



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ELC APPEAL NO. 5 OF 2015
(FORMERLY CIVIL APPEAL NO. 332 OF 2013)

BERNARD MWAI ERASTO 1ST APPELLANT
CHARLES MWANGANGI 2ND APPELLANT
JAMLECK KIURA.....3RD APPELLANT
BENJAMIN MUTHEE 4TH APPELLANT

VERSUS

DICKSON BUNDI NJAGI RESPONDENT

RULING

This is in respect to the 3rd Applicant's Notice of Motion dated 16th December 2015 seeking the following orders:

1. Spent.
2. Spent.
3. *That this Honourable Court be pleased to order that time within which the security of Ksh. 200,000 (two hundred thousand only) was paid by the 3rd Applicant on account of the Court's order of 11th June 2014 be enlarged and/or extended and/or deemed to have been paid within such enlarged and/or extended time as the Court may deem just and expedient in the circumstances.*
4. Spent.
5. *That this Honourable Court be pleased to confirm and/or extend the interim orders of stay of execution pending the hearing and determination of the appeal herein.*
6. *That this oHonHnhHHhHonourable Court be pleased to make such orders and/or further orders as it may deem just and fit in the circumstances.*
7. *That this Honourable Court be pleased to make such orders as to costs of the present application in any event.*

The application is based on the grounds set out therein and is also supported by the affidavit of **JAMLECK KIURA** the 3rd Appellant/Applicant.

The gravamen of the application is that on 11th June 2014, **GITHUA J.** granted him a conditional stay of execution arising from the judgment and decree issued in **KERUGOYA CHIEF MAGISTRATE'S CIVIL CASE No. 60 of 2011**. The condition was that he remits Ksh. 200,000 within 30 days and that although he did not meet the time limit, the Respondent's advocate accepted and acknowledged the payments yet he now seeks to execute the judgment against the Applicant which would be unfair and unconscionable hence this application to enlarge time.

In opposing the application, the Respondent **DICKSON BUNDI NJAGI** filed a replying affidavit in which he deponed, inter alia, that the subordinate Court entered judgment against the 3rd Appellant/Applicant and others in the sum of Ksh. 269,200.50 plus costs and interest. However, vide an application dated 28th April 2014, the 3rd Applicant/Appellant sought an order of stay of execution of that judgment and orders were granted on 11th June 2014 on condition that the 3rd Appellant/Applicant deposits within 30 days the sum of Ksh. 200,000 in a joint interest earning account and in default, the stay order would stand vacated. That by 11th July 2014, the 3rd Appellant/Applicant had not complied with the order to deposit the Ksh. 200,000 although on 7th July 2014, he paid Ksh. 50,000 promising to pay the balance of Ksh. 150,000 on or before 11th July 2014. However, that was not done and so the Respondent instructed his advocate to proceed with execution and a notice to show cause was issued for the committal of the 3rd Appellant/Applicant to civil jail. In the process of execution, the 3rd Appellant/Applicant made further payments as follows:

18th July 2014 - Ksh. 50,000

1st August 2014 - Ksh. 50,000

12th September 2014 - Ksh. 50,000

That the Respondent is therefore treating the Ksh. 200,000 deposited with his advocate as part payment of the decretal sum in view of the fact that it was not paid within the stipulated time and that as at 25th June 2015, the decretal sum stood at Ksh. 577,422 and his advocate recorded a consent with the other Appellants on the mode of payment of the said sum. That the 3rd Appellant/Applicant requested to be allowed to liquidate his share of the decretal sum which stood at Ksh. 144,355 in the month of September 2015. That by 10th December 2015, the other Appellants had made payments as follows:

1. BERNARD MWAI ERASTO - 1st Appellant - Ksh. 330,000

2. CHARLES MWANGANGI - 2nd Appellant - Ksh. 100,000

3. BENJAMIN MUTHEE - 4th Appellant - Ksh. 100,000

That the 3rd Appellant/Applicant did not deposit Ksh. 60,000 as ordered by the trial Court and so a warrant for his arrest was issued and it was then that he filed this application.

The application was canvassed by way of written submissions which have been filed both by **MR. OTIENO** instructed by the firm of **ABUODHA & OMINO ADVOCATES** for the 3rd Appellant/Applicant and **MR. NGIGI** instructed by the firm of **NGIGI GICHOYA & COMPANY ADVOCATES** for the Respondent.

I have considered the application, the rival affidavits and the submissions by counsel.

The facts in this application are largely not in dispute. The Respondent was the plaintiff in the lower Court having sued the 3rd Appellant/Applicant and three others for a sum of money on account of rent for a property at Kianyaga.

Judgment was entered for the Respondent against the 3rd Applicant and three others but aggrieved by that judgment, this appeal was filed originally by all the four defendants but on 3rd May 2016, the 1st, 2nd and 4th Appellants withdrew their appeal.

