



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 173 OF 2012

KANJI VAGJANI1ST APPELLANT/APPLICANT

AFRICAN BANK CORPORATION2ND APPELLANT/APPLICANT

KESHRA & SONS LIMITED3RD APPELLANT/APPLICANT

VERSUS

FRANCIS MWANZA MULWARESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court at Machakos by Hon. P.N. Gesora (SPM) in Civil Case No. 1089 of 2010 dated 25th September, 2012)

RULING OF THE COURT

Introduction

1. The Notice of Motion application before the court is dated **9th February, 2016**. It prays for the orders;
 - a. That the orders given by this Honourable Court on 3rd day of April, 2014 staying *inter alia* the execution of decree in Machakos CMCC No. 1089 of 2010 pending hearing and determination of appeal be vacated.
 - b. That the appellants/respondents do pay to the respondent/applicant his costs of this application.
2. The application is premised on the grounds that on **3rd of April, 2014** this court gave orders staying the execution of judgment, decree and all consequential orders in ***Machakos CMCC.No. 1089 of 2010*** pending hearing and determination of appeal on condition that the applicant deposits Kshs. 1,200,000/= in court within fourteen (14) days. The applicant who was previously represented by an advocate but has now opted to act in person has perused the court file and discovered that the appellants have never complied with the said order in that they did not deposit the said amount of Kshs. 1,200,000/= in court as ordered and thus the stay order should be vacated. The appellants have not taken active steps to prosecute their intended appeal since the time the stay orders were granted and it is now close to three (3) years since then. The respondent/applicant stands prejudiced as he cannot enjoy the fruits of his judgment in Machakos CMCC No. 1089 of 2010. Orders of this court out to be obeyed and the orders sought herein are necessary to uphold the dignity of the court and to prevent abuse of the process of court.

3. The application is supported by affidavit of **Francis Mwanza Mulwa** sworn on **9th February, 2016**.

The application

4. The applicant's case is that he is an advocate of the High Court of Kenya and the respondent/applicant herein hence competent to swear this affidavit. The respondent/applicant was the plaintiff in Machakos CMCC No. 1089 of 2010 wherein on 25th September, 2012, judgment in the sum of Kshs. 1,142,502/= was given in the plaintiff's favour against the defendants therein. The defendants, (*now appellants herein*) appealed against the said judgment/decreed and also filed an application for stay whereby on 3rd day of April, 2014 this court gave orders that there be a stay of execution of judgment, decree and all consequential orders in Machakos CMCC NO. 1089 of 2010 pending hearing and determination of appeal on condition that the appellant deposits Kshs. 1,200,000/= in court within fourteen (14) days. The respondent/applicant had previously been represented by an advocate but now he has opted to act in person as he was kept in the dark as to the progress of the appeal and on his perusal of the court file, the respondent/applicant has discovered that the appellants have never complied with the said order in that they never deposited the said amount of Kshs. 1,200,000/= in court within fourteen (14) days from 3rd April, 2014 when the said orders were granted or at all. It is the applicant's case that he stands prejudiced in that he cannot enjoy the fruits of the judgment in Machakos CMCC No.1089 of 2010. Further the applicant believes that the orders of this court ought to be obeyed and the orders sought herein are necessary to uphold the dignity of the court and to prevent abuse of its process. Under the circumstances, since the appellants did not deposit the decretal amount of Kshs. 1,200,000/= as ordered by this court, the stay order ought to be vacated.

The response

5. The application is opposed vide the Replying Affidavit sworn by **Steven Muregi Chege** on **15th March, 2016**. The respondent's case is that the appellants were granted stay of execution pending appeal on condition that they do deposit Kshs. 1,200,000/= within fourteen (14) days of the ruling. The appellants then engaged Annie Thoronjo, advocate for the respondent and discussed the possibility of having the sum of Kshs. 1,200,000/= deposited in a joint interest earning account instead of in court. Parties came to an agreement to have the said sum of Kshs. 1,200,000/= deposited in a joint interest earning account instead of in court subject to the respondent's advocates obtaining instructions from her client to do so. The respondent's advocate later confirmed their agreement to have the money deposited in a joint interest earning account, pursuant to which they opened a joint account with JamiiBora Bank Limited and deposited the sum of Kshs. 1,200,000/= into it. The respondent's case is that from the foregoing, it is inconceivable that the respondent who is also an advocate of the High Court of Kenya was not aware of the fact that the amount was deposited in a joint interest earning account. The appellants have fulfilled the conditions set by the court. The Respondents further state that they have been pursuing the typed proceedings to enable them prepare the Record of Appeal but to date they are still not ready.

6. Submissions Analysis and Determination

7. Parties made oral submissions in court which I have considered. The issue for determination is whether or not the respondent disobeyed the orders of the court to deposit Shs. 1,200,000/= in court within fourteen (14) days.

8. Court record shows that on **3rd April, 2014** the court issued an order of stay of execution of the judgment, decree and all consequential orders in Machakos CMCC No. 1089 of 2010 pending hearing and determination of the appeal on condition that the appellant deposited Kshs. 1,200,000/= in court within fourteen (14) days. That order was not complied with. Instead, the advocates for the applicant, and the respondents' advocate agreed to have the said sum of Kshs. 1,200,000= deposited in an interest earning account in the joint names of the advocates. There is correspondence to that effect being an e-mail dated 10th April, 2014 at 10.10a.m from **Stephen Chege**, Advocate for the appellants and **Annie Thoronjo**, advocate for the applicant. This communication was confirmed by M/S Thoronjo on the same day at 11.40am vide her e-mail. Subsequently, an account was opened in JemiiBora Bank and two

cheques for Shs. 600,000= each dated 14th April, 2014 were deposited into the joint account No. 3496-00200 in the name of ***S.M. Chege & Co. advocates & Annie Thoronjo & Co. Advocates***. To date the money is in the said account and has earned interest in excess of Kshs. 28,000. The issue then is whether or not the respondent failed to comply with the court order. To address this issue it is noted that the applicant herein was lawfully represented by an advocate who was his lawful attorney and agent in the matter before the court. When the respondent sought to vary the court order, they consulted the applicant's advocates. The presumption is that the applicant authorized his counsel to vary the said court order. The respondents' advocates would not have known if the applicant's counsel had no such authority. In fact, the applicant's counsel always had ostensible authority, and having acted in the matter, the respondent had every reason to believe that the decision to deposit the money in the joint names of the advocates was reached after due consultation between the advocate and client. While there is no evidence that the parties attempted to come back to court and to seek a consent to vary the order, their conduct and action accordingly varied the court order. The allegation by the applicant that he was not aware what his advocate did is not sustainable.

9. It is the finding of this court that the application before the court is not merited and the same is dismissed with costs in the cause.

DATED AND DELIVERED AT MACHAKOS THIS 1ST DAY OF DECEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

Mr. F. N. Mulwa for respondent

Miss Omuko holding brief for Chege for appellants.

Court Assistant – Mr. Munyao