REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 133 OF 2018

COMPLIANT INTERNATIONAL SECURITY LTD.....1st APPELLANT

JOSEPH GACHERU.....2nd APPELLANT

VERSUS

NICODEMUS MULWA MULI.....RESPONDENT

RULING

1. This is an application by the Appellant/Applicant dated 20.12.2018 seeking two main prayers, Firstly stay of execution of judgement and decree in **Kangundo SPMCC No. 47 of 2016** pending the hearing and determination of the intended appeal and Secondly review, variation and or extension of orders issued on 19th September, 2018 by the Honourable Mr. D.O. Orimba against the applicant in Kangundo **SPMCC No. 47 of 2016** and extend time within which to deposit the decretal amount of Kshs 2,629,650/-

2. The orders that the applicant seeks extended were issued in the trial court, which is the same court that gave the decision against which the applicant is appealing. The Application is supported by an affidavit sworn by Daniel Mugun, from the firm of advocates on record in this matter. The trial court had granted orders of stay of execution and the applicant was yet to comply. The interim orders have since lapsed and the applicant was unable comply with the trial court's orders hence filed this application. The Applicant has annexed copies of documentation indicating the process they have taken towards the performance of the orders they now seek to be extended. The Applicant deposes that the delay in compliance was occasioned by the process of opening a joint account.

3. The Applicants further deposed that they are ready and willing to deposit security and if the orders sought are not granted, then they shall suffer substantial loss and further that they have an arguable appeal.

4. The Application is opposed by the Respondent. The Respondent is of the view that the application is frivolous, vexatious, incompetent, bad in law, incurably defective, abuse of the court process, an afterthought, brought after inordinate delay and *res judicata* .In the replying affidavit dated 18th January, 2019, the respondent averred that a similar application had been filed in the Kangundo Court that was allowed on 19th September, 2018 with conditions but which orders were vacated on 19th December, 2018 after the Applicant failed to comply. The respondent pointed out that neither he nor the bank have received any communication from the Co-operative Bank, Upper Hill Branch to show that the appellant made any efforts towards obeying the court orders of 19th September, 2018. He averred that no reason had been given for not obeying the court orders.

5. The Application was canvassed by way of written submissions. I have considered the said submissions.

6. The issue for determination is whether the application for review, variation and or extension of orders issued on 19th September, 2018 is properly before the court and whether the applicant is entitled to orders for stay of execution.

7. Section 3A, 95 of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules are the operative parts in answering the question whether the prayer to extend interim orders is merited. The sections grant the courts unfettered discretion to enlarge time where a limited time has been fixed for doing any act or taking proceedings under these rules or by summary notice or by order of the court.

8. **In Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR,** the court stated thus**:-**

> **"..... It is clear that the discretion to extend time is indeed unfettered.**
>
> **It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. "We**

derive the following as the underlying principles that a court should consider in exercising such discretion:-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; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

9. It is not disputed that the Applicant was granted orders by the trial court and which had since lapsed. This issue was addressed in the case of **Hunker Trading Company Limited v. Elf Oil Kenya Limited [2010] eKLR** where the court found that instituting an application in the high court yet the same action was instituted in the trial court and orders issued that have not been complied with amounted to abuse of court process.

10. The points taken up by the Respondent is that the Application is frivolous, vexatious, incompetent, bad in law, incurably defective, abuse of the court process, an afterthought and brought after inordinate delay. This being an application that is similar to the one where orders were issued on 19th September, 2018 by the trial court, I agree with the respondent that the application might be vexatious, frivolous and incompetent and is clearly an abuse of court process. This being a discretionary remedy, having looked at the respondent's affidavit, the same alleges that the Applicants have come to court with unclean hands as there are claims of dishonesty on the part of the applicants since the respondent has disputed any payment and or deposit of the decretal amount by the appellants. The applicants on the other hand have given a proper response in their supplementary affidavit to the assertions by the respondent. The applicants have clearly indicated that the delay to deposit the decretal sums emanated from the bank's account regulations. Indeed the business name furnished by the respondent's counsel turned out to be similar to another law firm sharing a similar name. The bank thus sought clarification on the same and which caused the delay. I find this was beyond the applicant's control and that the trial court ought to have given them another chance to comply with the orders. Already the applicants have lodged their appeal which is yet to be determined. If the applicants are not given an opportunity to deposit the decretal sums as ordered by the trial court then the appeal will be rendered nugatory and will only be there for academic purposes. There will be no prejudice suffered by the respondent if time is extended in order for the deposit to be made as had been directed by the trial court.

11. Next I will address the issue of stay of execution and Order 42 Rule 6 of the Civil Procedure Rules is the law applicable in deciding whether the prayer is merited. The Rule provides as follows:

"6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (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 case of **Antoine Ndiaye v African Virtual University [2015] eKLR** gave the guiding principles for stay orders, in semblance with Order 42 Rule 6 of the Civil Procedure Rules; to wit,

a. The Application was brought without undue delay

b. Substantial loss occasionable to the applicant if the order is not granted

c. Security for performance

13. I have looked at the application herein, and with regard to the condition of undue delay, the appeal was filed on 9th October, 2018 and the application on 20th December, 2018 that is after about three months. Even though the respondent has challenged the delay, I note that the applicant was then busy sorting out the issue of account opening which delayed forcing it to seek an extension of time before the trial. It was only after the same was declined that the applicant moved to this court. Under those circumstances, I am satisfied that there was no inordinate delay. The same is excusable. With regard to the issue of substantial loss, I find that the applicants shall suffer loss in that their right to be heard on appeal will be extinguished if the order is not granted. On the other hand the respondent also stands to suffer if the order is granted in that their right to enjoy the fruits of judgement will have been kept away. However, since the decretal sums will be kept in a joint interest earning account, the concerns of the respondent will have been taken care of. On the issue of security for performance, the applicants have indicated willingness to deposit security as court directs while on the other hand the respondent has not shown his willingness or ability to refund the decretal sum if the appeal is decided against him. In these circumstances, the applicants appears to have met the basic requirements for grant of this order.

14. It would not be in order to presume that the grant of stay of execution is automatic on filing an appeal since in the words of Order 42 Rule 6(1) the court is to "**make such order thereon as may to it seem just".** Having considered the materials placed before me, there was a similar application before the lower court wherein orders were granted and the same had not been complied with and that the time lapsed.

The respondent has cast doubt on the averment that the appellant has actually taken any steps towards compliance and has urged this court to bring in the principle of *res judicata* as is provided for under section 7 of the Civil Procedure Act and to dismiss the application.

15. The test in determining whether a matter is *res judicata* was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others, (2010) eKLR** as follows: - (**a)** The matter in issue is identical in both suits; **(b)** the parties in the suit are the same; **(c)** sameness of the title/claim; **(d)** concurrence of jurisdiction; and **(e)** finality of the previous decision. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case. I find that the instant application meets the test of *res judicata*. However in view of my findings aforesaid, resorting to this principle will cause undue prejudice to the applicants. This court will try and do substantive justice in view of the fact that the appeal is pending determination .Allowing the request by the respondent will amount to granting the respondent to steal a match against the applicants as the respondent will execute the decree and walk away while the applicants are left holding onto an empty shell in the form of an appeal which will only serve academic purposes.

16. The respondent's counsel has finally urged me to reject the applicants application and cited the case of **Hunker Trading Company Limited v. Elf Oil Kenya Limited [2010] eKLR** where the Court of Appeal held that to file an application in the appellate court for stay of execution, after having failed to comply with the terms of an order of stay granted upon a similar application before the trial court, is an abuse of the process of the court. In the words of the Learned Justices :

> *"We think that we have the jurisdiction to stop it in its tracks in order to attain or further the "O2" principle. We would act unjustly if we were to allow it another chance in this Court to defeat the cause of justice by failing to obey an important order of the superior court."*

I am not persuaded to agree with the respondent's counsel's submission in that the delay had been partly caused by the respondent's counsel when she furnished a business name similar to another law firm which forced the bank to make enquiries. The applicants are now ready and willing to deposit the monies into the joint interest earning account. They should be given that opportunity to do so.

17. Consequently I allow the Applicants Application dated 20th December 2018 in the following terms:

> ***(a) An order of stay of execution of the decree and judgement in Kangundo SPMCC No.47 of 2016 is hereby granted upon the Applicants depositing the decretal sums of Kshs 2,629,650/ into an interest earning account in the joint names of the Advocates on record within fourteen (14) days from today failing which stay hall lapse.***
>
> ***(b) The costs of the application herein shall abide in the appeal.***

It is so ordered

Dated, Delivered and Signed at Machakos this 17th day of July, 2019.

D.K. KEMEI

JUDGE