



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 31 OF 2016

BETWEEN

JOSEPH MORARA OMOKE.....APPLICANT

AND

INVESCO ASSURANCE COMPANY LTD.....RESPONDENT

(Being an application for variation or setting aside consent order dated 25th April, 2016

in

MISCELLANEOUS APPL. NO. 59 OF 2015)

RULING OF THE COURT

[1] This ruling relates to the application dated 2nd December, 2016, which seeks two main orders viz:-

“1 ...

2... *Court be pleased to order the respondent/applicant to perfect and prosecute his intended appeal with a reason time failure to which the applicant be at liberty to apply to dismiss the intended appeal for want of prosecution within 30 days. (sic)*

3. *And in the alternative the decretal sum together with accrued interest be released to the judgment debtor”*

The application is supported by the grounds in the body of the application and in the supporting affidavit sworn by the applicant on 2nd December, 2016.

[2] The applicant, **Joseph Morara Omoke** was on 9th June, 2015 awarded Kshs.1,560,000/= against the respondent Invesco Assurance Company Limited (**Invesco**) by the Chief Magistrate Court Kisii in **CMCC NO.235 of 2015**.

The respondent filed a notice of appeal in the High Court and applied for stay of execution of the decree pending appeal. On 3rd November, 2015, the court granted an order of stay of execution of the decree on condition that the respondent paid Kshs.300,000/= as security for costs.

By an application dated 13th November, 2015 filed in the High Court, the applicant sought review of the order granting stay of execution on the main ground that the High Court was misled that Invesco had filed an appeal.

The application for review was allowed by the High Court on 1st April, 2016, whereby the High Court dismissed the application for stay of execution and set aside the order granting stay of execution.

[3] Invesco filed a notice of appeal against the order of the High Court and an application in this Court dated 18th April, 2016, seeking stay of execution of the order of the High Court pending appeal to this Court.

By a consent order dated 25th April, 2016, the application dated 18th April, 2016 was allowed in the following terms:-

“That the applicant having paid an amount of Kshs. 800,000 to date in respect of the decretal sum vide the ruling of the High Court – dated 23rd November, 2015, will deposit the balance of an amount of Kshs.1,100,000 in an interest bearing account in the joint names of the parties’ advocates in a reputable and credible financial institution within 14 days from the date hereof.”

[4] The applicant states in support of the application that since the date of the consent order, the respondent has not filed a notice of appeal nor sought extension of time and that the respondent has violated the terms of the consent order by failing to deposit the Kshs.1,100,000 within the time stipulated.

[5] The applicant filed a notice to act in person on 18th July, 2016. Previously he was represented by **M/S Momanyi Aunga & Co. Advocates**. The respondent is now represented by **M/S Kimanga & Co. Advocates** with effect from May, 2016. It was previously represented by **M/S Maina Njuguna & Associates Advocates**.

[6] Although the wrong enabling provisions of the law are cited, the Court has jurisdiction under **Rule 57(2)** Court of Appeal Rules to vary or rescind its orders.

Thus, the application is deemed as properly filed under the said Rule 57(2).

[7] The main prayer in the application in essence asks the Court to vary the consent order of 25th April, 2016, and impose a time frame by which the respondent should file the appeal. The respondent’s counsel merely stated before us that the respondent is preparing the appeal.

The consent order was recorded more than two years ago. The delay in filing the appeal is not explained.

In the circumstances, we are satisfied that time limitation for filing the appeal is justified.

[8] Since the order, the subject matter of this application was granted by consent and since the order did not limit the time within which the appeal should be filed, it would be unjust to grant the alternative prayer in lieu of the main prayer.

Moreover the Kshs.1,100,000/= was deposited in a joint bank account on about 3rd June, 2016. The explanation for delay of about one month and one week in depositing part of the decretal sum has reasonably been explained by **Gerald Omori Kimanga** in his replying affidavit.

[9] In the premises, prayer 2 of the application is allowed to the extent and it is ordered that:

(i) In furtherance of the consent order dated 25th April, 2016, the respondent (*Invesco*) to file the intended appeal within 45 days from the date hereof.

(ii) In default, the order of stay of execution granted by the said consent order shall lapse and the application dated 18th April, 2016 shall stand dismissed with costs.

(iii) In the event the order lapses pursuant to clause 9(i) above, the Kshs.1,100,000/= deposited in the joint bank account shall be paid to the applicant together with the accrued interests.

Dated and Delivered at Kisumu this 7th day of June, 2018.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR