REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 249 OF 2013

(Being an appeal from the Judgment of the Hon. Mr. P.N. Gesora SPM, delivered on 26th November, 2013 in the Chief Magistrates' Court Machakos CMCC No. 920 of 2012)

BEATRICE MUNENE.....APPELLANT

VERSUS

MOLLY WANGUI GITAHI.....RESPONDENT

RULING

1. This is a ruling on an application for extension of time to comply with orders of the court for the deposit of part of the decretal amount into court as one of the conditions for stay of execution pending hearing and determination of the appeal.

2. The Court has under Order 50 Rule 6 of Civil Procedure Rules an express jurisdiction and discretion to extend time in the following terms:

> "Order 50 Rule 6 Power to enla**rge time.**
>
> 6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, **the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require,** and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
>
> Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.**"**

3. This Court accepts the guidance of the Supreme Court in ***Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & Ors.*** *(2014) eKLR* on 'the underlying principles that a court should consider in exercise of the discretion to extend time" as follows:

> "This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:
>
> **1. 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;**
>
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
>
> **3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
>
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
>
> 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
>
> 6. Whether the application has been brought without undue delay; and
>
> 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

4. Considering the primary principle on the discretionary nature of an order for extension of time, on a case to case basis, this court has to examine the circumstances of the present case since the making of the order for the deposit of money into court the compliance with which time is sought to be extended.

5. The order for the deposit into court of half the decretal amount and the payment of the other half to the respondent within 14 days was made by the trial court on 18th February 2014 upon an application for stay of execution dated 23rd January 2014.

6. The High Court (B. Thuranira Jaden, J.) has previously ruled on an application dated 20th March 2014 for review of the order for deposit of the decretal amount, refusing the said application and, in effect, granting an extension for the deposit of the said monies within 14 days of the Court's ruling as shown in the said ruling set out verbatim herein below:

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> BEATRICE MUNENE…… APPELLANT
>
> VERSUS
>
> MOLLY WANGUI GITAHI ……..……RESPONDENT
>
> RULING
>
> 1. The application dated 26th February, 2014 principally seeks orders that the orders of the trial court made on 18th February 2014 directing the Appellant to release half of the decretal sum to the Respondent be set aside and that fresh orders of stay be issued pending the hearing and determination of the appeal.
>
> 2. It is stated that affidavit in support of the application that the ruling of the lower court directed the Applicant to deposit half of the decretal sum in court within 14 days and release the balance to the Respondent. According to the Applicant, the terms of the said ruling will render her appeal nugatory in the memorandum of appeal contests the award of the trial magistrate as highly excessive, incommensurate with the injuries sustained by the Respondent and unsupported by the evidence tendered during the hearing of the suit. That the appeal has high chances of success and the Respondent who is not a person of means may not be able to refund half of the decretal sum which comes to more that Ksh. 1,000,000/= (one million). The Applicant is willing to deposit the entire decretal sum in court as security. It is further deponed that the application was made timeously.
>
> 3. The application is opposed. The Respondent filed a replying affidavit in opposition to the application. It is deponed that the application is an abuse of the court process, has been brought after inordinate delay and has been overtaken by events. It is stated that the Applicants goods have already been proclaimed by the auctioneers and therefore there is nothing to stay. It is further stated that the Applicant has not even deposited half of the decretal sum in court as ordered by the lower court. That the application is improperly before the court as the lower court has already granted the orders for stay of execution. The Respondent has further stated that she is a person of means who can afford to refund the decretal sum as she is a Judicial Officer.
>
> 4. The application was canvassed by way of written submissions which I have considered.
>
> 5. Under Order 42 rule 6(2) of the Civil Procedure Rules 2010-
>
> "(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.
>
> 6. The ruling of the lower court in the application for stay was delivered on 18th February 2014. The present application was filed on 27th February 2014. The application was filed timeously.
>
> 7. The Appellant was dissatisfied with the conditional stay of execution granted by the lower court. The Appellant is allowed under Order 42 Rule 6(1) to apply to this court for stay, the refusal by the lower court to grant stay notwithstanding. The proclamation of the goods cannot be said to be a completed execution process. The application is therefore not overtaken by events.

8. It is observed that whereas the applicant's complaint is the payment of half the decretal sum to the Respondent and is even willing to deposit the entire decretal sum in court, no evidence has been exhibited to demonstrate the deposit of the other half of the decretal sum in court as per the orders of the lower court.

9. While deciding an application of this nature, the court has to balance the interest of the interest of both parties. As stated by the Court of Appeal in Kenya Shell Ltd. Vs. Kibiri & Another (1986) KLR:

> "In applications for stay the court should balance the parallel prepositions, first that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory."

10. The Applicant is apprehensive that in the event that stay is not allowed, she will suffer substantial loss as the Respondent may not be able to refund the half of the decretal sum paid to her. The Respondents' uncontroverted evidence is that she is employed and capable of refunding the amount.

11. I have considered the grounds of appeal in the memorandum of appeal. The contest is on quantum of damages, not liability. It is contended that the award of General Damages of Ksh.1, 800/= and Ksh.20, 000/= costs of future medical expenses is highly excessive. This is not a small sum of money by any standards. However, there being no contest on liability, the Respondent is entitled to enjoy some fruits of the judgment entered in her favour. I think the ½ of the decretal sum ordered by the trial magistrate is not unreasonable. In any event, it is evident that the Respondent is not a person of no means.

12. With the foregoing, I find no merits in the application and dismiss the same with costs.

13. The Applicant to comply with the lower court orders within 14 days from the date hereof. In default the Respondent at liberty to execute.

B. THURANIRA JADEN

Dated and delivered at Machakos this 28th day of May, 2015

B. THURANIRA JADEN

JUDGE"

7. The Court (Jaden J.) found no merit in an application for review of the order the compliance with which time is sought to be extended but while refusing the review the court extended time for compliance by a further 14 days. The applicant did not comply with the later order for deposit within 14 days.

8. To extend the time further in the circumstances of this case is to further review the order for this court declining the review of the order of the Trial Court but allowing some 14 days for the compliance with the order for deposit made by the trial court.

9. This court cannot supervise another court of equal jurisdiction, and it is the view of this court that the issue of extension of time must have merged in the application for review of the order for deposit of the money, which was made to the Court on 20th March 2014 and upon which Jaden, J. ruled on 28th May 2015.

10. Moreover, no explanation for the delay in compliance with the two orders of the court was given, save a reference to bureaucracy of the Insurance Company involved in not getting the cheques out promptly. That excuse cannot be used to validate delayed compliance with orders of the Court, which bind the parties without regard to their bureaucratic operations.

Orders:

11. Accordingly, for the reasons stated above, I consider that the application filed subsequently on 15th October 2015 for the extension if time to deposit the money into court is without merit and the same is declined. In view of this finding, I do not find it necessary to determine whether the applicant was further disentitled to favourable exercise of discretion of the court for reason of contempt of court.

12. The costs of the application shall be costs in the appeal.

Orders accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 6TH DAY OF NOVEMBER 2018.

G.V. ODUNGA

JUDGE

Appearances: -

M/s Muriithi & Ndonye Advocates for Appellant.

M/s Mutunga & Company Advocates for Respondent.