



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL APPEAL CASE NO. 5 OF 2018

JOHN SIMIYU KHAEMBA.....1ST PLAINTIFF/APPELLANT

SUSAN KAVULUNZE.....2ND PLAINTIFF/APPELLANT

-VERSUS-

COOPERATIVE BANK OF KENYA.....1ST DEFENDANT/RESPONDENT

R.M. NNGURU T/A NGURU AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

By an Amended Notice of Motion dated 19th July 2019 and filed in court on 25th July 2019, pursuant to **Sections 1A, 1B, 3A and 80 of the Civil Procedure Act cap 21 laws of Kenya, Rule 3(1) and (2) of the High Court Practice and Procedure Rules, Order 45 Rule 1, 2 and 3(2), Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules** and all other enabling provisions of law, the Appellants sought Orders;

- a. The Court to vary/review/set aside the orders of 25th February 2019 by which the Appellants were directed to pay a total sum of Ksh 3,000,000/- by end June as a mandatory condition of stay granted on 19th November 2018 and extended on 25th February 2019 and instead reduce the said amount to Ksh 1,600,000/-.
- b. The Court to review/set aside and vary the orders of 25th February 2019 by ordering that the sum of Ksh 1,600,000/- already deposited in the joint interest earning account be deemed as a sufficient condition of stay granted on 19th November 2018 and extended by the orders of 25th February 2019.
- c. That in the alternative, this Court be pleased to extend and or expand, by a further six months, the order of 25th February 2019 directing the Appellants to deposit into the joint interest earning account a total Ksh 2,000,000/- within 4 months from March 2019 in installments of Ksh 500,000/- per month.
- d. That this Court be pleased to extend the Orders (d) issued in the Ruling dated 25th February 2019
- e. The Court be pleased to reinstate the Appeal and the stay orders granted vide the Ruling dated 25th February 2019
- f. That status quo be maintained pending the hearing and determination of this application.

The Application was based on grounds;

- a. That the foregoing prayers were sought premised on the 1st Appellant/Applicant's recent diagnosis with cancer of the lymph node.
- b. That by a Ruling dated 25th February 2019, this Court directed the Appellants/Applicants to deposit Ksh 1,000,000/- in a joint interest earning account and further that the balance of Ksh 2,000,000/- be deposited within 4 months from March 2019 in

installments of Ksh 500,000/- thus effectively ordering that a total sum of Ksh3,000,000/- be paid by the Appellants/Applicants by end of June 2019. The failure to which the Appeal and stay of execution would stand dismissed.

c. That the Appellants tried complying with the aforesaid order, albeit, partially by depositing into the joint interest earning account a total sum of Ksh 1,600,000/- out of Ksh 3,000,000/- leaving a balance of Ksh 1,400,000/- which they were and or have been unable to obtain and remit/deposit in compliance with the order of 25th February 2019 owing to the following reasons;

i. The 1st Appellant/Applicant was diagnosed with cancer of the lymph nodes which he has been struggling with to treat since his diagnosis in December 2018;

ii. Unfortunately, his condition had continued to deteriorate thus prompting his doctors in Kenya to refer him for urgent specialized treatment at **Indraprastha Apollo Hospital in India**.

iii. The 1st Appellant/Applicant was scheduled for admission of the aforesaid hospital on 8th June 2019 and was therefore traveling to India 7th June 2019 for a rigorous one-month treatment.

iv. The Appellants though willing to comply with the orders of 25th February 2019, were completely unable to come up with the remaining Ksh1,400,000/- owing to the urgent need for treatment aforesaid as well as the subsequent medical expenses that would be incurred to manage the disease.

d. That notwithstanding, the Appellants were merely alleged guarantors to a 2nd loan issued to Mateka Construction Company which had filed an application for joinder in the ongoing **Civil Case No. 7839 of 2017** pending before the Chief Magistrate Court. This confirms that the 1st Respondent herein, without the knowledge/consent of the Appellants/Applicants, consolidated the second loan account with the first loan account and illegally sought to recover both loans from the Appellants and that the second loan issued to Mateka Construction Company Limited was not guaranteed under the charge in issue.

e. That vide the same application, Mateka Construction Company equally confirmed that the two loans issued to it were secured by the charge over Land owned by the Appellants; whereas the second loan was secured by a lorry of registration number **KCE 226L** and to which the Appellants were not parties.

f. That the foregoing admission/confirmation was not available to the conditional sum of Ksh 3,000,000/- is reduced to Ksh1,600,000/- being that;

i. The Appellants had already paid off the first loan relating to their charged property, a fact that which was not denied by the 1st Respondent.

ii. The Borrower, Mateka Construction Company, had confirmed that the Appellant's property was not used to secure the 2nd loan.

iii. That admission alone from a party who was the borrower, and who was directly involved in the processing, issuance and utilization of the 2nd loan is enough to sustain a stay of sale of the Appellants property without any condition.

iv. Lastly, the 1st Respondent had already repossessed and sold the lorry which was used to secure the second loan. It is therefore not running any losses.

g. That as relates to the record of Appeal, the Applicant's advocate issued the record of appeal for filing in good time with instructions to file and serve on the same date, and therefore proceeded on the assumption that the same was done by the clerk as instructed.

h. Unfortunately, the clerk filed the record of appeal in good time but inadvertently forgot and or omitted to serve the same within the timelines ordered by court.

i. That failure to serve as directed was an inadvertent omission on the part of the Applicant's Advocates and unintentional mistake of counsel ought not to be visited on the Applicant.

DETERMINATION

The Appellants relied on **Sections 1A, 1B, 3A and 80 of the Civil Procedure Act cap 21 laws of Kenya, Rule 3(1) and (2) of the High Court Practice and Procedure Rules, Order 45 Rule 1, 2 and 3(2), Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules** and sought that this Court reviews, varies or sets aside its Ruling of 25th February 2019. In the alternative grant extension of time to deposit the balance of Ksh 1.4 million within 6 months and reinstate the right to file the appeal to enable parties file an appeal.

The Court record confirms the following;

On 19th November 2018, LJ Ngetich granted conditional stay of execution pending intended appeal for the Appellants to deposit Ksh 3,000,000/- within 45 days and in default, the stay of execution shall abate.

On 25th February 2019 under Courts inherent jurisdiction **Section 3A CPA**, this Court granted the Appellant 4 months to deposit Ksh 2,000,000/- in monthly instalments of Ksh 500,000/- after Ksh 1,000,000/- was deposited in a joint interest earning account of respective Advocates. The stay of execution was then extended for 6 months based on the Appellant's medical grounds.

The instant application is to extend further the period of compliance and reinstate the appeal, this Court lacks jurisdiction to consider the application. As observed in my Ruling of 25th February 2019, I alluded to grounds/basis of review as outlined under **Order 45 CPR 2010 as follows;**

This Court considered the prerequisites of granting a review as prescribed by Order 45 CPR 2010 and Section 80 CPA and unfortunately none of the grounds are the basis of the instant application. Sufficient reason relates to analogous issues as the preceding grounds.

Similarly, in the present application, the Court lacks jurisdiction to review the same matter the 2nd time and the application not based on the outlined threshold. The Application for review cannot be granted at this stage.

The Appellant relied on the case of; *Rev. Madara Evans Okanga Dondo vs HFCK HCCC 262 of 2005* ; on inherent jurisdiction of the Court. This Court concurs that **Section 1A & 3A CPA** grants the Court jurisdiction to use inherent power to make such orders as may meet the ends of justice. This Court invoked the inherent jurisdiction on the basis of the Appellant's medical condition and granted the Appellant further 6 months to file an appeal and have stay of execution upon deposit of the amount in monthly instalments which expired in June 2019. The Court would not invoke inherent jurisdiction on the same grounds to extend further stay of execution and filing of appeal in the absence of cogent evidence and reasonable grounds availed to Court. The Applicant's subsequent medical treatment situation was not supported by any documentary evidence. The Court dispenses justice to all parties and not some parties in a matter. The ground for invoking inherent jurisdiction is not granted in the absence of new compelling evidence.

The Appellant sought enlargement of time under **Order 50 Rule CPR**.

The order for stay of execution was granted in 2018, by inherent jurisdiction, the Court extended period of compliance to June 2019.

The matter has been pending Ruling since November 2019 to date, by default the extension of time by 6 months has already expired after almost a year since the impugned Court Ruling of 25th February 2019.

Any rights, obligations or liabilities may be enforced through ongoing *Civil Case No. 7839 of 2017* pending before the Chief Magistrate Court as the timelines to file an appeal under **Section 79G of CPA** is 30 days and the Court already extended for 6 months.

DISPOSITION

1. Therefore, the instant application lacks merit and is dismissed.

2. It is during the Corona virus pandemic lockdown pending official announcement on resumption of normalcy, no precipitate action /execution shall be taken against the Appellant

DELIVERED SIGNED & DATED IN OPEN COURT ON 5TH JUNE 2020. (VIDEO CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

KENNETH WILSON FOR PLAINTIFF

ADONGO FOR DEFENDANT