



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

MISCELLANEOUS APPL. NO. 4 OF 2017

KIOKO PETER.....1ST APPLICANT

DENNIS KAVUU MBONDO.....2ND .APPLICANT

VERSUS

JOSEPHINE NTHENYA KIMEU (Suing as Legal representative of the

Estate of JUSTICE KIOKO MUTISYA (DECEASED).....RESPONDENT

RULING

1. Before me is the Applicants Notice of Motion dated 12/10/2020 premised under section 3A of the Civil Procedure Act Cap.21 seeking the following orders:-

(i) That the decretal sum of Kshs. 2,677,000/- deposited in court on 6/11/2018 be released to the Applicant

(ii) Costs of the Application be provided for.

2. The Application is supported by the affidavit of their advocate Alex Kyalo Mutua sworn on 12/10/2020 wherein he deposed that the Appellant had violated the terms of the consent entered into by depositing the decretal sums into court outside the stipulated period and hence the same should be released to the Respondent. The Appellant's advocate Abuga S. Mogusu swore a Replying Affidavit on 28/1/2021 opposing the release of the decretal sum to the Applicants and contended that there will be no prejudice since the money is already with the court and averred that the application is devoid of merit and ought to be dismissed.

3. A perusal of the court record shows that the Respondent had filed a Notice of Motion dated 23/1/2017 seeking stay of execution of judgment in Machakos CMCC No.17 of 2016 and leave to file appeal out of time. By a Ruling delivered by this court on 27/9/2018, the court ordered as follows-

(i) The Applicant granted leave to file the Appeal within 14 days from the date hereof.

(ii) There be a stay of execution of the judgment and decree of the judgment entered on 17/11/2016 in Machakos CMCC No.17 of 2016 upon the Applicants herein depositing the decretal sum in a joint interest earning account opened in the names of the parties advocates within (30) days from the date of this ruling.

(iii) Costs shall abide in the appeal.

3. The Appellants filed a Memorandum of Appeal dated 3/10/2018 on 4/10/2018. They also filed another Notice of Motion dated 23/10/2018 seeking inter alia-

(1) THAT the application be certified as urgent and be heard exparte in the first instance

(2)

(3) THAT there be an extension of the order delivered on 27/9/2018 by the Honourable Lordship Justice Kemei and/or as the

court may deem fit to order.

On 26/10/2018 the Appellant's Notice of Motion dated 23/10/2018 came up for inter parte hearing but parties agreed to record a consent in the following terms: -

(1) The Notice of Motion dated 23/10/2018 be allowed with condition that the full decretal sum be deposited in court within ten (10) days from today and in default, the application be deemed as dismissed.

(2) Each party to bear their own costs.

4. The Applicants Notice of Motion before me has been filed as a result of non-compliance with the aforesaid consent order of 26/10/2018 recorded in court. The Applicants assert that the Appellant deposited the decretal sum on 6/11/2018 two days late instead of 4/11/2018. It is therefore not in dispute that the decretal sum was deposited in court. However, the Applicants submit that the decretal sum was deposited outside the 10 days stipulated in the consent order without court's leave. The deposit slip attached as annexure 'AKM 1 confirms the deposit in court. The Appellant has sought reliance on his advocates replying affidavit to assert that the Applicants will not suffer any prejudice since the decretal sum has been deposited in court hence the application is vexatious, frivolous and an abuse of court process. The question that arises then is ***whether the court should order for release of Kshs.2, 677,000/- deposited in court for not being deposited as per the term of the consent order recorded in court on 26/10/2018?***

5. It is noted that from the terms of the consent order, the Respondent's Notice of Motion dated 23/10/2018 stood dismissed on 4/11/2018 upon the failure to deposit the decretal sums by that date as it was deposited in court on 6/11/2018. The Appellant's advocate posits at paragraph 5 of his replying affidavit on the question that the court should address namely whether or not the decretal sum was deposited by the Appellant in court and not whether it complied with the consent order. I find such a submission to be rather ambivalent since he was the one who had entered the consent on behalf of the appellant and was well versed with the need for parties to obey court orders once made and issued. The said counsel does not even explain the reasons that led to his client to delay in depositing the decretal sum. In Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] KLR 828, the court held thus:-

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void."

6. The application herein is premised on section 3A of the Civil Procedure Act that provides:-

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

Order 42 Rule 6(2) (b) of the Civil Procedure Rules, 2010 inter alia provides that-

'.....no order for stay of execution shall be made under sub rule (1)...unless such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

Nyakundi J. in James Ithale Akothe v Abdiwele Ali Abdi & another [2020] eKLR stated that:-

"The purpose for depositing the decretal sum in this particular instance is to provide security in an application for leave to appeal out of time and stay of execution pending appeal."

The court in Simba Coach Limited vs Kiriya Merchants Auctioneers [2019] eKLR placed reliance on the case of Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates, where the court stated that:-

"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

The Section 3A confers the court with inherent power to avoid an injustice or stop an abuse of the court process. It is clear under Article 159 (2) (d) of the Kenya Constitution 2010 that ***in exercising judicial authority, the courts and tribunals shall administer justice without undue regard to technicalities of procedure.***

7. Two days' delay is a reasonable delay notwithstanding that the application dated 24/1/2017 seeking extension of time to deposit the decretal sum stood dismissed. In any case, the decretal sum was deposited in court. The Applicant has not demonstrated the prejudice they would suffer if the decretal sum is not released to them. The Appellant has filed Appeal No.129 of 2018 that the Applicant will have an opportunity to challenge. The Appellant complied with the court orders directing it to file the appeal within 14 days. It would be prejudicial to the Appellant if he succeeds in the appeal when the decretal sum will have already been released to the Respondent.

In *Bernard Njoroge Gathua v Mwanzia Mutiso (Suing Through His Next Friend And Father Gideon Mutiso Mukali [2015] eKLR* the Respondent/Applicant sought release of the decretal amount on the basis that the Appellant, failed to deposit the decretal amount by 10th November, 2014, as originally ordered. The court stated that-

“There is an appeal pending determination of this court. The appeal should not of course be rendered nugatory in case the Respondent/Decree holder, if the appeal succeeds, finds himself unable to refund the same and thereby causes the Appellant irreparable loss.....with the decretal amount being deposited in court, the Respondent was sure to eventually get a settlement of its judgment although a little later. In the above circumstances, there are adequate grounds to confirm the stay of execution until appeal is determined.

8. I note that the appellant did deposit the monies albeit two days late with the consequence that its application dated 23. 10.2018 seeking extension to deposit the decretal sums stood dismissed. Had the deposit not been made then the respondent would have pursued the appellant for the money by executing the decree. There seems to be a conundrum in that on the one hand the appellant has complied with the order on the deposit save only that it was made outside the stipulated period while on the other hand the respondent seeks to access the said money. In the midst of this state of affairs, the appellant's appeal is still pending determination. This court must rise to the occasion and do justice for the parties. It is common knowledge that human beings do make mistakes as no man is infallible. It would be an injustice to allow the respondent access the money and leave the appellant high and dry even with the pendency of the appeal. I am inclined to excuse the delay of two days by the appellant in depositing the money into court. The respondent will not be prejudiced if the application is declined since upon the determination of the appeal, the monies will be accessed with ease.

9. In view of the foregoing observations, I find no merit in the respondent's application dated 12.10.2020 and the same is dismissed with no order as to costs. The following orders are made:

a) ***The order of dismissal of the Appellant's application dated 23.10.2018 is set aside and substituted with an order that the deposit of the decretal sums on 6.11.2018 into court is deemed as properly done.***

b) ***The Deputy Registrar of this court is directed to call for the lower court record and commence the admission of the appeal.***

c) ***The appellant is directed to file and serve the record of appeal within forty-five (45) days from the date hereof.***

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF MARCH, 2021.

D. K. KEMEI

JUDGE