REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 243 OF 2014

MUSYOKI CHRIS ……..……..…..…….1ST APPELLANT

MUTHAMA KATOLO.……..……..…..……...…….1ST APPELLANT

VERSUS

CHARLES KALOKI MAINGI……..…...….1ST RESPONDENT

ANN NJOGU……2ND RESPONDENT

RULING

The Application

The Appellants are seeking three principal prayers in an application made to this Court by way of a Notice of Motion dated 18th May 2016. The first is a stay of execution of the judgment and/or decree entered against them by the trial Court in **Kangundo Principal Magistrate's Court Civil Suit 221 of 2010** on 23rd October 2014, pending the hearing and determination of the appeal filed herein. The second is a variation of the order issued by the Court on 2nd April 2015 for the decretal sum to be deposited in an interest earning account, to the effect that Kshs 139,228/= that has already been paid to the Respondents be deemed as part compliance , and the balance of Kshs 139,228/= be deposited in Court pending the hearing and determination of the appeal filed herein. Lastly, that this Court makes such orders it deems just and expedient in the circumstances.

The Appellants state in the said Notice of Motion and in a supporting affidavit sworn by Joan Oburu, who is the Claims Manager at Directline Assurance Company which is their insurer, that they are aggrieved by the trial Court's judgment which found them liable. Further, that they consequently filed the appeal herein, and also made an application for stay pending appeal in the trial Court. The said application was granted by the trial Court on the conditions that the Appellants deposit the entire decretal sum in a joint interest earning account bearing the names of the advocates of both parties.

However, that as they were in the process of opening the said accounts, they negotiated with the Respondents' Advocate to deposit one half of the decretal sum being 139,228/= in court, and the balance of Kshs 139,228/= with the Respondents' Advocates. The Appellants attached copies of the consent and cheques sent to the Respondents' Advocates, and averred that the said Advocates failed to execute the said consent, and the balance of Kshs 139,228/= remains pending making them thereby exposed to execution.

The Appellants thereafter then applied for a variation of the stay conditions in the trial Court on the same terms as those sought in the instant application, which application was dismissed in a ruling delivered by the trial Court on 22nd April 2016. According to the Appellants, the Respondents' physical and financial means are unknown to them, and if the disputed sum of Kshs 139,228/= is paid to them , they will not be in a position to refund the same if the appeal herein is successful.

Kairu & McCourt Advocates, the Advocates for the Appellants, filed submissions dated 14th August 2016 wherein reliance was places on Order 42 Rule 6 of the Civil Procedure Rules and various judicial authorities, to demonstrate that they will suffer substantial loss if the orders of variation of, and stay of execution are not granted, and that they filed the instant application without undue delay and are willing to furnish security.

The Response

The Respondents opposed the Appellants' application in Grounds of Opposition dated 10th June 2016, wherein the proceedings in the trial Court were detailed, and it was stated that a similar application was dismissed by the Kangundo Law Courts, that the Appellant's instant application is therefore an abuse of the court process and is *res judicata*. Further, that the forms for opening the joint account were returned to the Appellants on 28th May 2015, and that the Appellant's counsel did not comply with the trial Court orders and instead on 11th November 2015 made a part payment of the decretal sum of Kshs 139,228/=.

It was alleged by the Respondents that there has been an inordinate delay on the part of the Appellants in complying with the trial Court orders made on 21st April 2015; that no consent was entered between the parties on the settlement of the decretal sum; and that the appeal herein was filed on 12th November 2014, yet the Appellants have not taken any steps to prosecute it. Therefore, that the stay of execution is sought to frustrate the Respondents from enjoying the fruits of their judgment.

These arguments were reiterated in submissions dated 26th September 2016 filed by Mutunga & Company Advocates, the Respondents' Advocates.

The Issues and Determination

I have read and carefully considered the pleadings filed. The first issue for determination is whether this application is competently before this Court, and if found to be competent, this Court will then proceed to address the second issue of is whether the execution of the judgment of the trial Court should be stayed, and on what conditions.

Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

> **"6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**
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> **(2) No order for stay of execution shall be made under subrule (1) unless—**
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> **(*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**
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> **(*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."

