



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, JA, IN CHAMBERS)

CIVIL APPLICATION NO. NAI.162 OF 2015

BETWEEN

RYCE MOTORS LIMITED.....APPLICANT

AND

JONATHAN KIPRONO RUTO.....1ST RESPONDENT

MIDWAY ASSURANCE INTERNATIONAL LTD.....2ND RESPONDENT

(Being an application for stay of execution of the Decree pending the hearing and determination of Civil Appeal No.271 of 2009 from the ruling of the High Court of Kenya at Nairobi (Gikonyo, J.), dated 8th June, 2015

in

H.C.C.C. No.271 of 2009

RULING

0. On the 30th June, 2015, I declined to certify the applicant's notice of

motion dated 17th June, 2015 as urgent. The applicant has now moved the Court under Rule 47(5) of the Court Rules for certification of his motion as urgent following an *inter parte* hearing.

[2] Mr. Oyatsi counsel for the applicant has urged the Court to certify the motion as urgent maintaining that the motion is intended to preserve the *status quo* that has been obtaining since 22nd May, 2009 when the High Court gave a conditional order of stay of execution pending the hearing of Civil Appeal No.271 of 2009. The order of stay of execution pending appeal that was issued by the High Court, provided *inter alia* for the deposit of the decretal sum into an interest earning account in the joint names of the parties advocate.

[3] Following an application made by the 1st respondent Jonathan Kiprono Ruto for the release of the decretal sum, the High Court made an order on 21st November, 2014, which order was issued on 5th December, 2014 for release of the entire sum of money that had been deposited to the decree holder. By

an application dated 5th December, 2014, the applicant applied for review of the order for release of the money, and by a ruling delivered on 8th June, 2015, the High Court (Gikonyo, J.), dismissed the application with costs.

0. The applicant now maintains that its motion which seeks an order of stay of execution for the decree pending determination of Civil Appeal No.271 of 2009 is urgent because there is a likelihood of the decretal sum being released to the 1st respondent before its motion for stay of execution is heard.
0. By a replying affidavit sworn by the 1st respondent's counsel Onsando Osiemo, the 1st respondent objects to the applicant's motion being certified as urgent.

The counsel swears *inter alia*, that the applicant has not been serious about pursuing the appeal against the substantive judgment delivered on 29th May, 2002; that the applicant is guilty of non-disclosure and concealment of material facts, to wit, unsuccessful attempts made by it to review that judgment, and the fact that it failed to comply with the order for conditional stay of execution pending appeal that was granted by the High Court.

0. Mr. Tiego, counsel who represented the 1st respondent at the *inter parte*

hearing, pointed out that despite the order by the superior court for release of the money having been made on 21st November, 2014, the applicant did not exhibit any urgency in filing its application for stay as its motion has been filed seven months after the order for release. Counsel pointed out that the order for stay of execution issued by the High Court lapsed automatically in November, 2009, and that the applicant never sought extension of the conditional stay orders and only sought the intervention of this Court after the 1st respondent had obtained an order for release of the money. He urged the Court to find that the appellant was indolent and unworthy of the exercise of the Court's discretion.

0. In response to Mr. Tiego's submission Mr. Oyatsi explained that the

applicant applied for review of the ruling made on 21st November, 2014, by the High Court for release of the decretal sum and that it was not until 8th June, 2015 that the ruling on the review was delivered. Mr. Oyatsi disputed the contention that the order of stay of execution given by the High Court was only for the period of six months. He maintained that there was no deliberate delay on the part of the applicant and urged the Court to certify the applicant's motion as urgent.

[8] It is appropriate at this stage to set out in full the order of stay of execution pending appeal as issued by the High Court on 22nd May 2009. It stated as follows:

- “1. A stay of execution of the judgment and the decree of this court be and is hereby issued pending the hearing and determination of the intended appeal against the order of this court made on 31st October, 2007;**
- 2. The decretal sum deposited in a joint account in the names of the decree holder's advocate and the judgment debtor's advocate should continue to be so held pending further orders of this court;**
- 3. The stay in (1) above will be limited to a period of six months within which the applicant is expected to have pursued its appeal in the court of appeal;**
- 4. It is ordered that six (6) months from the date hereof the stay granted in this application will automatically lapse;**
- 5. Either party has leave to apply.”**

0. A reading of the order reveals that paragraph 3 and 4 of the order was clear that the order of stay was to last for a period of 6 months only within which period the applicant was expected to pursue it appeal, but there was a rider that either party had liberty to apply for variation. Secondly, the amount deposited into court was to be held until the court issued “further orders.”

[10] Now, it is not disputed that the applicant never applied to the High Court for variation of the order for stay of execution even though six months had lapsed without its appeal being heard. It is also evident that the applicant was only spurred into action after the respondent moved to the High Court and obtained an order for release of the deposited sum about 5 years after the order for stay of execution had lapsed. The applicant not having exhibited any urgency in pursuing the order for stay, it cannot now claim that the matter is urgent merely because an order has been made for release of the deposited amount. While the applicant has explained its inaction from 5th December 2014 when it filed an application in the High Court for review of the order for release of the deposited amount, to 8th June 2015 when a ruling was delivered by the High court dismissing that application, the applicant has not given a satisfactory explanation for the inordinate delay in applying for an order for stay of execution after the stay order granted on 22nd May had automatically lapsed after six months. The fact that the respondent took its time in applying for release of the deposited amount cannot excuse the indolence on the part of the applicant in applying for stay of execution.

[11] I find that the applicant has failed to demonstrate any urgency in this matter and I therefore decline to certify the motion dated 17th June 2015 as urgent

Dated and Delivered at Nairobi this 25th day of September, 2015.

H. M. OKWENGU

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR