REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.7 OF 2012

NEW KENYA COOPERATIVE CREAMARIES…….....APPELLANT

VERSUS

ROBERT KIPLAGAT TONUI…….....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. S.R.Rotich-Principal Magistrate delivered in SRMCC No. 64 of 2009 on 13th October 2011)

RULING

1. The respondent was the plaintiff in **SRMCC No. 64 of 2009**, while the appellant/applicant was the defendant. On 13th October 2011, the trial court entered judgment in favour of the plaintiff/respondent for the sum of Kshs. 300,075/-.

2. The appellant was dissatisfied with the judgment of the trial court, and it therefore filed the present appeal through a Memorandum of Appeal dated 15th March 2012. Thereafter, the appellant took no steps to prosecute its appeal. The respondent then filed an application to dismiss the appeal for want of prosecution dated 11th December 2015.

3. In its ruling dated 6th April 2017, the court noted that there had been a delay in prosecuting the appeal, which was filed in 2012 and admitted for hearing in November 2013. Nonetheless, the court permitted the appellant to prosecute its appeal, but on condition that it provided evidence, within 7 days of the ruling, that the decretal sum and costs had been deposited in an interest earning account in 2012 as directed by the trial court in its order dated 3rd May 2012. In the event that the said evidence was not furnished, the appeal

would stand dismissed. The court then fixed the matter for mention on 3rd May 2017 to confirm compliance with its orders.

4. When the matter came up for mention on the said date, the counsel for the appellant, Ms. Chesoo, was absent. She had, however, sent Learned Counsel, Mr. Motanya, to hold her brief. Mr. Motanya informed the court that when the ruling of the court was delivered on 6 th April 2017, Counsel for the appellant was not present and so did not file any evidence of the depositing of the amount as directed by the court. Counsel for the appellant had only learnt of the orders on 20th April 2017. Mr. Motanya asked that the appellant be given a further 7 days to furnish the required evidence.

5. Counsel for the respondent, Mr. Mwita, vehemently opposed the application. He submitted that the order to furnish evidence of depositing the decretal sum in an interest earning account was issued in 2012. The appellant had been given a further 7 days to furnish evidence of so doing on 6th April 2017. One month later, the appellant was asking the court for more time. The appellant had not demonstrated any interest in prosecuting the appeal, and he urged the court not to grant additional time to the appellant. Upon considering the submissions of both parties, the court found that the appellant had had more than enough time to comply with the orders of the court issued on 3rd May 2012 and to supply the evidence as directed on 6th April 2017, but had failed to do so. It accordingly directed that the appeal stood dismissed in accordance with its ruling dated 6th April 2017.

6. The appellant has now filed the present application dated 8th May 2017 in which it seeks the following orders:-

(1) THAT this application be certified as urgent and service be dispensed with in the first instance.

(2) THAT the Honourable court be pleased to stay the orders made on 3rd May 2017 pending the hearing and determination of this application interpartes.

(3) THAT this Honourable court be pleased to stay execution of judgment and decree issued on 13th March 2012 pending the

hearing and determination of this application interpartes and thereafter pending the hearing and determination of the appeal.

(4) THAT this Honourable Court be pleased to review, vary and/or set aside the orders made on 3.05.2017

(5) THAT this Honourable Court be pleased to declare that as per the annexure marked 'PKO1' referred to in the sworn affidavit of Peter Kennedy Ombati, the Applicant has fully complied with the orders made on 6.04.2017.

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

7. The application is premised on the following grounds:

(a) The Respondent filed an application dated 11.12.2015 in which he sought to have the appeal dismissed for want of prosecution.

(b) The application was heard and a ruling delivered on 6.04.2017 where the court declined the Respondent's application.

(c) The Respondent's application was declined on condition that the decretal sum and costs deposited be furnished within 7 days as per the court orders of 3rd May 2012. Failure to fulfil the said condition, the appeal would stand dismissed.

(d) The ruling was delivered in the absence of counsel for the appellant who came to learn of this specific condition on 3rd May 2017.

(e) The Appellant's counsel did make a passionate plea for the court to enlarge time for the appellant to comply with the orders since the said sums had been deposited.

(f) The Appellant is now seized with a cheque deposit receipt dated 21.06.2012 showing that the amount of Kshs. 341,345/- being the decretal sum together with half of the agreed costs was deposited at Housing Finance Bank of \|Kenya Limited, Eldoret Branch Account No. TD-300-0013229.

(g) The said account was opened in the names of Kalya & Company Advocates for the Appellant and Joseph Kipkemoi Rono the then advocates for the Respondent.

(h) The failure to furnish the evidence for security deposit in time was not deliberate.

(i) It is fair, just, expedient and in the interest of justice that this application be allowed and the orders made on 3.05.2017 be reviewed and vacated and the time for compliance with order made on 6.04. 2017 be enlarged.

8. The application was supported by an affidavit sworn by Peter Kennedy Ombati on 8th May 2017. It was opposed by the respondent, who filed an affidavit sworn on 12th May 2017.

9. The response from the respondent is that the present application is frivolous, vexatious, is a waste of the court's time, is brought in bad faith and is intended to deliberately deprive him of the fruits of the orders of the court delivered on 3rd May 2017.

10. The respondent contends that a ruling notice was duly served by registered post on the appellant on 8th February 2017. He refers to the ruling notice as annexed to his affidavit, though the court notes that the documents are not annexed.

11. The ruling, however, was not ready as scheduled but was fixed for ruling the following day. The respondent avers that his advocates on record called the appellant's advocates and informed them of the date scheduled for ruling, but the advocates for the appellant were absent on the said ruling date.

12. Following the ruling on 6th April 2017, the appellant's advocates were served with a mention notice dated 7th April 2017 via registered post indicating the mention date of 3rd of May 2017.

13. The parties made oral submissions in support of their respective cases. Ms. Chesoo submitted that the appellant's application is brought under section 80 of the Civil Procedure Code as well as Order 45 of the Civil Procedure Rules. She relied on the case of **Shanzu Investments Ltd v Commisioner of Lands [1993] eKLR** in which the court had noted that "sufficient reason" was introduced in Order 45 in order to avoid clogging of the unfettered right of the court by section 80 of the Civil Procedure Act.

14. It was her contention that the omission by counsel for the appellant to comply with the orders of the court issued on 13th March 2017 (the order was made on 6th April 2017) was not deliberate. She submitted that the appellant had furnished evidence (annexure 'PKO 1') that the appellant had complied with orders of the court to furnish security for costs issued in 2012.

15. It was also her submission that the mistakes of counsel should not be visited upon the appellant especially in a case such as this in which the appellant had

already complied by depositing the sum of Kshs. 300,345/-. She further referred the court to the case of **Wanjiru Gikonyo & 2 Others v**

National Assembly of Kenya & 4 others [2016] eKLR and submitted that the court, in granting the orders of review, had stated that there was no error or default that could not be remedied by payment of costs. She urged the court to allow the application and review the orders issued on 3rd May 2017.

16. Mrs. Bett appeared for the respondent at the hearing of this application. She submitted that the application is not merited as the appellant is guilty of laches as is evident from the conduct of the entire proceedings. She further submitted that the appellant had not exercised due diligence in the conduct of the appeal.

17. It was her submission that the appellant was under a duty to find out the terms of the ruling dated 6th April 2017, and it was not enough to say that they did not know the terms and could not therefore comply. Given the circumstances of this case, the appellant was under a duty to ensure that it adheres to the conditions given to revive its appeal. The respondent had been waiting since 2012 to enjoy the fruits of his judgment, and the court should exercise its discretion in a just manner, noting that the sword of justice cuts both ways. She relied on **Sam Kiplagat & Another vs Charles Wanjohi Wathuku [2017] eKLR** for the proposition that the court must be careful to balance the rights of both parties. In her view, the appellant had not demonstrated sufficient cause to merit the order of review, and she urged the court to dismiss the application with costs to the respondent.

Determination

18. I have considered the submissions of the parties in this matter, as well as their respective averments set out in their affidavits in support of and opposition to the application. The application seeks review of orders made on 3rd May 2017, and is brought under section 80 and Order 45 of the Civil Procedure Code. Consequently, the sole issue for determination is whether the applicant has made out a case for review/variation and/or setting aside of the orders made on 3rd May 2017.

19. Section 80 of the Civil Procedure Act provides as follows:

> ***"Any person who considers himself aggrieved-***
>
> ***(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
>
> ***(b) By a decree or order from which no appeal is allowed by this act, may apply for a review of judgement to the court which passed the decree or made the order, and the court may make such orders as it thinks fit."***

20. Order 45 of the Civil Procedure Rules 2010 provides as follows:-

> ***1. (1) Any person considering himself aggrieved—***
>
> ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is hereby allowed, and who <u>from the discovery of new and important matter or evidence</u> which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or <u>on account of some mistake or error apparent on the face of the record</u>, or <u>for any other sufficient reason</u>, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***

21. From the averments and submissions of the applicant, I have not heard a contention that it has discovered 'new and important matter or evidence' which it had not discovered after the exercise of due diligence at the time the order of 3rd May 2017 was made. I have not heard it argue, either, that there is a mistake or error apparent on the face of the record.

22. What I understand Ms. Chesoo to be saying is that there is 'other sufficient reason' for the court to review its order. What is this 'sufficient reason'?

23. In the affidavit in support of this application sworn by Peter Kennedy Ombati on 9th May 2017, the appellant avers that the ruling admitting the appeal to be heard on merit on condition that the appellant furnished evidence of security for costs was delivered in the absence of counsel for the appellant, and that the learned counsel only learnt of the same on 3rd May 2017.

24. The record indicates that there was no appearance for the appellant on 6th

April 2017. Following its ruling, the court directed that the matter be mentioned on 3rd May 2017 to confirm whether the decretal amount had been deposited pursuant to the order of the court issued on 3rd May 2012.

25. On 3rd May 2017, Mr. Motanya, who was holding brief for Ms. Chesoo for the applicant, informed the court that the appellant had not furnished evidence of depositing the decretal sum as counsel for the appellant was absent on 6th April 2017. It would appear that Counsel for the appellant was aware that there was a requirement for the furnishing of evidence of deposit of the decretal sum well before the 3rd of May 2017 as is averred by Mr. Ombati. According to Mr. Motanya, the appellant had learnt of the mention date scheduled for 3rd May 2017 on 20th April 2017. At paragraph 5 of the affidavit sworn by Ms Chesoo on 26th May 2017, she admits to receiving a mention notice from the respondent's counsel but further states that she was not aware of the condition stated by the court.

26. Given that the ruling scheduled for delivery on 6th April 2017 was on an application seeking to dismiss its appeal for want of prosecution, one would have expected a little more diligence from the appellant and its Counsel. At the very least, it would have been expected to peruse the court file to establish what the ruling of the court had been. Further, after receiving the mention notice on 20th April 2017, one would have expected the appellant's Counsel to seek to find out why the matter was being mentioned. Again, this was not done.

27. From the averments of the appellant and the grounds set out in their application, I am unable to find a basis for review of the orders of this court made on 3rd May 2017. The appellant had been sleeping on its appeal for almost five years before it was roused from its slumber by the respondent's application to dismiss its appeal for want of prosecution. It was given a chance to litigate its appeal on merit, on the fairly straightforward condition that it furnishes evidence that it deposited the decretal sum in an interest earning account as it had been ordered to do by the trial court within 7 days.

28. It did not do this, and only woke up a month later to pray for extension of time.

29. This matter has been pending before the court for almost 10 years now. A decree was made in favour of the respondent six years ago. The appellant has been given a window through which to ventilate its grievance with the decision of the trial court, but was not willing to seize that opportunity. Justice must cut both ways, and in the present case, in the absence of sufficient reason to review the orders dismissing the appeal, it lies in dismissing the present application and allowing the respondent to enjoy the fruits of his judgment.

30. Accordingly, the application dated 8th May 2017 is hereby dismissed with costs to the respondent.

Dated Delivered and Signed at Kericho this 3rd day of October, 2018

MUMBI NGUGI

JUDGE