



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.60 OF 2018

WEST KENYA SUGAR CO. LTD.....APPELLANT

VERSUS

LUKA WAFULA NAMASAKA.....RESPONDENT

RULING

Background

By way of Notice of Motion dated 10th December 2018 the Applicant filed this application against the Respondent seeking the following prayers:

i. SPENT

ii. THAT this Honorable court be pleased to grant leave to the Appellant/Applicant to lodge/file her appeal out of time in relation to WEBUYE PMCC NO.64. OF 2016.

iii. THAT pending hearing and determination of this application interparties or further orders, the court be pleased to grant the Appellant interim orders of stay of execution of the judgement and Decree in BUNGOMA CMC NO.289 OF 2016 That there be a stay of execution of a decree/orders issued in WEBUYE PMCC NO.64. OF 2016 delivered on the 31st August 2018.

iv. THAT this Honourable court be pleased to extend the time within the appellant and respondent are to deposit the balance of decretal sum as ordered by the lower court on the 31st October 2018.

v. AND or in the Alternative THAT this Honourable court be pleased to order that the said balance of Kshs.5,584,906/= be deposited in court forthwith

vi. THAT this honourable court be pleased to cancel, set aside, recall and/or lift the proclamation and/or warrant of attachment issued in execution of the orders issued on the 7th December 2018 and the Respondent be condemned to pay the Auctioneer's costs.

The application is supported by affidavit of STEPHEN AMUKHALE briefly on the following grounds: -

a. That a memorandum of appeal was filed in the high court against the judgement delivered in Bungoma CMC CC 286 of 2016.

b. That on 31st October parties agreed and in lower court ordered that balance of decretal sum being Kshs.5,584,906/= be deposited in joint account in the names of both advocates within 30 days.

c. That the Appellant's advocate wrote to the Respondent asking for facilitation of joint account opening through a letter dated 29th November 2018 and respondent made a proposal that the joint account be opened at Diamond Trust Bank.

d. That on the 1/12/2018 the respondent acknowledged receipt of cheques for Kshs.2,934,037/= and enclosed unsigned account opening forms and other supporting documents for joint opening of the account and on 3.12.2018 the Appellant's Advocate submitted its documents to the bank for account opening as directed by the Respondent's Counsel.

e. That on 6/12/2018 through a letter dated 6th December 2018 the bank through its branch manager made a request through an email for additional documents to enable complete opening the account. The manager pointed out that Respondent's Counsel had

not signed mandate and Gtc pages on the forms and had not also submitted audited accounts for the last two years and thereof the account could not be opened.

f. That the Appellant's counsel made a request to the Respondent to submit the audited account and also asked to deposit the said balance in court to avoid delay but the request was declined but the Respondent upon expiry of 30 days the Respondent asked Eshikhoni Auctioneers to proclaim the appellant on 7/12/2018 on account of balance.

g. The appellant contention is that the delay in opening the account as ordered by lower court was occasioned by both advocates and failure by the Respondent advocate to sign the forms.

The Respondent opposed the application and filed replying affidavit dated 10th January briefly stating that the application is made in bad faith and lacks merit. She depones that there was consent order dated 31.10.2018 for stay for 30 days. He states that the 30days lapsed on 31/11/2018 and that he cannot be blamed for non-compliance and him instructing the auctioneers was proper as time for compliance had lapsed.

This application was argued by both oral and written submission Mr.Olendo for applicant orally submitted that the issue in dispute was settlement auctioneers cost and the same ought to be settled by the Respondent due to non-compliance with order made by lower court on the 31st October 2018.It is his submission that the Advocates were to open joint account where the balance was to be deposited but the Respondent failed to sign the account opening documents within the stipulated time. He submitted that by the time the Respondent was instructing the auctioneers there was communication between the counsels to opening of the account and thereof it was bad faith to instruct the auctioneers to attach. He submitted that he should not be pursued to pay the auctioneers cost.

Mrs.Mumalasi submitted that the consent order was issued by lower court and the same cannot be extended by this court and the application need to struck out. She submitted that there is no justification to have the order of extension time because the order had a default clause that in default execution to issue and thereof it is her submission that no material has been placed before the court to warrant this court to vary the consent order.

From the pleadings and affidavits and submissions the following issues are not in dispute:-

1. There was consent order dated 31/10/2018 by the lower court on the following terms;

(i) That the balance of the decretal sum of Kshs.5,584,906/= be deposited in a joint interest earning account within 30days from 31/10/2018.

2. That the sum of Kshs.2,934,037/= was paid by the Appellant to the respondent on the 29th November 2018 as was ordered by the court.

3. That the balance of amount Kshs.5,584,906/=was to be deposited in a joint interest earning account within 30days from 31/10/2018 to be opened by both Advocates.

4. That the joint account opening process was to be undertaken by both counsels providing necessary account opening documents

5. That the balance was only to be deposited in the joint account once opened.

I have also considered the following correspondences that were exchanged between the advocates with regard to the opening of the account;

i. Copy of Letter dated 29/11/2018 by applicant to respondent with enclosed cheques and copies of documents on account opening to have the same endorsed by Respondent and also requesting supply of further document to facilitate joint account opening

ii. Acknowledgement letter dated 29/11/2018 by respondent to applicant requesting compliance to consent order of 31/10.2018

iii. Copy of email from the Diamond Bank branch manager to both parties dated 6/12/2018

iv. Attachment documents by Eshikhoni Auctioneers dated 7/12/2018

From the above documents it is my finding that there was clear communication between the advocates within the 30 days period in an attempt facilitate joint account opening for deposit of the balance of the decretal sum.

From the documents attached and submissions it is clear that the Appellant's Advocate sent to the respondent cheques together with account opening forms to be signed by the Respondent through a letter dated 29th November 2018 but the respondent never signed the form because if she did then the bank could not have made a request to the Advocate to sign the mandate and Gtc forms. The bank wrote an email dated 6/12/2018 through the branch manager to the parties Advocates requesting submission of further documents and also requesting Respondent's Advocate to sign mandate and GTC pages on joint account.

By 6/12/2018 the Respondent had not signed the forms despite the same having been earlier sent to the advocate for signing but returned them unsigned for submission to the bank. The Respondent to my opinion has not given any reasons to this court why she never signed the

document which to my view it an action led to the delay in account opening within stipulated time.

The appellant also states the Advocate made a request to have the sum deposited in court account which to my view was an indication to settle the claim before time lapses but the Respondent declined.

The Respondent knew that the depositing of the amount was to be done in a joint account which had not been opened. The appellant has demonstrated steps taken to open the account and that the respondent did not supply all the documents needed from her to actualize it. It cannot be said that the appellant refused and/or neglected to make the deposit.

I therefore find that the instruction the instructions to execute were premature.

The upshot of the foregoing is that the court finds merit in the Applicant's notice of motion dated 10thDecember 2018 and orders that the Respondent should pay the auctioneers cost of execution. No order as to costs.

Dated and Delivered at Bungoma this 8th day of May, 2019.

S.N.RIECHI

JUDGE