



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 15 OF 2016

JAMAL MOHAMMED SUNKAR.....APPLICANT

VERSUS

ANGELINA MASAA MUTEMLI.....1ST RESPONDENT

DAUDI MUTUA MUTEMLI.....2ND RESPONDENT

R U L I N G

1. By way of Notice of Motion dated **19th March, 2018**, the Applicant seeks orders as follows:

- i) That the Judgment entered against the Objector in **Civil Case No. 165 of 2011** before **Honourable B. Thuranira Jaden, J.** on **30th September, 2014**, in **Machakos** being an Appeal from the Judgment and Decree of the **Senior Resident Magistrate's Court at Mwingi** of **Hon. H. M. Nyaberi (SRM) Civil Case No. 53 of 2008** dated **19th October, 2011** and the application for the attachment and sale of the Objector's movable property on the **29th June, 2017** be stayed pending hearing and determination of this Application.
- ii) That a Notice to Show Cause Application dated the **6th June, 2017** for orders that warrants of attachment and sale of the Objector's motor vehicle do issue to **Faith Auctioneers** be declared illegal, irregular and unlawful and be struck out.
- iii) That costs be provided for.

2. The application is premised on grounds that: on **30th September, 2014**, Judgment was entered against the Objector in **Civil Case no. 165 of 2011** before **Hon. B. Thuranira Jaden, J.** in **Machakos** being an Appeal from the Judgment and Decree of the **Senior Resident Magistrate's Court at Mwingi, Hon. H. M. Nyaberi (SRM) Civil Case No. 53 of 2008** dated **19th October, 2011**. That the Claimant/Decree Holder made an application before the Court dated **6th July, 2017** for orders of Warrant of Attachment and sale of the Objector's movable property to issue to **Faith Auctioneers**; At the time of proclamation motor-vehicle Registration No. **KAE 063Z** that was involved in the accident was insured by **United Insurance Company Limited**. A Moratorium was issued by the High Court in **Civil Suit No. 545B of 2006** placing **United Insurance Company Limited** under statutory management which had the effect of staying all claims against the Insurance Company and its insured; the fact of the Moratorium was not before the Court when the claim was instituted against the Objector upto and until the delivery of the Judgment; when the fact of existence of the Moratorium became known to the Objector, following correspondence between his Advocates (**Obong'o Wandago & Co. Advocates**) and the Claimant's Advocates (**Musyoka Muigai Advocates**) **United Insurance Co. LTD** and the **Insurance Regulatory Authority**, they agreed that the Moratorium rendered the proceedings against the Objector a nullity and not objecting to the same being set aside, the Claimant's Advocates however appealed to the Court through Notice to Show Cause dated **6th June, 2017** for orders of issuance of Warrants of Attachment and sale of the movable property by **Faith Auctioneers**; Orders of attachment are not available in view of extension of the Moratorium on payments by the **United Insurance Company Management (Under Statutory Management)** to its Policyholders and all other Creditors dated **1st December, 2017** which period was made in open Court on the **29th November, 2017** before **Hon. Justice Fred Ochieng** with an extension period to the last day of **March, 2018** and that the Objector will suffer irreparable loss unless the said proclamation is stayed and/or set aside.

3. The application is supported by an affidavit deponed by **Jamal Mohammed Sunkar**, the Objector, who reiterated what is stated in the grounds upon which the application is based.

4. The Respondents filed grounds of opposition dated **22nd March, 2018** stating that the issue of stay of execution of the Decree herein is *res judicata* having already been determined by the Court; that the application is a disguised Appeal of the Court's order dated **30th May, 2017**; and that the Deputy Registrar has no jurisdiction to entertain an application for stay of execution of a Judgment of the Court or to grant such orders.

5. The Application was canvassed by way of written submissions. It was urged by the firm of **Nyamu & Nyamu Co. Advocates** for the

Applicant that the Applicant/Objector approached the Court on time without an inordinate delay. That the Moratorium was in force and within the knowledge of the Claimant at the point of making the application for attachment, proceedings that were rendered a nullity by virtue of existence of the Moratorium. In this regard they relied on the case of **Florence Hare Mkaha vs. Pwani Tawakal Mini Coach & Another (2014) eKLR**, where the Court allowed a similar Application although it was brought a year after delivery of the Judgment.

6. That the Applicant had established a *prima facie* case since by virtue of correspondences between them the Applicants had knowledge of existence of the Moratorium and had acknowledged that proceedings were a nullity. That the Moratorium was extended by **Gazette Notice no. 5092 until March, 2019**, an order that renders the orders of attachment unavailable as held in the case of **Machira t/a Machira & Co. Advocates vs. East African Standard (No. 2) (2002) KLR 63** that:

“The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

In that respect he contended that the Objector risked losing his property, if sold, yet he was insured by the **United Insurance Co. LTD**.

7. The Respondent through the firm of **Musyoka & Muigai Advocates** opposed the application. It was urged that the Applicant through the firm of **Okong’o Wandago Advocates** made a similar application on the **15th December, 2014** which came up for hearing on the **30th March, 2017** but was dismissed for non-attendance of both the Applicant and his Advocate. That pursuant to **Order 21 Rule (3) Civil Procedure Rules** no fresh application can be brought seeking the same relief. That the remedy available to the Applicant is to set aside the dismissal order as **Order 12 Rule 6(2) of the Civil Procedure Rules** bars them of bringing a fresh application. In this regard they cited the case of **RC Kipsang Kandie (Deceased) (2005) eKLR** and **San Electricals LTD vs. Sitima Enterprises Limited & 4 Others (2015) eKLR**.

8. Further it was argued that should the Court consider the Application on merit it should fail because the sole argument is that the Applicant was a policy holder with **United Insurance Company Limited** which has been placed under statutory management and there is a Moratorium in place in respect of the said **Insurance Company** but the Applicant has not placed before Court a declaration of extension of the Moratorium as **JMS8** annexed to his Supporting Affidavit. That the notice reads thus:

“NOW TAKE FURTHER NOTICE that in exercise of powers conferred by section 67C (10) of the Insurance Act, the Statutory Manager hereby extends the Moratorium on payments by the said insurer to its Policyholders and all other Creditors until 31st March, 2018 with effect from the date of this Notice.”

9. That it is clear the extension of the Moratorium was until **31st March, 2018** it was not made apparent if by **27th November, 2018** when the application came up for hearing the Moratorium was still in force.

10. That the Moratorium is for payment by the Insurer to its Policyholders and all Creditors and Respondents are neither Policyholders nor Creditors of the Insurer. That the stay cannot be granted to last for an indefinite period.

11. I have considered rival submissions by Counsels for both Applicant and Respondents.

12. Prior to reaching the decision whether or not I should delve into the merits of the application I must determine the issue raised by the Respondent whether a similar application was dismissed and the laid down procedure of reviving it has been flouted.

13. Indeed there is an application dated **15th December, 2014** where the Applicant sought stay of further proceedings, Judgment, Decree, execution in this matter pending hearing of the Application that had been filed in **Misc. Application No. 67 of 2012 (previously 545 of 2006)** in **Nairobi High Court** on the grounds that there was an order of Moratorium staying all proceedings involving the **United Insurance Co. LTD** and its insured. It was averred that the Applicant’s suit motor-vehicle Registration No. **KAE 063Z** was insured by the **United Insurance Co. LTD**. The Application was opposed by the Respondents. On the **30th May, 2017** this Court dismissed the application as only the Respondent’s Counsel was in attendance and the Application could not be prosecuted. **Order 21 Rule 7 of the Civil Procedure Rules** provides thus:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

The Applicant had a remedy available under the aforesaid provision of law. The Court was seized of the discretion to hear an application for reinstatement of the Application depending on the reasons they would have advanced since the Application was dismissed due to non-attendance of the Applicant or his Advocate. (See **Order 12 Rule 3 Civil Procedure Rules**). Filing a fresh Application as in the instant case was erroneous (Also see **San Electricals LTD vs. Sitima Enterprises LTD & 4 Others (2015) eKLR**).

14. In the premises I decline to delve into the merits of the Application which I dismiss with costs to the Respondent.

15. It is so ordered.

Dated, Signed and Delivered at Kitui this 21st day of January, 2019.

L. N. MUTENDE

JUDGE