



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO 614 OF 2004

ZACHARIA MBORI & ANOTHER.....PLAINTIFFS

VERSUS

RAJENDRA RATILAL SANGANI & OTHERS.....DEFENDANTS

RULING

[1] The Plaintiffs, **Zachariah Mbori** and **Belinda Achola Mbori**, moved the court vide their Notice of Motion dated **17 June 2015** seeking the following orders:

[a] spent

[b] that the moneys deposited in the joint interest earning account of the Plaintiffs' and the 1st, 2nd and 3rd Defendants' Advocates in the name of **Oraro & Company Advocates** and **S. Kibera & Company Advocates** at Diamond Trust Bank Account No. [particulars withheld] pursuant to the Court Order dated **16 July 2014** being the sum of **Kshs. 5,000,000** together with interest earned thereof, be released to the Plaintiffs/Applicants.

[c] That the Plaintiffs be allowed to proceed and execute the Judgment entered in their favour on **27 March 2012**.

[d] That costs of the application be provided for.

[2] The application was filed pursuant to **Section 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Order 51 of the Civil Procedure Rules, 2010**. It is supported by the Affidavit of the 1st Plaintiff, **Zachariah Mbori**, annexed thereto, sworn on **17 June 2015**, in addition to the grounds set out on the face of the application. The brief background to the application is that by a Sale Agreement dated **22 January 1998** the parties agreed to the sale by the Defendants to the Plaintiffs of the property known as **Maisonette No. A1** situated on **LR No. 209/811, Nairobi**, for a sum of **Kshs. 4,500,000**. To that end, the Plaintiffs paid the requisite deposit of **Kshs. 2,000,000** to the Defendants on the agreement that the balance of **Kshs. 2,500,000** would be paid within 7 days from the date of registration of the **Transfer** of the property.

[3] It was further averred by the 1st Plaintiff that subsequent to the execution of the said Sale Agreement, the parties disagreed as to the manner of transfer of title of the property, and in consequence thereof, the Plaintiffs requested for a refund of their deposit. That when the Defendants declined to refund

the deposit, the Plaintiffs were constrained to file this suit, whereupon, following a full hearing of the matter, judgment was entered in the Plaintiff's favour on **27 March 2012** against the Defendants for the total sum of **Kshs. 8,680,000** together with interest and costs.

[4] That thereafter, almost two years after the delivery of judgment, the Defendants filed an application dated **11 December, 2013** seeking stay of execution pending the hearing and determination of their intended appeal to the Court of Appeal. The said application was conditionally allowed on **16 July 2014** in the following terms:

[a] That the 1st, 2nd and 3rd Defendants to deposit into a joint interest earning account in its Advocate's name and that of the Plaintiffs, the sum of sum of **Kshs. 5,000,000** within 90 days from the date of the Ruling.

[b] That the 1st, 2nd and 3rd Defendants do file and serve the Record of Appeal within 90 days from the date of the Ruling.

[c] That in the event of failure by the 1st, 2nd and 3rd Defendants to comply with the conditions aforesaid, the stay of execution pending the filing and determination of the intended appeal in the Court of Appeal would automatically lapse unless extended by the Court for good reason.

[5] It was further deposed by the 1st Plaintiff that although the deposit was made by the Defendants, the Record of Appeal was yet to be filed or served by the time the application was filed; and that the aforesaid conduct of the defendants has caused injustice to the Plaintiffs who are well along in age, and is merely calculated at denying them their legitimate right to enjoy the benefits of their judgment, hence this application. To augment the averments of the 1st Plaintiff, there were various documents annexed to the Supporting Affidavit, including the Sale Agreement, a copy of the Judgment and Decree, a copy of the Certificate of Costs and a copy of the Ruling of the Court dated **16 July 2014**.

[6] The application was opposed by the Defendants on the basis of the Replying Affidavit sworn by their Counsel, **Mr. Kibera**, on **15 July 2015**. According to **Mr. Kibera**, contrary to what is stated in the Supporting Affidavit, he followed up on the typing of proceedings severally in a bid to comply with the Court Order of **15 July 2014**, and that when he finally obtained a letter informing him that the typed proceedings were ready, he promptly made payment therefor and collected the same. He further averred that he requested to be provided with a Certificate of Delay, which is a pre-requisite for filing the Record of Appeal, but the same was yet to be provided. It is therefore the contention of the Defendants that the delay in the filing of the Record of Appeal is not due to any deliberate acts on their part or on the part of their Advocates, but is due to circumstances beyond their control. They therefore opposed the application and posited that to allow it would be to render their intended appeal nugatory. It was further their contention that they stand to suffer substantial loss and grave prejudice should the application be allowed.

[6] The application was canvassed by way of written submissions, which I have perused and carefully considered. There is no dispute that the Defendants did not comply with the conditions of stay given by the Court in the Ruling of **16 June 2014**. The Court was categorical that:

"...in the event the 1st, 2nd and 3rd Defendants shall fail to comply with the conditions hereinabove, the stay of execution pending the filing and determination of the intended appeal in the Court of Appeal shall automatically lapse, unless for good cause, it shall be extended by this court..."

[7] There being no such extension or enlargement of time by the Court, I would agree with the submissions of the Plaintiffs' Counsel that the stay order lapsed after the 90 day period aforesaid. Accordingly, it is of no consequence that an explanation has been given to account for the delay.

[8] I have given due consideration to the authorities cited by the Defence Counsel but note that they are both distinguishable. In **Peter M. Kungu & 11 Others vs. Makenagira Farmers Trading Co. Ltd, Nairobi HCCC No. 2014 of 1999**, the case was still pending hearing and final determination; while the

case of **George Mike Wanjohi vs. Steven Kariuki & 2 others SCK Civil Application No. 6 of 2014**, was itself an application for stay in which some **Kshs. 500,000** had been deposited as security for costs in an election petition from which an appeal had been preferred. In this instance, the court order was specific and liberty to apply for extension was given. Those specific conditions were neither complied with nor the court moved for enlargement of time. What is more there is no proof herein that the appeal has now been filed. Accordingly, I would entirely agree with the views expressed by **Warsame, J** in **London Distillers (K) Ltd vs Philip Kipchirchir & 2 Others [2007] eKLR**, namely that delay is an affront to the administration of justice and therefore ought to be deprecated.

[9] In the result, I would allow the application dated **17 June 2015** and grant orders as hereunder:

[a] that the moneys deposited in the joint interest earning account of the Plaintiffs' and the 1st, 2nd and 3rd Defendants' Advocates in the name of **Oraro & Company Advocates** and **S. Kibera & Company Advocates** at Diamond Trust **Bank Account No. 0045026002** pursuant to the Court Order dated **16 July 2014** being the sum of **Kshs. 5,000,000** together with interest earned thereof, be released to the Plaintiffs/Applicants forthwith.

[b] That the Plaintiffs be allowed to proceed and execute the Judgment entered in their favour on **27 March 2012**.

[c] That costs of the application to be borne by the Defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER, 2016

OLGA SEWE

JUDGE