On 28th April 2014, the 3rd Appellant/Applicant moved to Court and was granted orders by **GITHUA J.** on 11th June 2014 for stay of execution pending the hearing and determination of the appeal on condition that he deposits the sum of Ksh. 200,000 within thirty (30) days and in default, the order of stay would stand vacated. It is common ground that there was no compliance with that order because by 11th July 2014, the 3rd Appellant/Applicant had only deposited the sum of Ksh. 50,000. Indeed it was not until 12th September 2014 that the 3rd Appellant/Applicant raised the entire Ksh. 200,000 having paid part of the amount in instalments. There was a delay of three (3) months in complying with the orders of **GITHUA J.** issued on 11th June 2014 and he seeks orders for enlargement of time so that the Ksh. 200,000 is deemed to have been paid within time.

Order 50 Rule 6 of the Civil Procedure Rules provides as follows:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or 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”.

It is clear therefore that a Court can exercise its discretion and enlarge time for doing any act if the justice of the case so require. In considering the powers of the Court under this provision, the Court of Appeal in the case of **J.E KAMAU & JARED ARUWA VS THE DEVELOPER MR JOB C.A CIVIL APPEAL No. 243 of 2012 (2016 e K.L.R)** stated that:

“While we concur that Order 50 Rule 6 provides that an application for extension may be made even where the time allowed for the doing of the act has expired, the use of the word “may” is a clear indication that the provision is only permissive and therefore discretionary and dependent on the peculiar circumstances of the case”.

What therefore are the “***peculiar circumstances***” of this case or, as is provided under **Order 50 Rule 6 of the Civil Procedure Rules**, what would “***the justice of the case***” require in the circumstances of this case? The fact is that notwithstanding default on the part of the 3rd Appellant/Applicant in failing to meet the conditions made by **GITHUA J.** requiring him to deposit Ksh. 200,000 within thirty (30) days from 11th June 2014, the 3rd Appellant/Applicant made late payments and counsel for the Respondent received the same on 18th July 2014, 1st August 2014 and 12th September 2014. Having received and acknowledged those late payments, the Respondent nonetheless moved to the subordinate Court seeking to commit the 3rd Appellant to civil jail. It is clear to me that the justice of this case dictate that I intervene and stay the execution of that warrant of arrest and also enlarge time so that the Ksh. 200,000 is deemed as having been paid within time. It would be inequitable for the Respondent to now hinge his case on the orders of **GITHUA J.** issued on 11th June 2014 when he continued to receive payments from the 3rd Appellant/Applicant. My view is that having acquiesced to the actions by the 3rd Appellant/Applicant, the Respondent is estopped from relying on that very conduct and now seek to punish him for non-compliance with the orders of **GITHUA J.** The defence of estoppel and acquiescence was considered in the case of **EDGAR BERNARD CLIFTON VS ARTHUR JOHN HAWLEY 1966 E.A 44** where **HARRIS J** referred to the decision of the House of Lords in **CAIRNCROSS VS LORIMER (1860) 3 LT 130** as follows:

“It is well settled that if a party has so acted that the fair inference to be drawn from his conduct is that he consents to a transaction to which he might quite properly have objected, he cannot be heard to question the legality of the transaction as against persons who, on the faith of his

conduct, have acted on the view that the transaction was legal”.

It is the duty of this Court to do justice to the parties. The Respondent, by his conduct, made the 3rd Appellant/Applicant believe that it was safe to make those late payments notwithstanding the Court order. The 3rd Appellant/Applicant continued to make and finalize the payments albeit late. It would be unjust and inequitable for the Respondent to now base his application to commit the 3rd Appellant/Applicant on the ground that the orders of **GITHUA J.** dated 11th June 2014 were not complied with. Principles of justice and equity do not approve of such conduct and neither should this Court countenance the same. This is more so bearing in mind that although the payment of the Ksh. 200,000 was done three (3) months late, it has nonetheless been fully paid, received and acknowledged by the Respondent pursuant to the orders of **GITHUA J.** This, in my view, is a clear case when this Court should exercise its discretion and enlarge time as sought. The 3rd Appellant/Applicant is therefore entitled to the orders enlarging the time so that the payments of Ksh. 200,000 is deemed to have been made within the stipulated period.

Having granted the order to extend time, it follows that the other order issued by **GITHUA J.** staying execution pending the hearing of the appeal must also be extended as prayed.

Ultimately therefore and upon considering all the matters herein, I allow the 3rd Appellant/Applicant's Notice of Motion dated 16th December 2015 in the following terms:

- 1. Time within which the security of Ksh. 200,000 was to be paid by the 3rd Appellant/Applicant on account of the Court order dated 11th June 2014 is hereby enlarged and deemed to have been paid within time.***
- 2. The order of stay of execution issued on 11th June 2014 is extended pending the hearing and determination of the appeal herein.***
- 3. The 3rd Appellant/Applicant will meet the Respondent's costs occasioned by this application.***
- 4. The parties and the Deputy Registrar to take the necessary action so that this appeal is expedited.***

B.N. OLAO

JUDGE

19TH OCTOBER, 2017

Ruling delivered, dated and signed in open Court at Kerugoya this 19th day of October 2017

Mr. Mwangi for Mr. Ngigi for Respondent present

Mr. Omino for Applicants absent.

B.N. OLAO

JUDGE

19TH OCTOBER, 2017