



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CIVIL APPLICATION NO. 36 OF 2019

ASSETS RECOVERY AGENCY.....APPLICANT/RESPONDENT

VERSUS

JARED KIASA OTIENO.....RESPONDENT/APPLICANT

RULING

1. Through a Notice of Motion dated 28th April 2020 filed under certificate of urgency pursuant to Order 51 rules 1 and 15 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, the respondent/applicant sought orders as follows;

a. That this Honourable Court be pleased to vacate, discharge, review and or set aside its order issued on 23rd April 2020 pending the hearing and determination of this application inter partes.

b. That this Honourable Court be pleased to direct that motor vehicle Reg. No. KCD 966L Porsche Paramera currently held and detained by the applicant/respondent be released to the respondent/applicant on the condition that the respondent/applicant surrenders its original log book.

c. that the court do grant any other relief it deems fit and just in the circumstances.

2. The application is premised upon grounds set out on the face of it and an affidavit sworn on 27th April 2020 by Jared Kiasa Otieno. According to the respondent/applicant, this honourable court delivered its Ruling dated 20th November 2019 rescinding preservatory orders issued on 26th August 2019 in respect of motor vehicle KCD 966L. Aggrieved by the said ruling, the applicant/respondent sought temporary stay of execution for fourteen (14) days pending filing of a formal application for stay.

3. Consequently, the applicant/respondent (Asset Recovery Agency) proceeded to lodge twin applications for stay of execution before this honourable court and Court of Appeal dated 2nd December 2019 and 4th December 2019 respectively. That the application before the High Court came up for hearing on 10th December 2019 whereupon the respondent sought additional time to respond to the respondent's/applicant's replying affidavit. The court then adjourned the matter to 16th January 2020 and extended the interim orders.

4. That on 16th January 2020, the respondent/applicant notified the court that the court of Appeal had admitted the applicant's/respondent's stay application dated 4th December 2019 for hearing on 5th February 2020. That Lady Justice Ngugi directed that the matter be argued before the Court of Appeal. The Honourable Judge however extended the interim orders and the

matter scheduled to 27th February 2020 to confirm progress before the Court of Appeal. That they appeared before the Court of Appeal on 5th February 2020 for hearing of the application for stay but the same could not proceed as one of the Judges assigned the case was not available. Consequently, the Court of Appeal rescheduled the matter for hearing on 10th March 2020. On 27th February 2020 this court was informed of the progress before the Court of Appeal and therefore fixed this matter for mention on 18th March 2020.

5. That when they appeared before the Court of Appeal on 10th March 2020, the applicant/respondent opted to withdraw their application in favour of an expedited hearing of the substantive appeal. He further stated that, following the suspension of court operations by the Chief Justice on 15th March 2020, the case could not be mentioned on 18th March 2020.

6. That in the cause of that confusion, the applicant/respondent filed an application dated 18th March 2020 seeking extension of interim orders issued by this court on 20th November 2019 and extended on 16th January 2020, 27th February 2020, 19th March 2020 and 23rd April 2020. He contended that the application was riddled with non-disclosure of material facts.

7. It is the respondent's/applicant's averment that the applications lodged by the applicant/respondent were actuated with malice.

8. That the admission of the stay application before the Court of Appeal rendered this court *functus officio* and that the continued extension of interim orders before the High Court is punitive on the applicant's/respondent's part and would still amount to an abuse of the court process.

9. In response to the application, the applicant/respondent filed a replying affidavit sworn 11th May 2020 by Cpl Sautet Jeremiah Matipei averring that the application dated 28th April 2020 seeking to review and or set aside the orders of 23rd April 2020 is devoid of merit having been brought under wrong provisions of the law instead of invoking Section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules. That the applicant has not established the grounds set out under Order 45 rule 1 to warrant review or discharge of the orders issued on 23rd April 2020 by this Honourable Court.

10. He further averred that the instant application dated 28th April 2020 seeks to summarily dispense with the application for stay of the application dated 2nd December 2019 which is still pending hearing and determination. He admitted that on 4th December 2019 they filed an application for stay before the Court of Appeal which granted stay of execution and then scheduled interpartes hearing on 16th January 2020. That on 16th January 2020 the Court of Appeal directed the matter to be mentioned on 5th February 2020. However, the matter was taken out of the cause list and given 10th March 2020 for hearing. That on 10th March 2020 they opted to withdraw the Court of Appeal application case following the High Court extension of interim orders on 27th February 2020.

11. That the High Court application for stay scheduled for hearing on 18th March 2020 could not proceed due to suspension of court operations due to corona. Consequently, the orders were extended for a further two months on 23rd February 2020.

12. He further averred that the interim orders are a subject of the application dated 2nd December 2019 which is still pending and that the respondent/applicant is not the registered owner of the motor vehicle hence has no *locus standi*.

13. Lastly, the applicant/respondent averred that the stay orders should be complied with pending the hearing of the substantive application for recovery of the subject asset.

14. Due to Corona Epidemic, parties could not appear physically to argue the application. Accordingly, the court gave directions on 29th April 2020 for parties to file written submissions and file a consent for the court to deliver its Ruling based on their submissions. Consequently, parties filed their respective consents together with their submissions.

15. Mr. Allamano counsel for the respondent/applicant filed his submissions on 8th May 2020. Counsel submitted that the applicant's applications for stay dated 2nd December 2019 before the High Court and another one dated 4th February 2020 before the Court of Appeal seeking similar orders amounts to an abuse of the court process a situation not envisaged under Order 42 rule 6 of the Civil Procedure Rules. Counsel relied on the decision in the case of **Heritage Insurance Co. Ltd v. Patrick Kasina Kisilu (2015)eKLR** where the Judge held that:-

“I agree with the general tenor of the court decisions that take the view that to file similar applications over the same subject matter seeking similar reliefs is an abuse of the court process.”

16. Further, counsel submitted that this court is *functus officio* taking into account that the Court of Appeal had already entertained a similar application and even granted interim stay orders. That any further proceedings before the High Court amounts to exercising supervisory jurisdiction over the Court of Appeal. Learned counsel opined that there must be some element of finality in a matter in which a court exercising adjudicative powers acts only once in a matter. To support this proposition counsel relied on the decision in the case of **Raila Odinga and 2 Others v Independent Electoral and Boundaries Commission and 3 others (2013)eKLR**.

17. Counsel contended that the multiple stay applications by the applicant are nothing but an abuse of the court process and that stay application should be dismissed.

18. On their part, the applicant/respondent also filed their submissions on 11th May 2020 reiterating word by word the averments contained in their replying affidavit to the application.

19. I have considered the application herein, affidavit in support, replying affidavit and submissions thereof. It is not in dispute that on 20th November 2019 this court rescinded preservation orders issued on 26th February 2019 in favour of the Asset Recovery Agency in respect of the respondent's/applicant's motor vehicle Reg. No. KCB 966L. Upon delivering its Ruling, the applicant/respondent sought 14 days interim stay of execution orders pending filing of a formal application for stay. The court proceeded to grant their prayer as prayed. Subsequently, the applicant/respondent proceeded to file a formal application for stay dated 2nd December 2019. They also filed a Notice of Appeal to the Court of Appeal and thereafter an application for stay dated 4th December 2019.

20. Subsequently, the respondent/applicant filed a Preliminary Objection together with a replying affidavit sworn on 9th December 2019 and filed the same day arguing that the court was *functus officio* and that the application is an abuse of the court process. On 10th December 2019 the court granted interim stay orders and for various reasons as exhibited in the court record, the same interim orders kept being extended pending hearing and determination of the application dated 2nd December 2020 which is still pending.

21. The last time the said interim orders were extended was 23rd April 2020 for a further 2 months owing to the Corona Virus epidemic. The instant application is seeking review of the orders of 23rd April 2020 extending interim stay orders which have been in place since 10th December 2019.

22. Although the application seeks review of the orders extending interim orders on 23rd April 2020, the same is brought under Order 51 which has nothing to do with review applications and Sections 1A, B and 3A of the Civil Procedure Act which are sections of general application. That notwithstanding, this court is duty bound under the spirit of Article 159(2)(d) to determine disputes without due regard to technicalities.

23. The spirit of the application is review of the orders made on 23rd April 2020 extending interim orders. The orders of 23rd April 2020 were prompted by the applicant's/respondent's application of 20th April 2020 which was necessitated as a result of the lapse of interim orders extended last on 27th February 2020 to 18th March 2020 a date the court could not sit as a result of Corona Virus. The court on 23rd April 2020 merely reinstated the interim orders that were in place but could not be extended on 18th April 2020.

24. Having given that history, the question will be, whether under the circumstances of this case, the applicant/respondent has met the threshold for review orders.

25. The law governing review orders is Order 45 rule (1) of the Civil Procedure Rules. For such orders to issue, the applicant must prove that there is discovery of new or important matter or evidence, which after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was made or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons.

26. It is incumbent upon the applicant to prove the above ingredients before this court can exercise its unfettered discretion to grant the orders in his favour. In the case of **Asset Recovery v Charity Wangui Gethi and 3 Others (2020)eKLR**, the Court of Appeal had this to say:-

“In an application for review, as envisaged under Order 45 of the Civil Procedure Rules, the grounds which ought to be established are conclusive. An applicant must establish: that there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or made; that there has been a mistake or error apparent on the face of the record or: any “other sufficient reason”. The ground “other sufficient reason” has been held to be consonant with the first two grounds: See Kuria v Shah [1990] KLR 316. Additionally, the applicant must exhibit that he acted expeditiously.”

27. The applicant has not attempted to address any single ground to support the prayer for review. He has instead concentrated on arguing the application for stay and its demerits. He should preserve that argument for the substantive application which is pending.

28. On the face of the application, the applicant has not proved any of the ingredients under Order 45(1) of the Civil Procedure Rules to warrant review of the orders. From the face of the record, there is no error apparent nor mistake or discovery of any new evidence or material facts or any other sufficient reason to warrant review or setting aside interim stay orders which had lapsed at a unique time when courts could not sit due to Corona Virus and then extended on 23rd April 2020.

29. I am inclined to take judicial notice that these are unique times and justice demands that courts should not act in a vacuum overlooking the wider picture that courts serve the course of justice. If the orders have been in force since 10th December 2019 and only lapsed under peculiar circumstances, the court was duty bound to restore justice by extending the orders the soonest time courts resumed. There was no miscarriage of justice occasioned or committed in reinstating the orders that had lapsed for reasons beyond anybody’s control. There is no prejudice suffered by the respondent/ applicant in reinstating the interim orders as both parties have an opportunity to ventilate their case in respect of the application dated 2nd December 2019 and a determination made on merit.

30. To set aside the interim orders and direct release of the motor vehicle the subject of stay application and orders pending hearing and determination will be premature. However weak and unmeritorious the application may be, parties should have their day in court.

31. Accordingly, it’s my finding that the application dated 28th April 2020 is not merited and the same is dismissed with costs to the applicant/respondent.

32. Accordingly, I do direct that parties file submissions not exceeding three (3) pages of font 14 in disposition of the application dated 2nd December 2019 within seven (7) days from the date of delivery of this Ruling. Parties to file consent confirming that the court can proceed to deliver a ruling based on their submissions.

DATED, SIGNED AND DELIVERED BY EMAIL AT NAIROBI THIS 26TH DAY OF MAY 2020.

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J. N. ONYIEGO

JUDGE



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