



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 371 OF 2018

LINDA BOMU.....APPLICANT

VERSUS

KILUWA LIMITED.....RESPONDENT

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 103 OF 2018

KILUWA LIMITED.....PLAINTIFF

VERSUS

LINDA BOMU.....DEFENDANT

R U L I N G

1. This morning the Court accorded parties a hearing to canvass the Application dated 3/2/2020 essentially seeking an extension of time to comply with the terms of the court orders granting stay made on 16/12/2019 and for direction whether the execution can proceed on the basis of the decree which the applicant contends has been varied.
2. The reasons advanced to premise the application were that the applicant was aggrieved with the decision of this court and has filed an appeal to the Court of Appeal together with an application to stay pending appeal but the application was not certified urgent hence the same has not been listed before the said court on the 10/2/2020 on the question of urgency.
3. The applications was opposed by the Respondent on five grounds; two technical and asserting that the application does not lie while three go to the merits. The first objection taken against the application, to make it not meriting being considered to by the court is alleged to be the fact that this court did consider an application for stay and granted conditional orders which conditions are yet to be fulfilled.
4. It is added that while the conditions pends fulfillment, the same applicant approached the Court of Appeal for stay, the Court of Appeal did not certify the matter urgent and the same has been listed on the 10/2/2020 for parties to address the court on the question of urgency.
5. While that matter is still pending and live before the Court of Appeal, the same party has approached this court with current application essentially seeking stay. The Respondent considers the applicant's conduct to constitute an abuse of the court process because the orders issued by the court here awaits compliance and the applicant is thus accused of being in contempt of the court.
6. The respondent contends that the prayer for extension of time to avail sufficient time to urge the application before the Court of Appeal is not available to the applicant and tends to portray a plan towards forum shopping.
7. The second reason the Respondent considers the applicant not to merit courts discretion is that the application has been presented with

deceit and misrepresentation of facts intended to mislead the court because there is nowhere in the application where the reason for extension is revealed to enable compliance. For those reasons the application is termed bad which should be struck out without being heard.

8. On the merits, the Respondent asserts that the court has found in its ruling of 16/12/2020 that the refund of the sum paid was promised more than four years ago hence there is no prejudice to be occasioned to the Applicant if immediate payment is ordered rather to extend time would be to reward the Applicants contemptuous regard of the court orders. It was then asserted that the court equally found the respondent not to be a person of the straw and that the appeal will not be rendered nugatory even if payment is effected.

9. On request for direction on alleged variation of the decree, the respondent took the view and position that the decree remains unvaried to-date. Misrepresentation of facts was revealed to be another reason along the application ought not to be granted in favour of the applicant.

10. When counsel attended court, both largely relied on the affidavits and the averments therein. In fact none cited to court only decision for against the orders sought.

11. I appreciate the application to seek in the main an order of extension of time to comply with the conditions of stay issued on the 16/12/2020 and the auxiliary order that the court directs whether there has been a variation of the decree in the suit. I purpose to stand with the ancillary prayer.

Variation of the decree

12. A decree being the formal expression of a court's determination can only be varied when the decision is reviewed set aside or amended. So far in this file the court has not been moved to review, amend or set aside the decree. The orders issued on the 16/12/2019 must remain an order for stay of execution pending appeal and does nothing toward variation of the decree. That is the reason the same orders had a default clause to the effect that the decree holder would be entitled to execute in the event of default to comply with the conditions of stay. My directions are therefore that in the event of default the decree from the judgement dated 25/10/2019 shall be due for execution.

Extension of time

13. The prayer by the applicant even if ambivalent must be tied to the orders mentioned and related to it. The semantics and lack of coherence aside, the prayer is that I extend the time for compliance with the orders of 16/12/2019. I understand that to require compliance with the orders requiring part payment and part deposit of the decretal sum. Even though no reasons were given for failure to comply, when Mr. Abed addressed the court he said he need just 7 to 14 days.

14. That to me is not too much a favour to ask for. I consider it not too much to ask for because even in his response Mr. Muthama was prepared to accommodate Mr. Abed's client upto the 11th February 2020.

15. I am well aware that extension of time to a party who has had his day in court is not a right but a discretion by the court to facilitate the justice of the case. I am also appreciative that the decree-holder is entitled to her fruits of litigation just like the judgement debtor is entitled to his right to litigate on appeal.

16. When the counsel urged the matter before me I could see and hear the extent of frustration in Mr. Muthama's eyes and voice. I also did appreciate the anxiety of Mr. Abed.

17. With such facts taken into account, I do extend the time for Mr. Abed's client for a period of 7 days, not to pursue his application before the Court of Appeal, which is beyond this court but to arrange and comply with the orders of 16.12.2019. For clarity purposes, the judgement-debtor has upto the 14/2/2020 at 2.30pm to comply with the orders of 16/12/2019 and on default the decree-holder shall be entitled to move and have the entire decree executed.

18. I order that the costs of the application be in the cause.

Dated, signed and delivered at Mombasa this 7th day of February 2020.

P.J.O. OTIENO

JUDGE

In the presence of:-

Mr. Abed for the Applicant

Mr. Muthama for the Respondent