



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, KIAGE & SICHALE, JJ.A.)

CIVIL APPLICATION NO. 81 OF 2019

BETWEEN

B. N. KOTECHA & SONS LIMITED.....1ST APPLICANT

HEMAL KOTECHA2ND APPLICANT

AND

AMALO COMPANY LIMITEDRESPONDENT

(Being an application for setting aside, review or varying the order for depositing security of Kshs 20,000,000 made by this Court (Makhandia, Kiage and Odek JJA) on **2nd September 2019 in Civil Application No. 40 Of 2019**)

RULING OF THE COURT

[1] By a notice of motion dated 25th September, 2020, the applicants moved this Court seeking orders to set aside, vary, or review orders that were made by this Court on 2nd September, 2019 for a conditional order of stay of execution pending appeal on deposit of Kshs. 20,000,000, and instead provide for alternative security for costs. The applicants have offered original titles for properties known as Kwale/Dalgube/984, Kwale/Dalgube/986, Kwale/Dalgube/987, Kwale/Dalgube/988 and Kwale/Dalgube/980 whose total value is Kshs. 55,755,000

[2] The order made on 2nd September, 2019 arose from a notice of motion brought by the applicants under Rule 5(2)(b) of the Court of Appeal Rules for an order of stay of execution pending the hearing of its appeal against the ruling of the High Court (Cherere J) made of 14th March 2019. The applicants explain that despite the efforts that they have made, they have not been able to raise the security ordered on 2nd September as its finances are tied up in loans advanced to 3rd parties and its financial situation has been further aggravated by the global Corvid 19 pandemic.

[3] Due to the Corvid pandemic, hearing of the application was scheduled to proceed by way of written submissions without the presence of the parties or their counsel. A hearing notice was served on the parties through email on 19th February, 2021 and the parties were given opportunity to file their written submissions. However, none of the parties has filed any written submissions nor has the respondent filed any reply to the motion. The parties having had ample opportunity to file their submissions and having failed to do so, we proceed to determine the motion on the basis of the information before us.

[4] We have carefully considered this motion. The applicant has failed to comply with the conditional order for stay of execution that was made by this Court on 2nd September, 2019 and now seeks to have the same set aside, and or varied. Under Rule 35 of the Court of Appeal Rules this Court has very limited powers to correct arithmetic or clerical errors arising from accidental slip or omission. This Rule cannot aid the applicant because the order sought to be reviewed is not an accidental slip but one which was consciously made by the Court following consideration of the application for stay of execution.

[5] The applicants have cited several Rules of the Court but none of the Rules cited provide for review of this court's ruling or order. The applicant has also cited Sections **3A and 3B of the Appellate Jurisdiction Act**, that provides this Court with inherent powers to make orders that may be necessary to meet the ends of justice. It is evident that this Court can only use these provisions in circumstances, where there is good reason to justify the exercise of such discretion.

[6] The applicants urge the Court to review the order because they are unable to raise the security that was ordered due to the company's dire financial position. In the order sought to be reviewed, the Court had given the applicants 30 days from the date of the order to deposit the required security, in default of which, the order of stay was to automatically lapse. This means that the order of stay lapsed more than one

year ago. We have not been told what the situation on the ground is. The applicant has also not explained why it has taken them a year to make the application.

[7] In our view, the applicant has not given any proper reason to justify our reviewing the order of 2nd September, 2019. Accordingly, we dismiss his motion. As the respondent has not filed any reply to the motion or filed any written submissions, we do not find it appropriate to award any costs. Those shall be the orders of the Court.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021

HANNAH OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR