



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

CIVIL APPEAL (APPLICATION) NO. 15 OF 2018

Arising from the judgment by the Hon. Mrs. L. Ambasi, Chief Magistrate, in Meru CMCC No. 250 of 2016 delivered on 23rd January, 2018

(CORAM: GIKONYO J)

AMEDO CENRE KENYA LIMITED..... APPELLANT

-Versus-

PATRICK KAARIA NTONJIRA.... 1STRESPONDENT

THE ATTORNEY GENERAL 2NDRESPONDENT

RULING

Extension of Stay of execution orders

[1] The Motion dated 6th of June 2018 seeks *inter alia*:-

- 1. Extension of order of stay of execution granted on 3rd May 2018;**
- 2. Setting aside of orders of E. Mbicha SRM issued on 4th June 2018;**
- 3. Order directing Samuel Karithi Rurigi T/A Quickline Auctioneers not to auction goods seized by them;**
- 4. An order compelling the said auctioneers to return the goods seized by them herein; and**
- 5. Record of appeal filed on 4th June to be deemed as duly filed.**

[2] The application is premised on grounds set out in the application and the supporting affidavit and as adumbrated in the written submissions herein. The major argument presented by the Applicant is that the conditional stay granted herein on 3rd May 2018 lapsed on 3rd June 2018 which was a Sunday. Therefore, by dint of Order 50 Rule 3 of the Civil Procedure Rules, the stay was to lapse at the end of 4th June 2018 which was the next working day. Therefore it was illegal for the Respondent to have moved the lower court on 4th June 2018 for break-in orders for purposes of attachment of property belonging to the Appellant. They averred that the orders caused destruction of goods belonging to the Appellant. This is despite efforts by advocate Mutai which included placing a phone call to 1st Respondent's counsel informing him that the cheque for Kshs. 500,000 had been dispatched to Meru on 4th June 2018 for delivery to the counsel. The 1st Respondent also personally called on 5th June 2018 and was informed that the cheque had been dispatched to Meru and Joel Mutuma Advocate was to deliver it. He delivered it in the presence of the 1st Respondent. Yet, the 1st Respondent went ahead and raided the Appellant's premises and attached goods worth much more than the decretal sum. The appellant is apprehensive that unless the court intervenes, the 1st respondent will sell the attached goods. The Appellant also filed record of appeal out of time for which they are remorseful; they seek it to be deemed as duly filed. They cited ample authorities to support their standpoint.

[3] The application was opposed through a replying affidavit by Patrick Kaaria Ntonjira and submissions filed. He averred that attachment was done on 5th June 2018 after due procedure was followed. In the submissions the 1st Respondent argued that the stay lapsed on Saturday and not Sunday the 3rd day of June 2018. He emphasized that attachment was on 5th June 2018 after lapse of stay of execution. They stated

that order 50 rule 2 only applies to a period of less than six days. He blamed the Appellant of not only breaching the conditions of stay but for failing to file record of appeal in time. He prayed for dismissal of the application.

ANALYSIS AND DETERMINATION

[4] This application revolves around two things; when stay lapsed and extension of stay orders. There is also a prayer to deem the record of appeal as duly filed.

Computation of time

[5] Computation of time is at the heart of this application. The application is expressed to be brought *inter alia* under Order 50 rule 3 of the Civil Procedure Rules. Therefore, arguments by the 1st Respondent about Order 50 rule 2 is not relevant. Order 50 rule 3 of the CPR provides as follows:-

3. Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

[6] This provision has been discussed and interpreted in cases without number of which I do not wish to multiply. But I will state the following.

Excluded days

[7] The Respondent stated that the stay lapsed on 2nd day of June 2018 which was a Saturday, whilst the Appellant submitted that it lapsed on 3rd day of June 2018 which was a Sunday. The key words in Order 50 Rule 3 of the CPR are:-

Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed...
[underlining mine for emphasis]

[8] Section 57(a) of the Interpretation and General Provisions Act is relevant and will help in unpacking rule 3 as well as provide answers to the questions in controversy herein. The section states as follows:

7. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

[9] It may be argued that the phraseology in rule 3...***other day on which the offices are closed*** is made clear by the phraseology in section 57(b) to the effect that... ***all official non-working days (which days are in this section referred to as excluded days.*** Ordinarily and in our labour laws, Saturday may be classified as excluded day in computation of time. The next day the offices open was Monday the 4th day of June 2018.

[10] The foregoing notwithstanding, I am persuaded by the decision of Kasango J in **MBUNI DRYCLEANERS [2007] eKLR** and find that the 3rd of May 2018 when the ruling was delivered should be excluded from computation of the tenure of the stay order issued thereto. As such, proper computation is that the stay herein was to lapse on 3rd day of June 2018 which was a Sunday. And by law, the act that was to be performed thereunder ought to have been taken on Monday 4th June 2018. This clears any doubt there may have been as to the tenure of the stay order issued herein. Now therefore it goes without saying that the break-in orders issued by the lower court on 4th June 2018 were illegal and in violation of the orders of this court. I hereby set them aside. Again, and invariably, any proceeding or action taken upon such orders is illegal, and therefore, void.

[11] Applying this test of law, Quickline Auctioneers acted on an illegal break-in order. Therefore, whether they acted on 5th June 2018 or any other subsequent day, their actions are tainted *ab initio*. I declare the attachment and break-in by Quickline Auctioneers to be illegal. They shall now restore all or any goods carted away by them on the basis of the break-in orders of 4th June 2018. It is so ordered. But before I close on this aspect, and without indicting the 1st Respondent and Quickline Auctioneers, I note with great concern the submissions which

were captured in my ruling delivered on 3rd may 2018 as follows:- .

[5] The Applicants claimed that the 1stRespondent concealed from the court and Applicants the fact that he had obtained warrants of attachment for execution when they appeared in court on 28th February 2018 for hearing of the application. Immediately after court he proceeded to the Applicant's shop and served them with a proclamation notice for 7 days which lapsed on the same day the parties were going back for inter-parties hearing of application. That the 1st Respondent was aware that at the time of taking a date in court that he was going to serve the warrants of attachment and a proclamation notice whose period would lapse and execution commenced even before the Applicant's stay application is heard.

[6] The Applicants did not stop there. They urged that the 1stRespondent has retained a firm of auctioneers where he himself is a manager which raises a serious conflict, bias and prejudice, for he cannot be independent as an auctioneer in his own cause. The said firm proceeded to issue its bill of costs, which is excessive and oppressive, to the Applicant just one day after it had issued the warrants of attachment and the proclamation notice even before the proclamation period lapses. According to the Applicants, the 1stRespondent is engineering the whole exercise to embarrass and prejudice the Applicants. What's more, in extracting the decree, the 1stRespondent did not share a draft decree with the Applicant for comments and/or approval before sending it to the court for approval and execution. The Applicant alleged that they were kept in the dark on extraction of the decree which is in contravention of the law.

Record of appeal

[12] The record of appeal was filed herein outside time. The delay was for 3 days and is not inordinate. It was also explained to have been caused by the fact they were preoccupied with payment of the security. I excuse it in the interest of justice. The record of appeal is deemed to be duly filed. See Chesoni J In IVUTA case.

[13] As the appeal is in place now, and in light of the above findings of the court, it is fair and in the interest of justice that stay of execution herein is extended until determination of the appeal. I so order. However, as the 1st Respondent also has rights on his judgment, I direct that the appeal be heard expeditiously. The application dated 6th June 2018 is allowed in the specific terms stated in this ruling. It is so ordered.

Dated, signed and delivered in open court at Meru this 15th day of November 2018

F. GIKONYO

JUDGE

In presence of

M/s Kiome for Mutuma for appellant

M/s Mbijiwe holding brief for Mbogo for 1st respondent

No appearance for 2nd respondent.

F. GIKONYO

JUDGE

15/11/2018