



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU  
CIVIL APPEAL NO. 58 OF 2018

(Arising from the judgment of the Hon. Mrs. L. Ambasi (CM)

delivered on 12<sup>th</sup> June 2018 in Meru CMCCC No. 203 of 2016)

(CORAM: F. GIKONYO J.)

EWASO NGIRO NORTH DEVELOPMENT AUTHORITY.....APPELLANT

-Versus-

APA INSURANCE LIMITED.....RESPONDENT

**RULING**

**Stay of execution**

1. The significant order sought in the Notice of Motion dated and filed on 6<sup>th</sup> July 2018 is;

**a. Stay execution of the judgment and all the Consequential orders in Meru CMCC No. 203 of 2016 made on 12/6/2018 and 27/02/2018 pending the hearing and determination of the Appeal herein.**

The Motion is expressed to be brought pursuant to the Provisions of Order 42 Rule 6 of the Civil Procedure Rules, Section 3, 3A, 63E of the Civil Procedure Act and Article 50 & 159 (d) of the Constitution and all other enabling provisions of the Law.

2. On 10<sup>th</sup> July 2018 this Honourable Court issued a stay of execution for a period of fourteen (14) days pending the hearing and determination of this application Inter parties. The stay was extended on 23<sup>rd</sup> July 2018. On 26<sup>th</sup> July 2018 parties agreed to canvass the application by way of written submissions.

**Applicants Case**

3. The application is premised upon the grounds set out in the application and the supporting Affidavit sworn by Omar. M. Sheikh and supplementary affidavit dated 25<sup>th</sup> July 2018. These are:-.

**1. That Ruling on their application dated 18<sup>th</sup> April 2018 to set aside the judgment of the trial Court which had been scheduled for a Ruling on 5<sup>th</sup> June 2018 was read in their absence on 12<sup>th</sup> June 2018. And they only knew of it on 18<sup>th</sup> June 2018 when the auctioneers visited their offices.**

**2. That the primary suit was improperly filed for it failed to comply with Order 4 Rule 1 (4) & (6) of the Civil Procedure Rules.**

**3. That the mode of service did not comply with Order 9 & 5 of the Civil Procedure Rules.**

**4. That the firm of Kiogora Mugambi & Co. Advocates is properly on record. That the former advocates had already preferred an appeal in which they sought the current advocates on record to represent them. That the former advocates never consulted them when they entered a consent to the extent that they are to deposit the sum of Kshs. 6,876.574.50/= in an interest earning account to be opened by both parties. That the prior advocates on record i.e. Elijah. K. Ogoti & Co.**

**Advocates did not keep them abreast with the developments of the case.**

**5. That the impugned consent judgement has deprived them of their rights to fair trial.**

[4] In its submissions the applicant relied on the provisions of Article 10 & 5 of the constitution and cited the authority in **Focin M/c Co. Ltd vrs Ann Wambui & Anor (2018) Eklr Civil Appeal No. 22 of 2017.**

#### **Respondent Case**

[5] The Respondent replied to the Appellants application vide replying affidavit dated 20<sup>th</sup> July 2018 and Supplementary Affidavit dated 22<sup>nd</sup> August 2018 both sworn by Linda Mukami the Manager of legal Services at the Respondents company. She avers:-

**1. That the firm of Kiogora Mugambi filed this application whereas they were not properly on record hence rendering the subject application fatally defective. That the firm of Kiogora Mugambi filed the application dated 6/7/2018 in which they had sought leave to come on record for the appellant and which was granted on 12/7/2018 hence making this application fatally defective and a non-starter.**

**2. That the appellant has not demonstrated that the Respondent has begun execution proceedings and/or their appeal has chances to succeed considering that the application seeking to set aside the judgement was already dismissed.**

**3. That the applicant has also failed to demonstrate that they are willing to abide by the conditions that may be set for stay of execution.**

**4. That a similar application was made and when the court held that the Appellant was to pay half of the decretal amount it is then that the Appellant resorted to allegation of fraud and collusion.**

**5. Lastly, that the 24 days taken to file the application since the date of delivery of the judgement has not been explained.**

[6] In its submission she relied on the provisions set out in Order 9 & Order 42 (6) of the Civil Procedure Rules and the cited authority of **John Langat vrs Kipkemoi Terer & 2 others (2013) eKLR**

#### **ANALYSIS AND DETERMINATION**

[7] Two issues arise:-

**a. Alleged non-compliance with Order 9 of the Civil Procedure Rules; and**

**b. Stay of execution.**

#### **Of Order 9 of the Civil Procedure Rules**

[8] The Respondent has fastened a quarrel; that the Appellant filed the current application without seeking the leave of the court. They stated that the Appellant's advocates sought leave to come on record in the trial Court vide application dated 06/07/2018 and leave was granted on 12/7 /2018. At the time, the Appellant had already filed this application dated 6/7/2018.

[9] According to the Appellant, the former advocates had filed an appeal and in it they were granted leave to come on record for the Appellants but they never annexed the order or the appeal. It is also clear from the annexed application dated 06/07/18 that they sought leave to come on record for the Appellants herein. They also filed a notice of Appointment on 06/07/18 when they filed the application; hence contradicting their averments that they were already on record in the matter.

[10] **Order 9, rule 9 of the Civil Procedure Rules** provides as follows;

**“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.**

[11] Courts have interpreted this provision in strict sense. For instances see the decision in **Stephen Mwangi Kimote v Murata Sacco Society [2018] eKLR** in dealing with similar situation, the Court held as hereunder;

**“11. As per order 9 rule 9 the correct procedure to be followed in case of a dismissed suit was to seek leave to come on record, then file and serve the notice of change of Advocates and then file the application to set aside the orders of the Court. In the present case the Applicant's Counsel filed a notice of change of Advocates dated 04.04.2018 without leave of the Court,**

together with an application dated 04.04.2018 to set aside the dismissal orders of the Court then later on 09.04.2018 Counsel for the Applicant filed an application to seek leave to come on record. This clearly offends the express provisions of order 9 rule 9. The application for leave to come on record having been filed much later than the one for seeking to set aside the orders cannot be heard together as per order 9 rule 10. The procedure set out above is mandatory and thus cannot be termed as a mere technicality.....

**14. The Preliminary Objection raises a point of law that prescribes a mandatory procedure to be followed in matters where a judgment of the Court has since been delivered. The order of the Court dated 28.02.2018 was a determination of the Court. The submission of Counsel for the Applicant that the provisions of order 9 rule 9 are a mere technicality must be rejected.....”**

[12] The truth of the matter in this case is that the Appellant herein filed the aforesaid application before obtaining leave to come on record. I have stated before that the requirement in Order 9 rule 9 of the CPR serves a useful purpose of ensuring proper instructions to the incoming advocate and safeguarding any lien of the out-going counsel. It is a little rule but of enormous value in imbuing integrity in the legal practice in line with the Advocates Act. So, I will be slow to dismiss it as mere technicality.

[13] Nonetheless, I will take a wider view of justice in this case for I think that arguments that Ruling on their application dated 18<sup>th</sup> April 2018 to set aside the judgment of the trial Court which had been scheduled for a Ruling on 5<sup>th</sup> June 2018 was read in their absence on 12<sup>th</sup> June 2018 deserve consideration. Accordingly, I will determine whether stay is deserved.

#### **Of stay of execution**

[14] Non-compliance with order 9 rule 9 notwithstanding, is stay of execution deserved? Under Order 42 Rule 6 of the Civil Procedure Rules, the applicant must show that:-

- 1. Substantial loss may result to the applicant unless the order was made;**
- 2. The application was made without unreasonable delay; and**
- 3. Is ready to provide 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.**

#### **Of substantial loss**

[15] Substantial loss has been described in *Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005*, the High Court of Uganda at Kampala to be...

**“...a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal”.**

[16] In the same case (ibid), the court further stated that:-

**“...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a Commercial Court, such as ours, where the underlying transactions**

[17] The appellant has right of appeal and the respondent has right to full realization of the fruit of judgment. A balance need be struck here, and in the interest of justice order that there shall be a stay of execution on condition that the appellant pays:-

- 1. Half of the decretal amount to the Respondent within 30 days of today; and**
- 2. The auctioneers charges and costs of this application once agreed or taxed.**

**Dated, signed and delivered in open court at Meru this 6<sup>th</sup> day of February, 2019**

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**F. GIKONYO**

**JUDGE**

**IN PRESENCE OF**

Kariuki for respondent

Ngugi for applicant

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**F. GIKONYO**

**JUDGE**