



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 1009 OF 2005

GRACE WANGUI NGENYE.....PLAINTIFF/RESPONDENT

-VERSUS-

CAPITAL GROUP LIMITED.....DEFENDANT/APPLICANT

RULING

1. This ruling relates to the Notice of Motion dated 12th June, 2019 brought by the defendant/applicant and supported by the grounds set out on its face and the facts deponed to in the affidavit of *Somoina Kimojino*. The applicant is seeking the following orders from this court:

(i) *Spent.*

(ii) *Spent.*

(iii) *THAT this Honourable Court do extend time for a further 30 days or any other time it deems fit within which to deposit the security sum of Kshs.3,000,000/ as ordered via the ruling delivered on 14th March, 2019.*

(iv) *THAT the orders made via the ruling delivered on 14th March, 2019 requiring the applicant to deposit the security amount of Kshs.3,000,000/ in court be reviewed to an order for the deposit of the said amount in a joint interest earning account in the names of the respondent's and applicant's advocates.*

(v) *THAT upon the applicant making the deposit as ordered by this court, the deposit be deemed as security deposited in compliance with the ruling of 14th March, 2019 and any action taken by the applicant be deemed to be regularly done.*

(vi) *THAT the financial institution agreed upon by the parties herein do provide the respondent's advocates, the applicant's advocates and the applicant's insurer with the correct account details to deposit the remainder of the security in the sum of Kshs.3,000,000/ within the next 14 days of delivery of this court's ruling if in favour of the applicant, failure to which the applicant shall not be faulted on making the deposit and the stay orders shall not lapse.*

(vii) *THAT the applicant deposits the security in the sum of Kshs.3,000,000/ in the joint interest earning account within 16 days after receiving the correct account details, failure to which the stay orders shall automatically lapse and the respondent shall be at liberty to initiate execution proceedings against the applicant.*

(viii) *THAT this Honourable Court be pleased to issue any other orders as it may deem fit to serve the ends of substantive justice in the circumstances of the case.*

(ix) *THAT the costs of and incidental to the application be in the cause.*

2. The abovementioned deponent stated in his affidavit that vide its ruling delivered on 14th March, 2019 this court had granted the applicant an order for stay of execution pending appeal on the condition that it ensures to pay the respondent the sum of Kshs.6,000,000/ and deposits the sum of Kshs.3,000,000/ in court within 30 days from the date of the ruling.

3. The deponent further stated that the applicant complied with the part of the order requiring it to pay the amount of Kshs.6,000,000/ to the respondent and that the parties' respective advocates had agreed that they would file a consent in court to the effect that the remaining amount of Kshs.3,000,000/ be deposited in a joint interest earning account in addition to making the necessary arrangements on the opening of such account with Family Bank.

4. It was the deponent's assertion that upon the opening of the joint interest earning account by the parties through their advocates, they forwarded the details thereof to the applicant's insurer for further dealing, only for the insurer to later discover that the funds did not clear for the reason that the account was invalid.
5. The deponent further expressed the applicant's fears that the respondent is likely to proceed with execution and that its attempts at negotiating with the respondent regarding the payment of the balance of the decretal sum have proved futile, adding that the applicant stands to be severely prejudiced if the orders being sought are not granted.
6. The Motion stood opposed by way of the replying affidavit sworn by the plaintiff/respondent, wherein she challenged the Motion for being incompetent for the reason that it seeks to extend an order which has long lapsed, going further to state that given the age of the suit, any further delay in execution of the judgment entered in her favour shall prejudice her.
7. The respondent averred that following the ruling of 14th March, 2019 her advocates took the necessary steps, upon the request of the applicant, to open the account with Family Bank and executed the account opening forms before organizing to have the same forwarded to the applicant's advocates for further execution.
8. According to the respondent, the applicant's advocates neither appended the signature of their signatory nor ensured the transfer of the balance of the security to the bank account. As a consequence, the respondent pointed out that she instructed her advocates to cease indulging the applicant or its advocates any further and instruct the Manager at Family Bank to close the account, owing to the delay on the part of the applicant.
9. It is the respondent's position that since the applicant was all along aware of the timelines for stay of execution pursuant to this court's ruling and order of 14th March, 2019 its failure to comply is inexcusable and it is thus not deserving of a granting of the orders being sought.
10. The applicant rejoined with the further affidavit of *George Maina*, its Legal Officer. The deponent stated that the respondent will not be prejudiced if the orders sought are granted due to the fact that she has already received part payment of the security sum and the remaining sum may be deposited in a joint interest earning account which means that the successful party will be able to access the funds upon determination of the appeal.
11. The deponent also conveyed the applicant's position that it had informed its insurers of the need to comply with the order of 14th March, 2019 well in advance and that it is only later that the applicant came to learn that the balance of the security sum had not been paid to the account for the reasons elucidated in the supporting affidavit of *Somoina Kimojino* and should therefore not be faulted for the omission by its insurer.
12. The deponent also maintained that the applicant has offered sufficient explanation for its inability to comply with part of the order of 14th March, 2019, hence providing good reason to justify the exercise of this court's discretion in its favour.
13. The parties presented oral arguments on the Motion. *Miss Gatuhi* learned advocate for the applicant started off by restating the averments made in the supporting and further affidavits aforementioned, save to refute that the advocates declined to sign the account opening forms as claimed by the respondent.
14. The advocate went on to submit that there is sufficient reason for this court to review its earlier order regarding the conditions for granting the stay of execution, placing reliance on the case of *Josephine Moraa Cosmas v John Bosco Mboga [2014] eKLR* where the court considered the principles relating to the review of an order as encapsulated under Order 45 of the Civil Procedure Rules.
15. In contrast, *Mr. Mwaaura* learned counsel for the respondent, in equally relying on the assertions made in the replying affidavit of the respondent, argued that this is the 3rd application seeking a stay of execution that has been filed by the applicant and that the same is purely aimed at hindering the respondent from enjoying the fruits of her judgment. He was sure to reaffirm that there are currently no orders in place to be extended and that in any event, the applicant has taken no steps to lodge the appeal.
16. *Miss Gatuhi* rejoined with the argument that the applicant has already requested for the typed proceedings and judgment in relation to the appeal and that this court has the power to enlarge the time for compliance with its earlier order.
17. I have taken into consideration the grounds featured in the Motion, the facts deponed in the affidavits supporting and opposing it, as well as the rival oral submissions made by the respective advocates on record.
18. It is well noted that the application is largely seeking two (2) orders. The first concerns itself with the extension of time to comply with an earlier order made by this court.
19. **Order 50, Rule 5** of the **Civil Procedure Rules, 2010** empowers the courts to enlarge the time required for the performance of an action, regardless of whether such time has expired or not at the time of making an application to that effect. In the present instance, this court; upon hearing the applicant's prior application dated 16th January, 2019 seeking an order for stay of execution; granted the same pursuant to its ruling of 14th March, 2019 on the condition that the applicant pays the respondent the sum of Kshs.6,000,000/ and the remaining sum of Kshs.3,000,000/ be deposited in court.
20. The applicant's position is that it has since complied with the first part of the order by paying the respondent the sum of Kshs.6,000,000/; this position is not disputed by the respondent and further to this, there is evidence to that effect annexed to both the supporting and replying affidavits. In that case, the extension relates to the remaining sum of Kshs.3,000,000/.

21. It is not disputed by the applicant that there has been a delay in depositing the aforesaid amount, for the reasons laid out hereinabove. The applicant has annexed evidence to show that the insurer, UAP Insurance Co. Limited, had indeed paid the remaining amount on 15th May, 2019. While I am alive to the fact that the payment fell outside of the timelines set by this court, I am also appreciative of the fact that the applicant took reasonable steps towards complying with my order and actually complied with part of it. Moreover, I have looked at the evidence by way of correspondences availed by both parties and established that throughout, the said parties were in communication in regards to the deposit of the Kshs.3,000,000/.

22. Being considerate of the above circumstances and in exercising substantive justice, I am inclined to exercise my discretion by extending the time required for the applicant to comply with the pending condition relating to my earlier order.

23. This brings me to the second aspect of the application to do with review of the said order. The conditions to offer guidance to this court in deciding whether to grant an order for review are catered for under **Order 45** of the **Civil Procedure Rules** as hereunder:

- a) the discovery of new and important matter or evidence, or*
- b) some mistake or error apparent on the face of the record, or*
- c) any other sufficient reason.*

24. The application now before me rides on the third condition of sufficient reason. Without regurgitating my analysis made hereinabove, I am able to establish that the parties had previously taken active steps towards varying my order by arranging for the remaining security amount to be deposited in a joint interest earning account to be opened by their advocates.

25. Suffice it to say that it would appear the respondent has no issue with the applicant's request to deposit the remaining security in a joint interest earning account rather than in court. In the premises, I am satisfied that the applicant has provided sufficient reason to have me review the condition earlier set.

26. Nevertheless, I noted from the parties' version of events that the account previously opened between themselves has since been closed, meaning they would have to either re-open/re-activate it or open another account.

27. Accordingly, I will allow orders (iii), (iv) and (v) of the Motion on the condition that the applicant deposits the remaining security sum of Kshs.3,000,000/ in a joint interest earning account in the joint names of the parties' advocates/firm of advocates within 30 days of this date, failing which the order for stay shall lapse. I must also mention that this shall be the final opportunity granted to the applicant to comply with the condition touching on the order for stay of execution.

The court makes no orders as to costs.

Dated, Signed and Delivered at Nairobi this 14th day of November, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant