



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 976 OF 2010.

MICHAEL KIBOI GATUMIA CLAIMANT

VERSUS

MASTERMIND TOBACCO (K) LIMITED RESPONDENT

RULING

1. This is an application dated 6th November 2013, by the Respondent herein brought by Notice of motion under section 3A, 75, 78, 78G of the Civil procedure Act, Order 45 Rule 1(1), order 12 rule 6 and order 50 of the Civil Procedure Rules seeking for orders;

1. ...
2. *there be stay of execution of decree herein and all consequential orders pending the hearing and determination of the application;*
3. *the honourable court be pleased to review its orders of 13th June 2013, ordering the applicant [respondent] to pay the applicant 50% of the decretal sum to the respondent/claimant and instead do allow the applicant to deposit the full decretal sum in an interest earning account;*
4. *the honourable court be pleased to enlarge time within which to comply with the reviewed orders of 13th June 2013;*
5. *In the alternative and without prejudice, the applicant is allowed temporary stay of execution for 60 days pending applicant for stay of application in the Court of Appeal.*
6. *Those costs of the application be provided for.*

2. This application is supported by the annexed affidavit of Omwenga Kwamboka, advocate for the respondent and the same based on the grounds that the court granted conditional stay on 13th June 2013 where the respondent was ordered to pay 50% of the decretal sum as a condition for granting of execution pending appeal and that the reason furnished by the court is that the respondent is a person of means since he had pension which could have been used to offset any monies paid to him which is contrary to the law which does not allow any attachment of pension benefits and thus the applicant will be left with no recourse should its appeal succeed in full. More grounds are that the objective of preserving the subject matter of the suit pending appeal should be considered in the interests of justice, which objective is the underlying reason for stay of execution pending appeal and the respondent has brought the application for sufficient cause craving redress by the court. The application acted expeditiously by lodging this application on 8th August 2013 which was dismissed for non-attendance and the applicant has made effort to reinstate the same but not come for heading as the claimant sought to tax the bill during the pendency of this application. The respondent is ready to make a deposit of the total decretal amount in a joint interest earning account with the claimant.

3. The claimant opposed the application and filed Ground of Opposition dated 20th August 2013

noting that the stay of execution is a discretionary order and that the court exercised the discretion balancing interests of the parties and that the respondent does not say under what head review is sought and further that the application as drawn and filed and the conduct of the respondent are classic abuse of the court process.

4. The respondent, Mastermind Tobacco (k) Limited is seeking divers orders herein and raise various issues that can be outlined as;

- a. Whether stay of execution should be granted
- b. Whether there is need for review of court orders of 13th June 2013
- c. Whether the court should enlarge time to enable the respondent comply with the reviewed orders of 13th June 2013;
- d. Whether temporary stay of execution of 60 days should be granted pending application for stay at the Court of Appeal

5. Looking at the 1st and 4th issues, though there is interim stay, it would be necessary to go back to the history of this matter as this would appraise all parties as to where we are at in this case and thus the need to grant or not grant these two orders as sought by the respondent;

- On 25th August 2010 the claimant filed his claim before this court;
- On 6th October 2010 the respondent filed their defence;
- On divers dates parties came for hearing which closed on 4th May 2012 and judgement was to be delivered on notice. Judgement was eventually delivered on 16th October 2012. This judgement was reviewed on 11th April 2013.
- 6th November 2012 the respondent applied for stay of execution pending appeal, on the grounds that the judgement had been delivered in the morning instead of the afternoon as per the practice of the Industrial Court. parties agreed to file their written submissions and mention to take a date for ruling on 31st May 2013;
- On 31st May 2013 in court was Mr Bwire for the claimant and Mr Kiogora for the respondent who took a date for ruling for 13th June 2013. There was error noting the same to be for 13th July 2013 but this was noted and changed by the court;
- On 13th June 2013, the ruling with regard to stay pending appeal was delivered in open court in the absence of both parties who were directed to get copies of the same at the registry;
- On 7th August 2013 the respondent applied for stay and review of court orders which was granted in the interim pending hearing on 21st August 2013. This application was on the basis that the court ruling of 13th June 2013 was read in the absence of the respondent;
- On 21st August 2013 the application by the respondent was dismissed for non-attendance; and
- On 6th November 2013 the respondent filed a new application seeking stay and a review of court orders where stay was granted in the interim.

6. These are the orders that the respondent is now seeking to have stayed and further another stay of 60 days pending application for stay at the Court of Appeal.

7. On 13th August 2013 the respondent appeared in court for the hearing of their application dated 8th August 2013 where the court noted;

We are seeking review of the orders of justice Mbaru issued on 13th June 2013 but which came to our knowledge late July 2013. For now were asking that the matter be certified as urgent.

8. On this basis the court granted an interim stay and directed parties for hearing of the main application on 21st August 2013. On 21st August 2013, the matter came for hearing inter-parties, Bwire Advocate for the claimant was present and there was no appearance for the respondent and the

court proceeded to dismiss the application dated 8th August 2013. On 7th November 2013 the respondent was in court with an application dated 6th November 2013 seeking a stay of execution pending appeal on the grounds that the claimant had obtained a decree and was in the process of executing it. The advocate of the respondent stated;

I am seeking orders of stay pending appeal. The claimant has obtained a decree and is in the process of executing it ... our earlier application was dismissed for non-attendance as we sought reinstatement but the file was pending before the Deputy Registrar. The matter was being handled by my colleague and I do not know why the application for reinstatement was not filed under certificate of urgency.

9. The court directed the preservation of the subject matter and that hearing proceed on 11th November 2013.

10. These are the circumstances prevailing. However, on 13th June 2013, this court dealt extensively with the question of stay of execution pending appeal by the respondent. Going back to this ruling, the Court considered all the submissions and the application filed by the respondent seeking stay of execution pending appeal, which was addressed and the respondent was given conditional stay noting the inherent right of an aggrieved party to lodge an appeal and also that no party who has a judgement should be denied its enjoyment and in the balance of both interests, the court reasoned and made orders therein. The respondent did not comply, on the reason that the ruling of 13th June 2013 was read in their absence and only got to know about it one month later when the claimant commenced taxation of their costs. This Court notes that the respondent was in court on 8th August 2013 and filed their application seeking to review the orders of the court, there were interim orders but these were dismissed for non-attendance on 21st August 2013. This was followed by another application seeking stay pending appeal and again interim stay was granted pending the main hearing.

11. In this case, on 8th August 2013, the respondent is presumed to have been aware of the ruling of the court on 13th June 2013 hence their application for stay pending appeal and application for review. This was never prosecuted as the application was dismissed. Dismissal of an application or suit is a clear indication that the issue is spent. This occurs when an applicant is absent from court to prosecute their matter on the day fixed for hearing it, but if there is *good cause* which must be stated to the court, this can be reconsidered. This *good cause* must be determined by the court before the same issue can be reinstated or totally rejected. This is what the Court Of Appeal extensively considered in the case of ***Ngome versus Plantex C. Ltd [1984] KLR 798***. This view as old as it may seem still hold true to date.

12. The respondent herein while enjoying interim orders for an application they had lodged in Court under Certificate of Urgency and left court with a hearing date for 21st August 2013 failed to attend court and did nothing thereon until 7th of November 2013 when the previous dismissed application was reconditioned and resubmitted again and true to luck, the respondent got more interim orders of stay! This is nothing short of an outright abuse of the court process and an effort to circumvent the cause of justice for no apparent reason. This is a perfect description of a vexatious litigant where one is granted stay on 13th June 2013 and does not comply with set condition, two months later on 8th August 2013 is back in court for another stay and review, fails to attend court to prosecute the application and again on 6th November 2013 exactly after two months is back to court again seeking similar orders. This is not what courts are made of, courts are institutions of justice and parties come to court not as busybodies but to seek that justice. I find no good effort on the part of the respondent to seek justice but to circumvent the same.

13. On the second issue on review, there is now long and wide jurisprudence on the principles that govern the grant of review orders. A party who fails to disclose the material fact sought to be relied upon for a review of court orders does not deserve such a review. I have read the application by the

respondent, the grounds upon which the same is based and the supporting affidavit sworn by Omwenga Kwamboka. At paragraph of the affidavit the deponent states;

That the basis of the ruling is that the amount can easily be recovered from the pension benefits should the appeal succeed.

14. Far from it, the ruling of this court on 13th June 2013 was not directed at the pension savings of the claimant or of any other party for purposes of attachment, the context and reasoning of the Court being very clear. I find no new facts or a new discovery, mistake or error or any sufficient cause to warrant a review of the orders clearly outlined in this court ruling on 13th June 2013. Both parties were in court to argue the application subject to the ruling on 13th June 2013, similar issues were gone into where the respondent has the chance to offer a deposit of the decretal sum in full. To so offer now is simply to ridicule the court ruling and disregard of clear provisions of the law. Parties do not choose what to obey and what not to, if this were to be allowed, it would be to ridicule and bring grave disrepute to the institution of the Judiciary. This should not be sanctioned by this Court. This said the last issue of enlargement of time is consumed as a party who comes to court without clean hands should not enjoy equity as to do so would to smirk the very equity one is seeking this is with due cognisance of the fact that judicial discretion must be exercised upon reason, not like and dislike, caprice or spite as well discussed by the Judges of Appeal in ***Gharib Mohamed Gharib versus Zuleikha Mohamed Naaaman, Civil Application 4 of 1999.***

The total sum of it is that the application by the respondent dated 6th November 2013 must fail and is hereby dismissed in its entirety. Costs will be awarded to the claimant.

Dated and Delivered at Nairobi this 19th day of February, 2014.

M. Mbaru

JUDGE

In the presence of:

Court assistant

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