



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 38 OF 2019

TRENT DEVELOPERS LIMITED.....APPLICANT

VERSUS

NATHAN LLOYD NDUNG’U.....1ST RESPONDENT

JENNIFER MUKONYO MBOGO.....2ND RESPONDENT

RULING

The application dated 5th October 2021 is brought under Section 1A, 1B, 3A of the Civil Procedure Act, Order 42 Rules 6 and 35, Order 22 Rule 18 and 22 of the Civil Procedure Rules. It seeks the following orders:

- 1. Spent.**
- 2. Spent.**
- 3. That the Order dated 29/7/2021 dismissing this Appeal be stayed and/or set aside.**
- 4. That this Appeal and the Orders of stay pending the hearing of this Appeal be reinstated.**
- 5. That the Appellant be granted leave to show cause why this Appeal should not be dismissed.**
- 6. That Costs of this application be in the cause.**

The affidavit of Ann Adul sworn on 5th October 2021 supports this application. The Respondents opposed the Application and filed a Repling Affidavit sworn by Nathan Lloyd Ndung’u on 1st November 2021.

The matter was heard *inter partes* on 4th November 2021.

Applicant’s Case.

It is the Applicant’s claim that on 5th October 2021, Bealine Auctioneers Kenya forced their way into one of the Directors of the Applicant’s house in Karen L.R. No. 2250/47 and took all their property. The director of the applicant further claimed that the auctioneers falsely alleged that on 13th September 2021, they served her with a proclamation which she refused to sign. The Auctioneers proceeded to execute the decree of the lower court which was delivered on 4th May 2021 without proclaiming or serving notice. Further, the notification of sale refers to office furniture but household goods were taken. The Auctioneers were accompanied by five uniformed police officers. No breaking order was shown to the Director. Counsel for the Applicant submitted that if a decree is more than one year one has to serve notice to show cause.

Counsel for the Applicant submitted that they were unable to log in on 29th July 2021 when the Appeal came up virtually for notice to show cause why it should not be dismissed. Counsel sought for court’s leave to file an affidavit to show cause. The reason why the appeal has not been prosecuted, as per the applicant’s affidavit, is because the proceedings from the lower court have not been provided by the court. Further the appeal raises serious issues of law such as whether the magistrate court had jurisdiction to lift the corporate veil and order execution of the decree against the two directors of the Appellant without hearing all the directors who are three. Further, the appellant’s debt was unproven and the judgment in the lower court was an *ex parte* judgment whereas the appellant had a counter claim against the respondents.

Respondents' Case

The Respondents are opposed to the application. According to the respondent, the appellant confirms the appeal was dismissed for want of prosecution. The reasons given by the appellant for failing to attend court are flimsy. Further, the respondents submit that the appellant's appeal isn't on the lower court's decision to lift the corporate veil of the Appellant made on 19th July, 2018 by Hon. Mbeja. Their application for leave to appeal against the lifting of the corporate veil was dismissed for want of prosecution on 23rd July 2021 in Miscellaneous Civil Application No. 402 of 2018 by Justice Meoli. Therefore, in the absence of an Appeal by the Appellant against the lower court's decision of 19th July 2021 lifting the corporate veil, the decision still stands. The Appeal herein was in respect of the lower court's ruling of Hon. Mbeja dated 2nd January 2019 in which the lower court set aside interlocutory judgement on condition that the Appellant deposit Kshs.3,000,000 in court within 21 days failure to which execution was to proceed.

Counsel for the Respondents submits that indeed proclamation was done. Before proceeding with execution, the respondents applied for and obtained breaking orders and orders for security and police assistance from Hardy Police station. Counsel referred to section 34 of the Civil Procedure Act which provides that questions relating to execution of the decree should be determined by the court executing the decree and not by a separate suit. Therefore, this court lacks the original jurisdiction on the execution. The consent recorded in the High Court to refer the matter to the trial court did not upset the decree.

Analysis and Determination

Examining the Application, the supporting affidavit and the Replying affidavit, the issues for determination is whether this Appeal should be reinstated and the orders staying execution pending the determination of the appeal be reinstated.

On 31st January 2019 the Applicant filed a Memorandum of Appeal against the Ruling of Hon D. O. Mbeja delivered on 2nd January 2019. Thereafter, on 26th February 2019 the Applicant, through an application, prayed to the court to stay execution of the judgment and decree issued on 4th May 2021 and the ruling dated 2nd January 2019 pending the hearing and determination of the appeal. On 20th May 2019, counsel for the parties recorded consent in court where the application dated 26th February 2019 was allowed on condition that the appellant do pay respondents' thrown away costs within 21 days. Further, the recorded consent provided that the parties do proceed to prosecute the lower court matter in Milimani CMCC 2166 of 2017. On 29th July 2021 the appeal was dismissed after notice to show cause was issued and there was no appearance on the part of the Appellant. The Respondent filed the dismissal order before the trial court and proceeded with the execution proceedings.

The decision whether a suit should be reinstated for trial is discretionary and depends on the facts of the case. In the case of **IVITA VS KYUMBU [1984] KLR 441**, Chesoni, J stated:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay. Justice is justice to both the plaintiff and the defendant; so both parties to a suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced by the delay. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time.”

The consent recorded and signed by both counsels for the parties clearly state that the application dated 26th February 2019 seeking to **stay execution of the judgment and decree** issued on 4th May 2021 and the ruling dated 2nd January 2019 pending the hearing and determination of the appeal be granted so that the proceedings at the lower court could continue. Parties therefore agreed to stay execution so as to prosecute the matter before the trial court. It is not clear what the parties meant in their consent that the lower court matter be prosecuted as ex-parte judgment had already been entered and was not set aside.

After the appeal was dismissed, the respondents went to file the dismissal order so as to finalize the matter at the lower court and proceed with execution. The decree is over one year. As per Order 22 Rule 18 where an application for execution is made more than one year after the date of the decree, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause why the decree should not be executed against him. However, there is no notice to show cause against execution or evidence of service of the notice on record to prove that the judgment debtor was served.

Guided by **Ivita vs Kyumbu case**, this court has to determine whether the delay was prolonged, it is inexcusable and finally what prejudice the Respondent stands to suffer. Further, in **PAN AFRICAN PAPER MILLS LIMITED V SILVESTER NYARANGO OBWOCHA [2018] EKLK**, the court stated:

“Dismissal of a case is however a draconian judicial act and should be done sparingly and employed only in cases where dismissal is the feasible and just thing to do. Courts should strive to sustain rather than dismiss suits especially where justice would still be done and fair trial had, despite the delay. The respondent herein has not shown any prejudice that is likely to be suffered if the appeal is reinstated.”

The Appeal was dismissed on 29th July 2021. This application was brought on 5th October 2021. This was about three months later. However, it was brought immediately after execution had begun. I see no inordinate delay in the filing of the application. Though the respondent claim the High Court has no original delay on matters of execution as per section 34 of the Civil Procedure Act, the application before this court is on reinstatement of the dismissed appeal. Moreover, the respondents have not shown what prejudice they stand to suffer if

the appeal is reinstated. The dismissal was done by the court on its own motion and was not prompted by the respondents. The Applicant is, however, not without blame for it has not demonstrated the steps taken to revive the matter at the lower court as per the consent.

Perusing the memorandum of appeal, triable issues arise. These include the issue as to whether summons were properly served and the issue of the counterclaim against the respondents. However, it does not mean to say that the appeal will succeed and it is not the duty of this court at this stage to go into the merits of the intended appeal.

Dismissing the application would be too much of a draconian order and I'm of the opinion that justice will be served if the appeal is reinstated. In the case of **JOHN NAHASHON MWANGI V KENYA FINANCE BANK LIMITED (IN LIQUIDATION) [2015] eKLR** it was held:-

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

The applicant had to file the current application in the High Court since the execution was stayed by this court via the consent recorded on 20th May, 2019. Upon dismissal of the Appeal, the respondent extracted the dismissal orders and revived the execution process before the trial court. Although the respondent cannot be faulted for the dismissal of the appeal, it is apparent that the execution process was not properly carried out. No notice of intended execution was issued as required. The affidavit of Ann Adul indicated that on 5th October, 2021 auctioneers went to her premises and took away her property. The proclamation is alleged to have been made on 13th September 2021. It is clear that the judgment debtor was not aware of the proclamation and was ambushed on 5th October 2021 the same day the current application was made.

I am satisfied that the application dated 5th October 2021 is merited and the same is granted in terms of prayers three (3) and four (4). Since the appeal has been reinstated, prayer five (5) is unnecessary. I do proceed and make the following orders:-

1. The application dated 5th October 2021 is granted as hereinabove stated.
2. The appellant to file the record of appeal within ninety (90) days hereof.
3. The attached goods to be released forthwith to the appellant without any payment of auctioneers costs or storage charges.
4. The appellant shall meet the respondent's costs of this application in view of its indolence in prosecuting both the appeal and the trial court case.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2021.

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S. CHITEMBWE

JUDGE