



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 163 OF 2019**

**VINE PACK LIMITED.....APPELLANT/APPLICANT**

**-VERSUS-**

**MILLY GLASS WORKS LIMITED.....RESPONDENT**

**RULING**

1. There are several applications pending in this matter some of which remain unprosecuted. The first application is the Appellant/Applicant's notice of motion application dated 29/7/2019 and filed on 15/8/2019. The substantive prayers in the said application were that;

**(a) Spent;**

**(b) Spent;**

**(c) That pending the hearing and determination of the intended appeal, this court be pleased to grant a temporary stay of execution of a decree dated 22/7/2019, arising from a ruling for summary judgment in CMCC No. 203 of 2019;**

**(d) That this Honourable court be pleased to set aside the decree dated 22/7/2019 arising from the ruling delivered by Hon. F. Kyambia on 5/7/2019 on the application for summary judgment dated 21/03/2019 in Mombasa CMCC No. 203 of 2019;**

**(e) That this Honourable court be pleased to issue an order directing the matter be heard and determined substantively based on merits of the case; and**

**(f) That costs of this application be provided for.**

2. It is worth noting that on 16/8/2019, the court granted ex-parte orders for temporary stay of execution in the interim on the condition that the Applicant deposits Kshs.300,000/= in court as security within 7 days thereof.

3. The Respondent opposed the application vide a replying affidavit sworn on 25/9/2019 by Tanisha Chhaniyara, the Respondent's financial controller. The main ground of opposition therein is that there was no jurisdiction to grant any stay of execution in the absence of an appeal filed within time where no leave has been sought to file an appeal out of time.

4. The second application is the Respondent's Notice of motion application dated 25<sup>th</sup>September,2019. It seeks the following orders;

**a) The interim orders granted on 16/08/2019 be set aside for having been granted without jurisdiction.**

**b) The memorandum of Appeal dated 29<sup>th</sup>July 2019 and filed on 15<sup>th</sup>August, 2019 be struck out.**

**c) The cost of the application and the struck out appeal be awarded to the Respondent.**

5. The Respondent's contention is that by dint of Section 79G of the Civil Procedure Act, an appeal is to be filed within the prescribed 30 days of the delivery of the impugned judgment. It is argued that the Appellant prepared its memorandum of appeal on 29/7/2019 but never bothered to file it until 15<sup>th</sup>August,2019, some eleven (11) days out of time and only after the Respondent commenced execution. It is also the Respondent's assertion that there has been no application for leave to appeal out of time and therefore the ex-parte orders granted on16/8/2019 were granted without jurisdiction.

6. The application is opposed. The Appellant filed a replying affidavit sworn on 14/10/2019 by its Financial Manager, Joseph Kimani in

opposition thereof. The Appellant further filed a supplementary affidavit on 16/10/2019. The Appellant's case is that the failure to file the appeal within the prescribed time is because the court file could not be traced and was unavailable from the registry. It is further averred therein that the delay was further occasioned by the delay in the court's registry in furnishing the Appellant with the ruling and order issued on 4<sup>th</sup> July, 2019. It is the Appellant's further argument that there is an application seeking the extension of time to appeal since the intended appeal raises arguable grounds. According to the Appellant, it will not only be in the interest of justice but also fair if the appeal is allowed.

7. The third application is Notice of Motion application dated 14<sup>th</sup> October, 2019 filed by the Appellant. It is premised on the provisions of Sections 1A, 1B, and 3A of the Civil Procedure Act and seeks for the Orders that;

- a) That the application be heard and determined first and on a priority basis.**
- b) That this Honourable court be pleased to enlarge time within which to file the appeal.**
- c) The memorandum of Appeal filed on 15<sup>th</sup> August, 2019 be deemed to have been duly filed.**
- d) The costs of the application be in the cause.**

8. The grounds relied on in support of the application are that: the delay in filing the appeal and the application for stay is not deliberate because the same was occasioned by circumstances beyond the Applicant's control; the delay is reasonable and excusable. It is further argued that the Applicant is likely to suffer substantial loss if the orders sought are not granted and that no prejudice incapable of remedy by way of damages if the application is allowed will be suffered by the Respondent. These grounds are further reiterated in the affidavit sworn in support of the application by Joseph Kimani, the Applicant's Financial Manager on 14/10/2019.

9. On 26/9/2019, this court gave directions that the first and second application be disposed of by way of written submissions. The matter was subsequently mentioned on 24/10/2019 to confirm filing of submissions. Both parties had filed their submissions. However, the Appellant's counsel made an oral application that the third application seeking extension of time to appeal be heard and determined first. The court rejected the request on the ground that the third application dated 14.10.2019 was filed way after directions had been given in respect of the hearing of the first and second applications dated 29/7/2019 and 25/9/2019 respectively. A ruling date for the first two applications dated 29/7/2019 and 25/9/2019 was then reserved for 11/12/2019.

10. However, on 9/12/2019 the Appellant's counsel sought to defer the ruling until an application dated 8/11/2019 is heard and determined. Consequently this court deferred the said ruling with directions that the application dated 8/11/2019 be disposed of by way of written submissions. This ruling is therefore to determine the Appellant's application dated 8/11/2019 brought pursuant to Section 1A, 1B, 3A and 63 of the Civil Procedure Act, Sections 4(1)(a), 5 and 28 of the Contempt of Court Act, 2016, Order 40, Rule 3 of the Civil Procedure Rules.

11. By the said application, the Appellant/Applicant seeks for the following orders:

- a) Spent;**
- b) That the Honourable court be pleased to order the Respondent in contempt for disobedience of the orders issued on 16/8/2019 by Hon. Lady Justice R. Korir sitting at the High court of Kenya at Mombasa, in High Court Civil Appeal No.163 of 2019;**
- c) That the Honourable Court be pleased to order that the Respondent's Managing Director, Mohamed Rashid, be punished by being committed to jail for six months or as the court may deem fit; and**
- d) That This Honourable Court be pleased to order the Respondent do pay costs for this application.**

12. The application is supported by an affidavit sworn on 8<sup>th</sup> November, 2019 by Joseph Kimani, the Applicant's Financial Manager. In essence, he reiterates the grounds on the face of the application.

13. According to the applicant, on 16/8/2019 this court issued an interim order for temporary stay of execution on the condition that the Applicant deposits into court Kshs.300,000/= as security within seven days from the date of granting the orders. The Appellant/Applicant avers that it deposited the said sum into court's account and the said orders are still pending hearing and determination of the application and the appeal.

14. It is also averred that despite service of the said order to the Respondent, in disdain of the same, the applicant filed an ex- parte application dated 30/10/2019 seeking an order attaching the Appellant/Applicant's funds held by Stanbic Bank Limited in ostensive satisfaction and execution of the judgment and decree of the trial court in Mombasa CMCC No. 203 of 2019. Thus the lower court granted ex-parte orders freezing the Applicant's bank account at Stanbic bank.

15. The Appellant/Applicant flaunts the Respondent for failing to disclose to the lower court that the Applicant had preferred an appeal and that this court had issued an interim order for temporary stay of execution pending the hearing and determination of the application dated 29/7/2019.

16. It is the Appellant/Applicant's case that the Respondent and its advocates deliberately and flagrantly ignored/violated the existing court orders with impunity and utter disregard of the consequences of such disobedience. The Appellant/Applicant further asserts that the actions of the Respondent are intended to put the dignity of this court into shame and disrepute and must therefore be punished.

17. The application was opposed by the Respondent who filed an affidavit sworn by **Mohamed Rashid**, the Respondent's Director on 23<sup>rd</sup> January 2020.

18. According to the said affidavit, the Respondent concedes that when it attempted to execute the decree issued by the lower court on 5/7/2019, it was stopped by an order issued on 16/8/2019 by J. Korir. It is averred that on 26<sup>th</sup> September, 2019 the matter was mentioned and directions were given that the parties do file submissions to be highlighted on 24/10/2019 and the Appellant's advocate requested for the said orders to be extended until 24/10/2019. However, according to the Respondent, on 24/10/2019, the Appellant/Applicant's advocate did not seek for the extension of the interim orders for stay further. The only request made was for the application dated 24/10/2019 that there be enlargement of time for it to be heard before or together with the application seeking stay of execution but the request was denied.

19. The Respondent's case is that the orders for temporary stay lapsed when they were not extended and the Respondent was free to proceed with execution. It reiterates that there were no orders staying execution that were willfully disobeyed because the Appellant was fully aware that the orders issued on 16/8/2019 were interim and had to be extended.

20. The Respondent was however of the considered view that the present application is targeted at delaying execution as far as the legal ingenuity can take it.

21. On 9/12/2019, this court gave directions in presence of advocates for the parties that the application be disposed of by way of written submissions and a date for highlighting reserved for 4/2/2020. On the date for highlighting, Mr. Kongere appeared for the Respondent whilst the Appellant was unrepresented. The Respondent's counsel submitted that he would be relying on his submissions which had been filed on 24/01/2020. He then moved the court to issue a ruling date. The court, on being satisfied that the date had been given in the presence of counsels for both parties proceeded to fix a date for ruling and directed that the Appellant was at liberty to file its submissions before then.

22. At the time of writing this ruling, only the Respondent's submissions were on record. This court presumes that the Appellant either opted not to or neglected to file its submission.

23. Nonetheless, the Respondent in its submissions sought this court to determine on three issues being;

- a) *Whether the application is fatally defective*
- b) *Whether there is an order capable of being breached*
- c) *Whether there has been a willful breach of the order.*

#### **Whether the application is fatally defective**

24. It is submitted that Sections 1A, 1B, 3A & 63 of the Civil Procedure Act do not donate jurisdiction to entertain contempt proceedings. The Respondent flaunts the application for being bad in law, fatally defective and contrary to Section 5 of the Judicature Act Cap 8 for the reason that in terms of Section 5(2) of the Judicature Act, the court, in punishing for contempt exercises ordinary criminal jurisdiction and that it is paramount that the procedure for instituting such proceedings be scrupulously followed. This argument was buttressed by excerpts from the cases of ***Kiru Tea Factory Company Ltd- vs-Stephen Maina Githiga & 14 others [2019]eKLR*** and ***Christine Wangari Gachege-vs-Elizabeth Wanjiru Evans & 11 others [2014] eKLR***.

#### **Whether there is an order capable of violation**

25. It is the submission of the Respondent that on 16/8/2019, Justice Korir in granting the temporary orders for stay stated that the orders were interim and if he intended the stay to last until the determination of the application then, Hon. Korir J. could have said so. The Respondent is thus of the view that the orders granted on 16/8/2019 required extension on a continuing basis. That the Appellant sought for extension of the orders on 26/9/2019 but on 24/10/2019, the Appellant did not apply for extension and thus the temporary orders for stay automatically lapsed. On this line of argument, the Respondent called to aid judicial precedents in the cases of; ***Solomon Kinoti & Another -vs-Attorney General [2011] eKLR*** and ***Diplomatic Duty Free Ltd-vs-Attorney General & Another [2012]eKLR***.

#### **Whether there has been a willful breach of the order**

26. The Respondent submits that its decision to proceed with execution of the lower court decree is based on the honest belief that the order this court's order made on 16/8/2019 lapsed on 24/10/2019 for failure of renewal. It is further averred that the Respondent's actions cannot be contemptuous and therefore the application should be dismissed for lack of legal and factual foundation. To buttress the argument, reliance is placed in the case ***Ram Kishan -vs- Tarun Bajaj & Ors on 17th January, 2014***.

#### **Analysis and Determination**

27. I have considered the application, the affidavits in support and opposition thereof. I have also considered the submissions filed by the Respondent and the authorities relied thereon. The only burning issue this court has deduced from the pleadings and arguments thereof is whether the Respondent acted in contempt of court's temporary stay orders issued by the Hon. Justice Korir on 16/8/2019.

28. However, this court finds itself in a state of perplexity for what might simply be referred to as a conflict of laws for the reason, that Parliament vide Act No. 46 of 2016 enacted the ***Contempt of Court Act, 2016*** which was assented to on 23<sup>rd</sup> December, 2016 and

commenced on 13<sup>th</sup> January, 2017. The same was declared inconsistent with the Constitution on the ground that there had been no public participation in its enactment as required by Article 10 and 118(b) of the Constitution of Kenya 2010. The decision was upheld by the court of Appeal in the case of ***Kiru Tea Factory Company Ltd-vs-Stephen Maina Githiga & 14 others [2019]eKLR***. However, the same Act continues to be displayed as if it was still effective. It is up to the law drafters to rectify what needs to be done since it is beyond the mandate and scope of the court.

29. Nonetheless, for purposes of discussing the issues herein, this court agrees with Respondent's submissions as well as the decision in Kiru Tea Factory Company case (supra) that, once an Act has been declared inconsistent with the Constitution, it becomes void ab initio and anything done under it is a nullity. In a nutshell this court will consider the law applicable in contempt proceedings as the law of contempt in the High Court of Justice in England by dint of Section 5 of the Judicature Act, Cap 8 Laws of Kenya.

30. I also am mindful to an equally important Constitutional imperative under Article 159(2) (d) of the Constitution where this court is enjoined to consider substantive justice as opposed to procedural technicalities. The overriding objectives of the Civil Procedure Act contained in **Sections 1A and 1B** of the Act as well command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities. I therefore hold the view that dismissing a suit or an application or pronouncing it as defective on account of citing a wrong provision of law would amount to a technicality.

31. The law is a living thing; it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes, it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle. Consequently, I dissent on the opinion held by the Respondent that in punishing for contempt, the court will be exercising ordinary criminal jurisdiction and proceed to determine the application on its substance.

32. In the case of ***KIMANJA KAMAU (Suing as the personal representative of the representative of the estate of GIDEON GITUNDU KIMERE-deceased v Francis Mwangi Mwaura & another [2018] eKLR***, the court observed that; in order to succeed in civil contempt proceedings, the Applicant is duty bound to prove the following 4 elements; -

- a. *the terms of the Order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;*
- b. *the Defendant had knowledge of or proper notice of the terms of the Order;*
- c. *the Defendant has acted in breach of the terms of the Order; and*
- d. *the Defendant's conduct was deliberate.*

33. The Appellant/Applicant alleges that the Respondent disobeyed the order for temporary stay issued by this court on 16/08/2019 and the directions given thereof by moving the lower court in Mombasa CMCC No. 203 of 2009 to obtain an order freezing the Appellant/Applicant's funds held by Stanbic Bank Limited in satisfaction and execution of the decree and judgment issued by the lower court in CMCC No. 203 of 2009. It goes without saying that court orders are never issued in vain and the same must be heeded in order to uphold the rule of law.

34. I note that the Respondent does not dispute being served with the said order. Indeed, it was the Respondent's submission that when it initiated its execution process, it was stopped by the interim order of temporary stay of execution issued by this court on 16/8/2019. However, the Respondent's contention is that the orders issued on 16/8/2019 were interim and ought to have been renewed or extended. Further, that the Appellant only applied for extension of the said orders on 26/9/2019 but when the matter was mentioned on 24/10/2019, they failed to apply for the same. The Respondent further submitted that the decision to proceed with execution was based on the honest belief that the order issued on 16/8/2019 lapsed on 24/10/2019. As shown above, the Respondent cited authorities which supported the argument that the interim orders had to be extended, failure of which the orders would automatically lapse.

35. On the other hand, the Appellant/Applicant vide the affidavit in support of the application argued that in granting the temporary order for stay of execution, the court imposed a condition that the Appellant does deposit a sum of Kshs.300,000/=. The Appellant/Applicant complied with the condition imposed by the court and its major argument was that the order would subsist until the determination of its application dated 29/7/2019. By the above description, the question which follows is whether the Respondent wilfully disobeyed the order issued on 16/8/2019.

36. I have perused the proceedings of 16/8/2019 before Hon. Justice R. Korir. Mr. Michuki appeared for the Applicant. The subject application was heard ex-parte. The court granted the following orders which I quote verbatim;

***'I have heard the Applicant counsel on his submissions for stay of execution. I direct as follow:-***

***The application dated 29/7/2019 be served upon the Respondents for inter-parties hearing in the new term. In the interim I grant temporary stay of execution on condition that the Applicant deposits with court Kshs.300,000/= as security within 7days of today...***

***Mention before the court in Mombasa on 26/9/2019"***

37. It is worth noting that the orders were interim pegged to inter- parties hearing of the application. On 26.9.2019, counsels for both the parties appeared before Hon. Lady Justice Chepkwony. Mr. Kabungu, Counsel for the Appellant submitted that the matter was coming up for directions with respect to the application dated 29/7/2019 and that he had been served with a replying affidavit an another notice of motion application dated 25.9.2019 seeking to strike out the appeal. He sought for some time to respond and requested that the two

application be heard together. Upon listening to counsels of the parties, the court directed among other things that;

*a) The applications dated 29.7.2019 and 25.9.2019 be canvassed together*

*b) Both applications to be disposed of by way of written submissions.*

*c) .....*

*d) .....*

*e) Highlighting on 24.10.2019*

*f) The interim orders granted herein are hereby extended.*

38. It is worth noting from the proceedings that on 24/10/2019 the orders issued on 16/8/2019 were not extended on 24/10/2019 when the highlighting of the application was to take place. Therefore, there were no orders subsisting capable of being maintained as regards the notice of motion application dated 29/7/2019. In any event, the Court never extended nor granted any orders in respect to the status quo or otherwise pending the hearing and determination of the appeal. This being a Court of record, the record of the proceedings speaks for itself.

39. It is therefore clear that there is no Court order legally obligating the Respondent to obey, the Appellant/Applicant has not demonstrated that there was indeed a Court order, binding on the Respondent and whose terms were clear and capable of being obeyed. I agree with the learned Counsel for the Respondent that the orders expired/lapsed and therefore no contempt of Court can hold in the circumstances. There is nothing on record to support the Applicant's contention that the orders were subsisting pending hearing and determination of the appeal.....none in the proceedings on record. It would appear that the Appellant/Applicant laboured under a mistaken belief that there were valid interim orders subsisting. The first limb of the requirements stated in paragraph 32 has not been complied with and there is no reason to go into the others.

40. In the end, the application is found devoid of merit and is hereby dismissed. I will however not condemn the Appellant to costs but direct each party to bear its own costs with regard to the present application.

41. However, in the interest of justice, I direct that status quo be maintained until all the other pending applications are determined or otherwise ordered by this court.

42. A date to be fixed for directions on the disposal of the pending applications on priority basis.

It is so ordered.

**Dated, Delivered and Signed at Nairobi this 19<sup>th</sup> day of May, 2020.**

**D.O CHEPKWONY.**

**JUDGE.**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15<sup>th</sup> March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes