



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 223 OF 2016

ANTHONY MBWABI KHAYIMBA.....PLAINTIFF/RESPONDENT

-VERSUS-

LAXMANBHAI CONSTRUCTION LIMITED.....DEFENDANT/APPLICANT

RULING

1. This ruling is premised on the Notice of Motion brought by the defendant/applicant herein dated 16th April, 2019 supported by the grounds set out on its face as well as the facts deponed in the affidavit of *Anthony Leshan*. The applicant is seeking the following orders:

(i) Spent.

(ii) Spent.

(iii) Spent.

(iv) THAT the time for depositing the decretal sum in court as ordered by this court on 14th March, 2019 be enlarged by 30 days.

(v) THAT the order for a stay of execution granted on 14th March, 2019 be reinstated and/or extended to allow for compliance by the applicant.

(vi) THAT the costs of the application do abide the outcome of the appeal.

2. The deponent asserted that this court vide its order made on 14th March, 2019 directed the applicant to deposit the entire decretal sum of Kshs.17,590,620.80/= in the court's account within 30 days failing which the order for a stay of execution would lapse.

3. The deponent further explained that the applicant has since deposited the sum of Kshs.13,590,620.80/= as directed, leaving a balance of Kshs.4,000,000/= which was to be paid by its insurer, Jubilee Insurance Co. Ltd, but which payment has been delayed by virtue of the unavailability of some of its officers who were meant to sign off on the remittance of the funds as well as a delay in extracting the relevant court order.

4. It is also deponed that the insurer, through its legal officer, has indicated that the monies should be remitted sooner rather than later, hence the applicant is urging this court to extend the time required to comply in the interest of justice.

5. The Motion is opposed by way of the replying affidavit sworn by the respondent. Therein, he stated that the orders being sought by the applicant have been overtaken by events and that in any case, the stay orders lapsed on 14th April, 2019 hence there are no orders to be extended, adding that the Motion is an abuse of the court process since, inter alia, the applicant was given ample time to comply with the court order of 14th March, 2019 but did not.

6. In his supplementary affidavit, counsel for the applicant maintained that the applicant has since fully complied with the court order, having remitted Kshs.13,590,620.80/= on 15th April, 2019 and Kshs.4,000,000/= on 29th April, 2019, carefully adding that the late remittance of the latter amount was unintended and sufficiently explained and that the respondent has not demonstrated the manner in which he has been prejudiced.

7. The parties agreed to make oral submissions on the Motion. *Mr. Leshan* advocate for the applicant reiterated the contents of the Motion and supporting affidavit, emphasizing that by 15th April, 2019 the applicant had substantially complied with the aforesaid court order by depositing the sum of Kshs.13,590,620.80/= in the court's account and that the applicant has now fully complied with the court order, which leaves this court to consider the order seeking reinstatement of the stay order, thereby citing the cases of *Samuel Njau & another v Pauline*

8. The counsel went further to contend that the insurer required the court order prior to releasing the funds and which order could not be extracted in good time due to the procedure of approval. The said advocate also raised the argument that the signature appearing on the replying affidavit differs from those in the verifying affidavit and witness statement, hence the replying affidavit is incompetent.

9. In reply, *Mr. Nyasae*, learned counsel for the respondent while relying on the averments made in the replying affidavit, submitted that the supporting affidavit accompanying the Motion ought to be struck out as leave of court was not sought prior to filing the same as is required under Order 51, Rule 14(3) of the Civil Procedure Rules. The said counsel maintained that there remains no orders in place for extension or enlargement since the stay order lapsed.

10. *Mr. Nyasae* also urged this court to strike out paragraphs 3-9 of the supporting affidavit of Anthony Leshan, arguing that he is an advocate who deponed to facts which were not within his knowledge, adding that the delay in obtaining the extracted order lay purely with the applicant.

11. In rejoinder, *Mr. Leshan* submitted that a party is permitted to file an application out of time under Order 50, Rule 6 of the Civil Procedure Rules, further arguing that counsels can swear affidavits where they have personal knowledge of the facts at hand.

12. I have been careful to consider the application as well as the respective affidavits both in support of and in opposition to the same. I have likewise considered the rival arguments made by the respective counsels.

13. In first addressing the subject of the signatures appearing on the replying affidavit and verifying affidavitS and/or witness statement, my simple view is that this court does not have the expertise to determine whether or not the same are similar, hence this court will make no attempt to dwell any further on the argument, which inevitably fails.

14. Secondly, I noted the respondent's argument regarding the supporting affidavit which was deponed to by the applicant's advocate on record. From my observations, it is common practice for advocates to swear affidavits in support of their clients' applications as long as they possess knowledge of the facts in issue. In the present instance, it is possible and even expected that the applicant's advocate would be privy to the facts pertaining to his client's case; in any event, the said advocate made it clear that the facts were within his knowledge as he was personally following up the matter. I therefore find no reason to have the supporting affidavit struck out on this basis.

15. Now to the merits of the Motion, it is clear from the record that the applicant had previously sought an order for a stay of execution pending the hearing and determination of its appeal. Upon hearing the parties on the same, this court vide its ruling of 14th March, 2019 granted the order for a stay conditional upon the applicant depositing the entire decretal sum of Kshs.17,590,620.80/= in court within 30 days from that date.

16. The applicant, while indicating that it has since deposited the entire decretal sum in court, has admitted to having failed to do so within the timelines set out in the court order. The explanation for the same has been set out hereinabove. The applicant also annexed a copy of the letter dated 21st March, 2019 forwarding the draft order to the respondent's advocate for approval or amendments; it is not clear whether the same elicited a response from the respondent.

17. I have also considered the letter dated 5th April, 2019 from the applicant's advocate to the deputy registrar, thereby requesting for the extraction of the order. It is noted that the court order was issued on 12th April, 2019.

18. In my humble view, while it is clear the applicant did not adhere to the timelines given by this court on 14th March, 2019 I find the explanation offered to be reasonable.

19. Furthermore, this court is granted the power to enlarge the time for doing any act pursuant to **Order 50, Rule 6** of the **Civil Procedure Rules** which provides thus:

“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.”

20. In the present instance, the strict timelines expired on 14th April, 2019 while the present application was filed on 16th April, 2019. The applicant has demonstrated that it has since deposited the entire decretal amount in court, albeit late in the day. This means that the order sought for enlargement of time will serve no useful purpose in the circumstances as the same has been overtaken by events.

21. Suffice it to say that I have equally considered the length of the delay which delay I might add is not so inordinate as to amount to a miscarriage of justice.

22. In the premises, I will exercise my discretion in granting order (iv) of the Motion and direct that the stay order earlier issued on 14th March, 2019 be hereby reinstated. The applicant shall however bear the costs of the application assessed at Kshs. 10,000/- to be paid within 7 days from today.

Dated, Signed and Delivered at Nairobi this 18TH day of JULY, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant