



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & M'INOTI JJA.)

CIVIL APPLICATION NO. NAI 279 OF 2011

BETWEEN

GEORGE W. OMONDI.....APPLICANT

AND

GUILDERS INTERNATIONAL BANK LIMITED.....RESPONDENT

(Application to vary the terms and conditions in the ruling of this Court (Nambuye, Musinga & M'Inoti, JJA.) dated 7th November, 2014)

REASONS FOR THE RULING DELIVED ON 2ND MARCH 2015

On 2nd March 2015, we dismissed the applicant's Notice of Motion dated 23rd February 2015 with costs and reserved our reasons for the dismissal. The following are our reasons for the said ruling.

The Notice of Motion dated 23rd February 2015 was the third application filed by the applicant in his quest to stay execution of the judgment and decree of the High Court, (Kimaru, J.), dated 29th October 2010. In the first application, this Court, by a ruling dated 7th November 2014, granted the applicant stay of execution on condition that he deposited **Kshs. 36,137,388.05** in an interest earning account in the joint names of his advocates and those of the respondent within 30 days of the ruling. That amount was the principle sum due to the respondent in a decree presently said to exceed **Kshs.100 million**.

The applicant did not comply with the conditions upon which the stay was granted. Instead, twenty one days later, he was back before us seeking variation of the conditions, so as to be allowed to provide a bank or insurance guarantee for the Kshs. 36,137,388.05 within 30 days in lieu of the deposit, or alternatively the period within which to deposit the said amount be extended to 120 days. The primary ground upon which that application was based was that the applicant had entered into negotiations with a financial institution to raise the required deposit and those negotiations could not be concluded within the 30 days set by the Court.

After hearing the applicant and in spite of strong objections from the respondent, this Court, by a ruling dated 2nd December 2014, nevertheless allowed the application, varied its order of 7th November 2014 and extended by an additional 60 days with effect from 6th December 2014, the period within which the applicant was to deposit the Kshs. 36,137,388.05.

Once again the applicant did not comply with the conditions and instead on 23rd February 2015, he filed yet again another Motion under certificate of urgency, this time round seeking 45 days within which to meet the conditions of stay of execution.

The main ground upon which this new application was based, as set out in the motion and expounded by the applicant's learned Counsel, **Mr. Wasuna**, in his submissions was that the applicant and his wife, being shareholders and directors of **Lake Victoria Fish Limited** which owns a fish processing factory on **Kisumu/Kogony/2915**, had resolved to sell the said factory to **Lake Victoria Fish Two Thousand Limited** for **Kshs 33 million** so as to raise the deposit ordered by the Court. In furtherance of that transaction, we were informed, the **Industrial & Commercial Development Corporation (ICDC)**, had agreed to finance the purchase to the tune of **Kshs 40, 144, 000**. So some 45 more days were required to complete that transaction and put the applicant into funds.

For reasons best known to himself, the applicant said absolutely nothing concerning his earlier purported negotiations with a financial institution to raise the deposit, the basis upon which this Court had varied the initial terms of stay of execution. If those negotiations had been genuine, we expected an update, or at the very least some information that the negotiations had fallen through. As it were, the court was confronted with a totally different scenario from what was presented the last time.

Mr. Murugara, learned counsel for the respondent vigorously opposed the application for further variation of the terms upon which the order of stay was granted. Counsel submitted that he had advised the applicant's advocates in writing that no sale of the applicant's property could be undertaken in execution of the decree without settlement of the terms of sale and the issuance of requisite notices under the **Auctioneers Act**, an aggregate period which would take in excess of the 45 days requested by the applicant.

Counsel also cast serious doubt on the veracity of the documents relied upon by the applicant to establish the transaction which was expected to result in funding from ICDC. For example, counsel argued, the transfer dated 14th December 2014 and registered on 24th December 2014 did not have the photographs of the Transferor and the Transferee as mandatorily required; that the said transfer showed the consideration to be Kshs 10 million while the agreement for sale indicated the consideration to be 33 million; and that the documents indicated that the stamp duty was purportedly paid *after* rather than *before* the registration of the transfer.

On the discrepancy regarding the consideration, for example, Mr. Wasuna rather incredulously explained that the amount indicated in the transfer was not the agreed consideration, but was for purposes of stamp duty only! The inescapable conclusion, of course, was that the applicant wanted the Court to rely and act upon documents that were otherwise calculated to mislead the taxman.

We have duly considered the merits of this application. In our ruling of 2nd December 2014, we stated that although the Court has power to vary or otherwise amend the terms and conditions upon which it has given relief, that power is to be invoked sparingly and only for good reason. It is not a power to be resorted to routinely or as a matter of course. We also stated that the overriding objective, which requires expeditious resolution of appeals, strongly militates against bogging the Court down with applications and counter applications for variation of terms that have been set after due consideration of all relevant facts. Apparently the applicant did not take those views seriously.

We do not see any merit in the application for further variation of the terms upon which we granted the applicant stay of execution. As of now, the application for stay of execution already stands dismissed by the applicant's failure to meet the conditions. We do not even see any basic *bona fides* in the application for further variation of the terms. The applicant's story has been rather inconsistent, changing from one application to another. Furthermore, the applicant, who as we have previously noted, collects Kshs 250,000 per month from the suit property, has not even paid to the respondent a single penny as a sign of good faith.

For all the foregoing reasons, we found the Notice of Motion dated 23rd February 2015 totally bereft of

merit and we had no option but to dismiss the same with costs to the respondent.

Dated and delivered at Nairobi this 13th day of March, 2015

R. NAMBUYE

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR