



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISCELLANEOUS CIVIL APPLICATION NO. 207 OF 2019**

**PATRICIA MUSIMBI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**PETER KHAKALI.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**CROWN BUS SERVICES LIMITED.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. Before the Court for determination is the Notice of Motion dated **29 July 2020**. It was filed herein by **M/s Kairu & McCourt Advocates** on behalf of the two applicants pursuant to **Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21** of the Laws of Kenya; **Order 42 Rule 20 and 21; Order 22 Rule 22** of the **Civil Procedure Rules** for the following orders:

(a) Spent

(b) that the Court be pleased to grant an interim order for stay of execution of the judgment and/or decree issued by Hon. C. Obulutsa on **27 September, 2019** for **Kshs. 320,400/=** pending the hearing and determination of the application *inter partes*;

(c) That the Court be pleased to order that the applicants' **Motor Vehicle Registration Number KCW 329Z** attached by **M/s Chartless Auctioneers** be released pending the hearing and determination of the application;

(d) That the Court be pleased to make an order to stop the sale of **Motor Vehicle Registration No. KCW 329Z** attached by **M/s Chartless Auctioneers** pending the hearing and determination of the application;

(e) That the Court be pleased to order that the applicants' **Motor Vehicle Registration No. KCW 329Z** attached by **M/s Chartless Auctioneers** be released;

(f) That the Court be pleased to make an order to stop the sale of **Motor Vehicle Registration No. KCW 329Z** attached by **M/s Chartless Auctioneers**;

(g) That the Court be pleased to grant an order for stay of execution of the judgment and/or decree issued by Hon. C. Obulutsa on **27 September 2019**;

(h) That the Court be pleased to enlarge the time for the applicants to comply with the stay conditions issued on **10 January 2020**; and,

(h) That the costs of the application be provided for.

2. The application was predicated on the grounds that judgment was delivered in **Eldoret CMCC No. 971 of 2017: Patricia Musimbi vs. Peter Khakhali & Crown Bus Services** on **27 September 2019** for **Kshs. 320,400/=**; whereupon an order for stay of execution for 30 days was given to enable the defendants therein appeal the said decision. The defendants thereafter filed this Miscellaneous Application seeking, among other orders, leave to appeal out of time; which application was compromised and a consent order made on **10 January 2020** by which the applicants were granted conditional leave. It is the contention of the applicants that, due to the prevailing global COVID-19 pandemic, they were unable to fully comply with the conditions set in the consent order within the agreed timelines; and therefore that, in consequence thereof, the respondent has since commenced the process of execution by proclaiming attachment on the subject motor vehicle; which is a commercial vehicle and therefore part of the applicants' tools of trade.

3. It was further the contention of the applicants that they risk suffering substantial loss and inconvenience to their business operations should the subject motor vehicle be sold as proposed by the plaintiff. They added that, while their appeal will be rendered nugatory should the prayers sought not be granted, the respondent stands to suffer no prejudice or inconvenience, since she can be compensated by way of costs. The applicants further indicated that they are ready and willing to abide by such conditions as the Court may impose.

4. The grounds aforementioned were expounded on in the applicants' Supporting Affidavit, sworn by **Isabella Nyambura** on **22 July 2020**. At paragraph 8 thereof, it was averred that the applicants have partially complied with the consent order by paying **Kshs. 300,000/=**, being half of the decretal amount as well as agreed costs. Copies of the Remittance Advice dated **13 February 2020** and the forwarding letter were annexed to the Supporting Affidavit in proof thereof. Also exhibited as annexures to the Supporting Affidavit are copies of the applicants' Memorandum of Appeal, the Order issued on **10 January 2020** and the Proclamation of Attachment dated **20 July 2020**, among other documents.

5. On her part, the respondent opposed the application. She relied on her Replying Affidavit sworn on **10 August 2020** and pointed out that the consent order was made, not on **10 January 2020** as posited by the applicants, but on **10 December 2019**. She averred that, whereas the applicants proceeded to file an appeal within the period stipulated in the consent order, they failed to make the payments within the agreed timelines; and therefore that she was perfectly entitled to commence the process of execution as she did. The respondent further averred that, since the consent order was made, and was to be complied with well before the outbreak of the COVID-19 pandemic, the applicants cannot now seek to hide behind the pandemic as an excuse for their failure to comply with the terms thereof. She also pointed out that, in any event, no application was brought for the purpose of setting aside or varying the terms of the consent. She urged the Court to find that the instant application is completely devoid of merit and is for dismissal with costs.

