in the Act because the two sets of sections are in pari material. Section 1A (3) of the Civil Procedure Act reads: -

‘A party to civil proceedings, or an advocate for such party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the direction and, orders of the Court.’

As the applicant has admitted having failed to comply with the order of stay by (Koome, J) we find that it is in breach of section 1A (3) of the Civil Procedure Act and also section 3A (3) of the Appellate Jurisdiction Act.

We do not think that the fact that the orders has since lapsed has in any way eroded the relevance of the disobedience of the order to the operation of the overriding objective. The thrust of the applicant’s application to this Court under Section 3A is substantially to seek similar orders to those he was granted in the superior court and failed to obey. Under section 1A (3) the applicant has a duty to obey all court processes and orders.

In our opinion, coming to us having abused the process in the superior court violates the overriding objective (which in another case has been baptized the (double “O” principle”) and in this case, we have chosen to call it (“the O2 or the oxygen principle”) because it is intended to re-energize the processes of the court’s and to encourage good management of cases and appeals. The violation arises from the fact that this Court is again being asked to cover almost the same points although using different rules and this is a waste or misapplication of this court’s resources (time) and also an abuse of its process. The fact that the notice of appeal under rule 5(2)(b) and is directed at the judgment of (Lesiit, J.), would still not take the matter outside the provisions of Section 3A which is a provision of an Act of Parliament...

As the applicant did not appeal against the order of stay on terms and The applicant is seeking the same orders it declined to obey. We think that we have the jurisdiction to stop it in its tracks in order to attain or further the “O2” principle. We would act unjustly if we were to allow it another chance in this Court to defeat the cause of justice by failing to obey an important order of the superior court....

In the case of *MRADULA SURESH KANTARIA AND SURECH NANILLAL KAPTARIA CIVIL APPEAL NO. 277 OF 2005 (unreported)* this Court observed: -

“In this regard we believe one of the principal purposes of the double “OO principle” is to enable the Court to take case management principles to the centre of the Court process in each case coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap.”

The applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will as has happened in this matter.

Again in this Court’s decision which was cited by the applicant’s counsel, namely, *CALTEX OIL LIMITED vs*

“Before we set out the terms of the conditional stay it is important to state that in our view, the powers of this Court have recently been enhanced by the incorporation of an overriding objective in sections 3A and 3B of the Appellate Jurisdiction Act Cap 9 and sections 1A and 1B of the Civil Procedure Act Cap 21 following the amendment of the Statute Law (Miscellaneous Amendment Act No.6 of 2009). The overriding objective provides that the purpose of the two Acts and the rule is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Although the overriding objective has several aims the principal aim is for the Court to act justly in every situation either when interpreting the law or exercising its power. The Court has therefore been given greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.”

As stated above, it would be unjust for the applicant to violate the “O2 principle” in the superior court and again purport to invoke it in this Court.”

14. Similarly, in this case, this Court cannot find any justification to allow the Appellant’s plea for more time to comply when they have already squandered almost two years in disobedience of **Kamau J**’s orders. It would be a travesty of justice and disregard of the overriding objective if the court were to allow the Appellant to litigate at leisure at the Respondent’s expense. In my view, this is a proper case for invoking the Court’s inherent power under Section 3A of the Civil Procedure Act to stem abuse of the process, as well as the provisions of Order 42 Rule 35 (2) of the Civil Procedure Rules to dismiss the appeal herein for want of prosecution, and to grant in its entirety the Respondent’s motion dated 13th November 2020. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 8TH DAY OF JULY 2021

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Ms Mulwa

For the Respondent: Ms Mutua h/b for Mr Ngala

C/A: Carol