



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 154 OF 2015**

**PAUL KIBUGI MUIITE.....1<sup>ST</sup> APPELLANT**

**EDITH NDETI MUIITE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**NATIONAL BANK OF KENYA.....RESPONDENT**

**RULING**

This is an application by way of Notice of Motion dated 7<sup>th</sup> October, 2016 for the substantive order that the ruling and order of 15<sup>th</sup> March, 2016 be reviewed so that the Order that **“the interim stay of proceedings in the lower court be and is hereby extended until the decision on the appeal”** is vacated.

The application is brought under Section 80 of the Civil Procedure Act, Order, and 45 Rules 1, 2 and 6 of the Civil Procedure Rules and Order 51 Rule 1 of the same rules. The grounds upon which the order is sought are set out on the face of the application which is also supposed by an affidavit sworn by Samuel Gichohi Kiura, a Recovery Officer – Remedial Management Division of the respondent.

The application is opposed by way of grounds of opposition filed by counsel for the appellants. Both counsel have filed submissions which I have noted.

The thrust of the respondent’s application is that the court granted an order which had not been sought by the appellants and is therefore misplaced in the circumstances of the case. Order 45 Rule 1 of the Civil Procedure Rules provides that any person who considers himself aggrieved by any order, and who from the discovery of new and important matter or evidence or on account of some mistake or error on the face of the record, or for any sufficient reason desires to obtain a review of the order, may apply for a review of the judgment to the court which passed the decree or order without unreasonable delay.

In the application and the supporting affidavit the respondent has set out in detail the history of the dispute resting with the ruling now being challenged.

In the ruling delivered by this court on 16<sup>th</sup> March, 2016, reference was made to several applications, some of which had been determined by the lower courts. This court observed that the only prayer that had not been determined as at the time I was seized of the application leading to that ruling, related to leave to appeal out of time the decision of T. Wamae dated 27<sup>th</sup> July, 2013 and the ruling of Hon. T. Ngugi on 26<sup>th</sup> May, 2014.

Having considered the matter placed before the court, leave was granted to file appeal out of time the record of which should be filed within 30 days from the date of the ruling, that is 15<sup>th</sup> March, 2016. The court then proceeded to make an order that has prompted the filing of the present application. It is clear that there was no prayer whatsoever before this court or submissions by the parties for the court to make an order that the interim stay in the lower court shall now be extended until the decision on appeal. As it is, any stay of proceedings in the lower court was limited to 30 days which had long expired and the court could not extend an order that was non – existent.

Even if that order was still in place, there was no prayer as I have observed, that called for its extension. The court has no jurisdiction to grant any order that is not grounded in the pleadings. – see **Republic vs. Judicial Service Commission ex-parte Pareno (2004) e KLR, Sande vs. Kenya Co-Operative Creameries Limited (1992) KLR 314.**

There is clearly an error on the face of the record in that the court granted an order that had not been sought by the appellants. A party to the proceedings cannot be allowed to benefit from an order that is clearly misplaced. In view of the foregoing, the application by the respondent is allowed, and the contested order of stay of proceedings in the lower court, and extension thereof until the decision on appeal, is hereby vacated as prayed.

The mistake was on the part of the court and therefore each party shall bear their own costs.

***Dated, signed and delivered at Nairobi this 6<sup>th</sup> Day of February, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**