Order 42 rule 6 (1) of the Civil Procedure Rules therefore provides jurisdiction to stay execution pending appeal to both the trial court and the appellate court, and in cases where the trial court declines stay of execution, the appellate court may consider an application for stay pending hearing and determination of the appeal.

The Respondents have in this respect argued that in the instant application, not only have the Appellants not complied with the trial Court's orders as to stay of execution, but their application is also *res judicata*, as a similar application was denied by the trial Court, and the Appellants ought to have appealed the said ruling. The Appellants on the other hand contend that there was part compliance with the trial Court's orders in that they paid half the decretal sum, and admit to having made an application for variation of the stay of execution orders in the trial Court which was denied.

It is indeed the position that where an applicant has failed to comply with the terms of an order for stay granted by the trial court, the repeat of the application for stay in the appellate court is an abuse of the process of the court. In **Hunker Trading Company Limited v. Elf Oil Kenya Limited [2010] eKLR**, the Court of Appeal held that to file an application in the appellate court for stay of execution, after having failed to comply with the terms of an order of stay granted upon a similar application before the trial court, is an abuse of the process of the court.

The Court may have been persuaded to consider the instant application on the basis of the arguments made by the Appellants that they had since paid half of the decretal sum to the Respondents, were it not for the fact that similar arguments and an application for variation of the stay execution orders had been made and decided by the trial Court. Therefore both prayers for stay of execution, and for variation of the stay of execution orders given by the trial Court in the instant application are by dint of the decision in **Hunker Trading Company Limited v. Elf Oil Kenya Limited [2010] eKLR** in abuse of the process of Court.

I particularly adopt the decision of the Court of Appeal in the above-cited case, which involved similar circumstances as those in the present application, and where it was held as follows:

> **"In the circumstances, we find that the exercise by us of any original jurisdiction would be inappropriate where, as in this case, the lower court has exercised a parallel jurisdiction, it must be demonstrated to this Court that the jurisdiction of the lower court has not been properly exercised, otherwise we would be encouraging duplication of effort and poor management of the available resources.**
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> **The applicant is seeking the same orders it declined to obey. We think that we have the jurisdiction to stop it in its tracks in order to attain or further the "O2" principle. We would act unjustly if we were to allow it another chance in this Court to defeat the cause of justice by failing to obey an important order of the superior court."**
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> **Indeed, where such applications have previously determined the matter the subsequent applications are barred by the principle of** res judicata **(see** Mburu Kinyua v. Gichini Tuti **(1978) KLR 69); where an application is dismissed for want of appearance, the applicant cannot be allowed to bring a second application unless he seeks reinstatement of the application for good cause (**Wanguhu v. Kania **(1987) KLR 51) and where the earlier one is not concluded, a similar subsequent application is** sub judice **by virtue of section 6 of the Civil Procedure Act."**

The Appellants in the instant application can therefore only appeal the decision of the trial Court, and cannot re-litigate the same issues already decided by the trial Court by way of an original action.

Lastly, the instant application is also incompetent to the extent the applicable provisions of law on setting aside and/or review or variation of a judgment or order of a court in section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, are clear that the jurisdiction to vary a judgment or

order is with the Court that delivered that judgment or order. Section 80 of the Civil Procedure Act provides as follows:

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

Likewise, Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside as follows:

> **" (1) Any person considering himself aggrieved—**
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> **(*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
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> **(*b*) by a decree or order from which no appeal is hereby allowed,**
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> **and who from the discovery of new and important matter or evidence 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 on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, 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."**

The order sought to be varied in the instant application is the order given on 2nd April 2015 for the decretal sum to be deposited in an interest earning account. No such order was given by this Court on 2nd April 2015. The only order that is referred to in the pleadings that was given on 2nd April 2015 is the order of conditional stay of execution given by the trial Court, which the Respondents claim has not been complied with, and which the Appellants also sought a review of in the trial Court which was denied. This Court therefore does not have jurisdiction to vary the said order, and the Appellants, having sought and been denied the variation sought in the court that gave the order, only have the option of appeal in the circumstances.

The upshot of the findings in the foregoing is that the Appellants' Notice of Motion dated 18th May 2016 is denied, and the Appellants shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 14th day of November, 2016.

P. NYAMWEYA

JUDGE