6. A perusal of the court record confirms that this matter was commenced by way of the Notice of Motion dated **25 November 2019**, by which the applicants sought leave to appeal out of time in respect of the judgment and decree passed in **Eldoret CMCC No. 971 of 2017**. They also prayed for stay of execution pending the lodgment, hearing and determination of the proposed appeal. The court record further shows that the application was resolved by consent, not on **10 January 2020** as was asserted by the applicants, but on **10 December 2019** on the following terms:

**“By consent the appli. dated 25/11/2019 be allowed as follows:**

**a) Appl. to pay Respt. half the decretal sum being Ksh 175,000/- (One hundred and seventy five thousand ONLY) plus agreed costs of Kshs 125,000/- (On hundred and twenty-five thousand ONLY) making a total of Ksh. 300,000/- within 30 days (Thirty) from today.**

**b) Appl. to deposit half the decretal sum of Ksh. 175,000 (One hundred and seventy-five thousands only) within 30 (thirty) days from today.**

**c) Appl. to pay auctioneers fees which shall be agreed or taxed.**

**d) Appl. to file their appeal within 14 (fourteen) days from today.**

**e) In default of any of the above clauses, execution to proceed...”**

7. The parties are in agreement that, whereas the applicants paid a sum of **Kshs. 300,000/=** pursuant to the consent order, the same was not done in strict compliance with the terms set out in the consent order; and that in any case, full compliance is yet to be had. Indeed, there is no dispute that the applicants are yet to deposit half of the decretal sum in court pursuant to Clause (b) of the consent order. It was for that reason that the respondent took steps, on **17 July 2020**, to initiate the execution process in accordance with Clause (e) of the consent order.

8. In the premises, the only issue for the Court's determination is the question whether extension of time ought to be granted to enable the applicants comply with Clause (b) of the consent order; noting that the other prayers in the Notice of Motion dated **29 July 2020** are spent. Needless to say that it is within the discretion of the Court to grant the extension sought, for **Order 50 Rule 6** of the **Civil Procedure Rules** stipulates that:

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:**

**Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”**

9. In this matter, the applicants have demonstrated substantial compliance with the consent order. The only outstanding aspect is the depositing of the remaining half of the decretal sum in court in terms of Clause (b) of the consent order. They blamed the corona virus pandemic for their failure to comply with Clause (b) of the consent order; and whereas the respondents deflected that argument by pointing out that the consent order was to be complied with in full within a period of 30 days from **16 December 2019**; and therefore that there was no justification for the extended failure to comply, there is cogent proof that the 1<sup>st</sup> payment was not made until **13 February 2020**. The respondent appears to have unreservedly accepted that belated payment.

10. It is a matter of notoriety that by **March 2020**, Kenya was already grappling with the adverse effects of the COVID-19 pandemic, including lockdowns and limitations on travel. Accordingly, the Court takes judicial notice that business operations of the majority of the

SMEs have since been adversely affected as a result of the containment measures put in place by the Government of Kenya in a bid to slow down the spread of the contagion. Consequently, it is not farfetched at all for the applicants to blame their woes on the pandemic. Indeed, in **William Olotch vs. Pan Africa Insurance Co. Limited** [2020] eKLR the Supreme Court accepted as plausible a similar explanation and granted extension of time. It held that:

**[3] UPON considering the written submissions on record for the Applicant and the Respondent dated 29th June 2020 and 14th July 2020, respectively, wherein the Applicant contends that the delay in filing the application for review to this Court was inadvertent, and was caused by the adverse effects posed by the Covid 19 pandemic, including restrictions on travel imposed by the Government and coupled with the challenges in accessing reliable internet; and**

**The Respondent in opposing the application submits that the explanation advanced by the Applicant is not plausible; that the reasons for the delay are not satisfactory, and, that the application lacks merit, is an abuse of the processes of this Court and does not disclose any substantial grounds for the Court to exercise its discretion; and**

**[4] HAVING considered the application, the Grounds of Opposition and the submissions filed by the respective parties, by a unanimous decision of this Bench, we find that ... *the Applicant has a reasonable and cogent explanation and adduced sufficient reasons for the inadvertent delay in filing his application for review of the Court of Appeal decision on certification in Civil Application No. SUPP 15 of 2019...***

11. Thus, I am likewise convinced that it is in the interests of justice the application be allowed and that time for compliance be extended to enable the applicants pursue their appeal without hindrance; confident that an award by way of costs would sufficiently compensate the respondents for any inconvenience suffered. In the premises, the application dated **29 July 2020** is hereby allowed and orders granted in favour of the applicants as hereunder:

- (a) That the time for compliance with Clause (b) of the consent order dated **10 December 2019** be and is hereby extended by 30 days from the date hereof;
- (b) That the applicants' **Motor Vehicle Registration No. KCW 329Z** attached by **M/s Chartless Auctioneers** shall remain under attachment pending compliance;
- (c) That, in the event of default, the respondent and her agents shall be at liberty to proceed with the sale of the subject motor vehicle, **Registration No. KCW 329Z**, through **M/s Chartless Auctioneers**;
- (d) That the costs of the application be borne by the applicants in any event.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 24<sup>TH</sup> DAY OF FEBRUARY 2021**

**OLGA SEWE**

**JUDGE**