



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 324 OF 2019

AFRICA MERCHANT ASSURANCE COMPANY

LIMITED..... APPELLANT/APPLICANT

VERSUS

MAMA RAEL FOUNDATION.....RESPONDENT

AND

ELIZABETH KOSKEI.....1ST INTERESTED PARTY

LAWRENCE TANUL.....2ND INTERESTED PARTY

NANCY KHAKANE.....3RD INTERESTED PARTY

RULING

1. This is the application dated 5th July 2021 which seeks the following orders:

i) and ii) spent

iii) THAT the court do issue any further orders to safeguard the interest of Justice as it deems fit

iv) THAT costs do be provided for

2. Its premised on the grounds on its face and the supporting affidavit of Grace N. Njuguna with authority of the appellant/applicant. The main ground is that this court had vide a ruling dated 20th February 2020 allowed stay of execution on condition which have been duly complied with (GNN-1). Despite the compliance the respondent has obtained warrants from the lower court issued to Dollar Auctioneers who are ready to execute hence embarrassing the appellant.

3. Counsel for the respondent filed a replying affidavit sworn on 26th July 2021, with the consent and authority of the Board of Trustees of the respondent. He challenges this court's jurisdiction to hear the application as it would amount to sitting on appeal over the orders of 20th February 2020 by Mbogholi J (as he then was).

4. He depones that the applicant has been over indulged by himself and the court. He has set out all the related instances. That the deposits and clearance of cheques were done out of time. Further that the bank guarantee tendered by the applicant was not from a reputable bank and it has long expired. He adds that the applicant failed to pay the costs of Kshs. 30,000/= as assessed. He has denied receipt of the cheque No. 01979 dated 21st August 2020 as alleged by Kennedy Kiprop.

5. He further deposed that there is a winding up cause insolvency petition No E 163 of 2019 (Milimani) lodged by the applicant's creditors. The respondent is fearful as this is a threat to the decree it holds. Annexed to the affidavit is a bundle of supporting documents (HK 1 pages 1-16).

6. The respondent also filed a preliminary objection (P. O) dated 23rd July 2021, in which it challenges this court's Jurisdiction in hearing this matter. It relies on order 45 Rule 6 of the civil procedure rules which provides:

“No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.”

7. It has cited the many instances where the applicant has been indulged over and over in terms of reviews of the orders by this court. He found the application to be an abuse of the court process.

8. The application was argued orally by both counsel on 30th July 2021. Mr. Kanyonge submitted that there are orders of stay in place pending the appeal herein. That the conditions set have been complied with (GNN1). However, to their surprise the respondent was issued with warrants of execution and he did the Auctioneers a letter (GNN3).

9. In reference to the replying affidavit counsel contends that there is no evidence to show that the guarantee issued was rejected. On the P.O he submitted that this court is not functus officio in the matter.

10. Mr. Kurauka for the respondent opposed the application contending that Order 45 Rule 6 of the civil procedure rules prevents the applicant from seeking a similar application for review after failing to comply with the set conditions. He adds that all the payments were made out of time. That the bank guarantee is non-existent and the applicant is facing serious receivership challenges.

11. In response Mr. Kanyonge for the applicant submitted that the applicant was not seeking any review of the orders. He further submitted that Transnational Bank exists in the name of Access Bank and the applicant has not been adjudged insolvent. That the issues of compliance had been dealt with by Justice Mbogholi (as he then was) in a previous application.

12. I have considered the application, preliminary objection, affidavits and the oral submissions by both counsel. I will address the P.O in the first instance. It is the respondent's submission that this court lacks jurisdiction to entertain the present application. The reason given is that this court has dealt severally with the applicant's applications for review of the current order. Further that if the applicant is dissatisfied with the said order it should have filed an appeal and not sought review of the same.

13. The Ruling dated 20th February 2020 was the 1st one to review the conditions of the order of stay of execution issued on 5th December 2019. Another Ruling dated 8th December 2020 and delivered on 16th December 2020 was in respect to the officials of the appellant/applicant. The orders issued against them were later on set aside vide another Ruling dated 22nd April 2021. Vide the said Ruling some interested parties were brought on board. I have therefore not seen on the record the alleged several reviews of the conditions of the stay of execution as alleged by the respondents.

14. Secondly what is before this court vide the notice of motion dated 5th July 2021 has nothing to do with a review of the conditions of the stay of execution. The applicant is seeking for stay of execution of the warrants dated 23rd June 2021 on the ground that the said conditions have been complied with. Does this court have jurisdiction to deal with the issue? My answer is in the affirmative. There is no Law cited which stops this court from dealing with the issue. I therefore find no merit in the P.O which I dismiss.

15. The reviewed conditions for the stay of execution are clearly set out in the Ruling dated 20th February 2020. They are the following:

i) Deposit of Kshs. 2 Million in an interest earning account in the joint names of the advocates on record for the parties within 14 days.

ii) The balance of Kshs. 13 Million to be secured by a guarantee from a reputable bank, to be agreed upon by the parties and to be executed within 14 days.

iii) In default of the stated conditions execution to proceed.

iv) The appellant to pay the respondent costs assessed at Kshs. 30,000/=.

16. It is the respondent's submission that the applicant complied with the conditions but out of time more so the bank guarantee which was issued by a bank that is not reputable has expired. On the other hand, the applicant submits that it is in total compliance with the conditions set by the court on 20th February 2020.

17. The documents relied on by the respondent are marked GNM1, LT2, LT3 and LT5.

GNM1 – Shows a deposit of Kshs. 1,500,000/= on 7th March 2020.

LT2 – shows a guarantee of kshs. 8,000,000/= dated 5th March 2020 which expired on 28th January 2021.

LT3 – Shows a guarantee of Kshs. 5,000,000/= dated 29th January 2020 which expired on 5th March 2021.

Both bank guarantees are by Transnational Bank Limited.

LT5 – Is a cheque for Kshs. 30,000/= to the respondent's advocates. It is dated 21st August 2020.

18. Counsel for the respondent contends that the Transnational Bank is not a reputable bank. The guarantee was however not rejected at the time of issue. Secondly the order by the court was that the parties were to agree on the issue of the bank. Is Mr. Kurauka trying to say that they never agreed on this and the guarantee was imposed on him? I don't think so. Further the late payment of the respondent's costs of Kshs. 30,000/= was accepted by counsel on issuance of the cheque. He is therefore stopped from raising issue on it at this point. The guarantee for Kshs. 5,000,000/= was issued even before the Ruling of 20th February 2020 while the one for Kshs. 8,000,000/= was issued within the 14 days granted by the court.

19. On further observation of these documents, I do note the following short falls:

- i)** The cash deposit made by the applicant is Kshs. 1,500,000/= and not Ksh. 2,000,000/= as ordered by the court.
- ii)** The guarantee for Kshs. 8,000,000/= expired on 28th January 2021 and there is no evidence of renewal of the same.
- iii)** The guarantee for Kshs. 5,000,000/= expired on 5th March 2021 and there is also no evidence of renewal of it.

20. As at now there is no guarantee in place. This is a clear breach of the conditions given by the court in the Ruling of 20th February 2020. I therefore find no merit in the application dated 5th July 2021 which is hereby dismissed with costs.

DELIVERED ONLINE, SIGNED AND DATED THIS 8TH DAY OF OCTOBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE