



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 3 of 2019

PMG.....APPLICANT

VERSUS

EMJ..... RESPONDENT

RULING

1. The Applicant, PMG through his notice of motion dated 29.1.2020 seeks a review of the orders of this Court of 17.1.2020 requiring him to deposit the sum of Kshs. 650,000/= in Court within 14 days and a replacement of the same with a deposit of the original logbook of motor vehicle registration no. KBR xxxC, which should not be sold, pending the hearing of the appeal herein. The Applicant further seeks a review of the order of even date requiring him to file the record of appeal within 21 days and instead that the Applicant be allowed to file the record of appeal within 21 days from the date of hearing of the Application herein.

2. The grounds contained in the Applicant's affidavit sworn on 29.1.2020 are that the ruling containing the said orders was to be delivered on 1.11.19 but the Judge was indisposed. The ruling was then delivered on 17.1.2020 without notice to the Applicant. The Respondent's advocate notified the Applicant's advocate of the ruling vide a letter dated 22.1.2020. However, the Applicant's advocate had travelled upcountry to attend a funeral and it was not until 28.1.2020 that the Applicant got to know of the ruling. The Applicant averred that he is unable to raise the amount of Kshs. 650,000/= within the few days remaining. The remaining period for filing the record of appeal is almost lapsing and although he has applied for certified copies of the proceedings and decree from the lower Court, the same are yet to be supplied to him. He is however ready and willing to deposit the original logbook of motor vehicle registration no. KBR xxxC, which belongs to a company of which he is a director. The company has in the past been authorized by this Court to deposit the said logbook as security. The Applicant further stated that he is ready to prosecute the appeal within the shortest time possible and that no prejudice will be suffered by the Respondent if the orders sought are granted.

3. The Respondent in her replying affidavit sworn on 11.3.2020, averred that the Application out to be struck out as it contains a misapprehension of the law and seeks orders incapable of being granted, and is otherwise and abuse of the Court process. The Respondent further stated that the Application is *res judicata* and the Court is *functus officio* as far as the Application is concerned. To the Respondent, the Application and the appeal are intended to evade the judgment of the Court and frustrate the realization of the awards made in her favour. The Respondent further avers that she has been rendered homeless and was thrown out of the family business by the Applicant, while he lives lavishly with his new girlfriend and family; that the Applicant has no regard for her welfare and threw her out of the family business without paying her salary arrears and terminal benefits; that the orders of 17.1.2020 lapsed on 12.2.2020 and the Applicant had ample time to comply with the orders of the Court; that the vehicle the Applicant seeks to offer as security is not the kind of security envisaged by the law.

Further, vehicles depreciate in value and that the vehicle offered does not even belong to the Applicant. As a director of the company that owns the vehicle, the Applicant does not approve of the same being offered as security. The Respondent further averred that the Applicant is a foreigner and thus a flight risk, hence the need for stable security. The Respondent urged the Court to dismiss the Application with costs.

4. In brief, the background of this matter is that in a judgment in Mombasa CM Divorce Cause No. 8 of 2018 between the parties herein, the Applicant was directed to pay to the Respondent a monthly maintenance of Kshs. 50,000/= with effect from 31.1.17, until the Respondent remarries or dies. Being aggrieved by the judgment of the trial Court, the Applicant did on 28.1.19, file the appeal herein, against the same. The Applicant also filed an application of even date, seeking stay of execution of the decree of 16.1.19 emanating from the said judgment. In its ruling of 17.1.2020, this Court granted stay, on terms that the Applicant would file the record of appeal within 21 days and deposit the decretal amount in Court within 14 days. Any default would result in the automatic lapse of the stay granted.

5. **I have considered the Application, the rival affidavits as well as the parties' written submissions.** The jurisdiction of this Court for review of orders is provided for in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Section 80 allows an aggrieved litigant to apply for review of an order or decree and empowers the Court to make such order as it deems fit as follows:

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

6. Order 45 Rule 1 (1) stipulates the grounds upon which an order may be reviewed:

45 (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

7. In the present case, it has not been said that there is discovery of new and important matters or evidence, which after due diligence, was not within the Applicant's knowledge or could not be produced at the time the order was made. It has also not been said that there is a mistake or error apparent on the face of the record. The Applicant has hinged his Application on the last limb namely, **for any other sufficient reason**. Parliament was deliberate in making provision for this last limb, the intention being to buttress the unfettered discretion of the Court. In the case of Shanzu Investments Ltd v Commissioner of Lands [1993] eKLR, the Court of Appeal stated:

In WANGECHI KIMITA & ANOTHER vs MUTAHI WAKABIRU CA No 80 of 1985 (unreported) it was held that

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by Section 80 for the Civil Procedure Act. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous.

8. The Applicant's grounds for review of the order are that the notice of delivery of the ruling which was delivered in absence of both parties, was not served upon him. Although his advocate became aware of the ruling on 22.1.2020, he was away attending a funeral upcountry and it was not until 28.1.2020, that he was advised of the same. At this time, only 3 days were left to deposit the decretal sum of Kshs. 650,000/= and it was impossible to raise the sum in such short time. The Applicant urged the Court to review the order for deposit of

security by directing the Applicant to deposit the logbook for the said motor vehicle instead of the decretal amount.

9. For the Respondent, it was submitted that the Applicant in his affidavit in support of the application for stay of execution, had acknowledged the decretal sum. He also affirmed that he was ready to provide an appropriate security as the court may direct. Had the Applicant wanted to give a specific security, he ought to have offered the same in the application for stay of execution. It was further submitted that litigation must come to an end. It was further submitted that company to which the vehicle belongs is not party to the dispute herein. No minutes authorizing the use of company assets have been exhibited.

10. It is not disputed that under Section 80 of the Civil Procedure Act, the Applicant has an unfettered right to seek orders for review. Similarly, the Court has an unfettered discretion to make such orders as it thinks fit. See Sarder Mohamed v Charan Singh Nand Singh and Another [1959] E.A. 793. A party invoking the discretion of the Court must however, satisfy the Court that he is deserving of the orders sought.

11. Order 42 Rule 6(2) of the Civil Procedure Rules provides:

No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

12. The Court notes that when the Applicant applied for stay of execution, he did state, as parties seeking stay are wont to say, that he was ready to provide an appropriate security as the Court may direct. An order of security for due performance of a decree or order is entirely at the discretion of the Court. Once an order for security has been made, it is not open for a party to suggest to the Court an alternative security. Indeed, the security envisioned is not just any security, but such security as is ultimately binding upon an applicant. In Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others [2015] eKLR, the Court stated:

First of all, the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here.

13. In the present case, the Applicant purports to offer to the Court as security, a vehicle that does not even belong to him. It belongs to a company known as Solar Innovations Limited. As per the well-known principle espoused in the famous case of Salomon v Salomon & Co. Ltd. [1897] AC 22, a company is a separate legal entity apart from its members. Although the Applicant has stated that the vehicle will not be sold, it is trite that he has no control over the vehicle for the simple reason that the same does not belong to him. Further, the Respondent, who is shown to be a director of the company in the company search exhibited by the Applicant, is opposed to company assets being used as security herein. Such security is obviously not ultimately binding upon the Applicant as contemplated in Rule 6(2)(b) of Order 42 of the Civil Procedure Rules.

14. In the case of Lochab Brothers Ltd v Lilian Munabi Nganga & 2 Others [2007] eKLR the Court dismissed an application for substitution for security and stated:

However as it was submitted by counsel for the respondent there is no guarantee that by the time the appeal will be heard and determined the vehicle will be worth the same money or it be their (sic) at all. The vehicle is still under the control and use of the applicant. Many things can happen to it before the appeal is heard. It can be wasted and its value diminished or it can even be involved in an accident and be completely damaged. I am not saying that this is gang (sic) to happen but it can happen. If that happens then there will be no security for the respondent to fall back on if the appeal is not successful. Deposit of motor vehicle log book is therefore not a satisfactory security.

15. In the present case, it is bad enough that the Applicant has offered as security, a vehicle that does not belong to him and over which he has no control. To exacerbate the situation, the valuation report he has placed before Court indicating that the vehicle is worth KShs. 750,000/=, is dated 23.2.17. It Such a valuation being over 3 years old is useless and cannot be accepted for any purpose. The current value of the vehicle is not known. Further, as stated by the Court in the Lochab Brothers case (supra), many things could happen to the vehicle before the final determination of the appeal. It could be wasted and its value diminished. It could also be involved in an accident and be written off. In such a situation, the Respondent would be left high and dry were the appeal to be dismissed.

16. On extension of time to file the record of appeal, the Applicant urged the Court to exercise its discretion under Order 50 Rule 6 of the **Civil Procedure Rules**, and allow the extension. His contention is that he became aware of the order to file the same within 21 days of the date of the ruling, on 28.1.2020. Under **Order 50 Rule 6** this Rule, the Court has the power to enlarge the time for doing any act upon such terms as the justice of the case may require as follows:

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

17. It is trite law that extension of time is an equitable remedy and a party seeking extension of time must demonstrate, by laying a basis to the satisfaction of the Court, that he is deserving of the same. The guiding principles for determination that a party is deserving of extension of time were stipulated in the case of Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others [2015] eKLR, cited by the Applicant. The Supreme Court stated at paragraph 25:

In determining whether such a basis has been laid, the Court in the Salat case set the guiding principles for consideration thus:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

- 1. extension of time is not a right of a party; it is an equitable remedy that is only available to a deserving party at the discretion of the court;***
- 2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;***
- 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;***
- 4. where there is [good] reason for the delay, the delay should be explained to the satisfaction of the Court;***
- 5. whether there will be any prejudice suffered by the respondents if the extension is granted;***
- 6. whether the application has been brought without undue delay; and***
- 7. whether in certain cases, like election petitions, the public interest should be a consideration for extending time.”***

18. As stated by the Supreme Court, extension of time is not a right of a litigant, but a discretionary power of the Court, for which a party invoking the same, must lay a basis. It is noted that the Applicant filed the memorandum of appeal on. 28.1.19. It was and remains incumbent upon of the Applicant to file the record of appeal. No explanation has been given for the delay in filing the record of appeal. The filing of the application for stay of execution did not stop the running of the time, within which the Applicant was to file the memorandum of appeal. As submitted by the Respondent and correctly so, no reason has been advanced for failure or difficulty in filing the record of appeal. It has not been stated that there has been a delay in the typing of the proceedings in the lower Court, for which a certificate would be issued. There is also no evidence of any letter requesting the same. The explanation that the delay was caused by the fact that the Applicant’s advocate was away upcountry attending a funeral between the date he was notified of the ruling and the date the Applicant got to know the same, is not

supported by evidence. In any event, such explanation is neither here nor there as the period this Court is concerned about is from 28.1.19, when the memorandum of appeal was filed. Further, the Applicant has not demonstrated to the Court the prejudice, if any, he will suffer if the extension is not granted. Accordingly, this Court finds that the Applicant has not laid a basis to the satisfaction of the Court, for discretion to be exercised in his favour.

19. In the result and for the reasons stated, I find that the Application dated 29.1.2020 is devoid of merit and is an abuse of the Court process and the same is hereby dismissed. I will however give the Applicant another opportunity and now direct that:

i) The Applicant shall deposit in Court, the decretal amount of Kshs. 650,000/= within the next 14 days, that is to say by 24.7.2020. In default, execution shall ensue.

ii) The Applicant shall within the next 21 days, that is to say by 31.7.2020 file and serve the record of appeal. In default, the memorandum of appeal herein will stand struck out.

iii) The Respondent shall have costs.

DATED, SIGNED and DELIVERED in MOMBASA this 10th day of July, 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**