



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. E096 OF 2020

JOHNSTONE KASSIM MUUMBO.....1ST PLAINTIFF/APPLICANT

ALEX MUNYASYA MUUMBO.....2ND PLAINTIFF/APPLICANT

CAROLYNE KALUNDE MUUMBO.....3RD PLAINTIFF/APPLICANT

VERSUS

LEE FUNERAL SERVICES LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The first application for consideration is the plaintiff's notice of motion dated 7th May 2021, brought under sections 1A,1B,3 and 3A of the Civil Procedure Act, Orders 50 (6) and 51 of the Civil Procedure Code. The application seeks the following orders:

i & ii Spent

iii. That the court be pleased to expand and/or extend the time within which parties shall comply with the consent orders dated 28th October, 2020 and issued on 6th November 2020 by a further 6 months.

iv. That costs of this application be provided for.

2. The 2nd application for consideration is the defendant's notice of motion dated 27th May 2021, brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Orders 50 (6) and 51 of the Civil Procedure Code. The application seeks the following orders:

i. Spent

ii. That this Honourable Court be pleased to set aside the interim orders issued ex parte on 10th May,2021 by Hon. Justice Sergon pending the hearing and determination of this application inter parties;

iii. That this Honourable Court be pleased to set aside the interim orders issued ex parte on 10th May,2021 by Hon. Justice Sergon pending the hearing and determination of the application dated 7th May,2021 by the plaintiffs herein

iv. That this Honourable Court be pleased to release to the defendant the original title deed to the property known as Mwingi/Kiomo/210 and the Blank Transfer Deeds which are in the custody of the court and allow the defendant to execute the orders issued on 28th October ,2020 and

v. That costs of the application be provided for.

3. The application dated 7th of May 2021 is supported by the grounds on its face plus a sworn affidavit by Alex Munyasya Muumbo the 2nd plaintiff/applicant. A summary of this matter is that the applicants had deposited title to L.R Mwingi/Kiomo/201 in the name of Alex Munyasya Muumbo, together with a blank signed transfer form with the deputy registrar (Mediation High Court) as security for Kshs. 2,197,500/= outstanding morgue charges. The applicants were to pay the outstanding balance within a period of 6 months from the date of

release of the body, which was released on 7th November, 2020.

4. After the burial the applicants filed an application in the Family division for the release of the funds to meet the burial costs of the deceased (annexure AMM-3). They were given a hearing date for 24th of February 2021. The two sons of the deceased, Mr. Billy Mbuvi and Mwinzi Muumbo who have been controlling the estate since 2015 had to deposit all the income in court by 1st of April 2021(annexure AMM-7). On the said date the two sons had not complied with the court orders. They came back to court on 27th April 2021 but the court was not sitting and parties were asked to return on 15th June 2021.

5. The deponent avers that due to non-compliance with the court orders, the outstanding morgue fees to satisfy the accrued debt for the burial of the deceased has not been forthcoming. That unless the orders prayed for herein are granted the applicants stand to suffer irreparable loss since the deponent (2nd plaintiff/ applicant) gave his land as security to facilitate burial of their late father. He asks the court to grant stay of execution to enable his brothers comply with the court orders.

6. The 2nd application dated 27th May 2021 is supported by the grounds on its face plus a sworn affidavit by Martha Gichuki counsel for the defendant. She depones that this honourable court gave orders on 28th October 2020 upon parties reaching a settlement after mediation sessions. The settlement agreement was adopted as an order of the court on 6th November 2020. The defendant fully complied with the order and released the body of the deceased to the plaintiffs for burial and the matter was to be mentioned after 6 months to confirm compliance.

7. She avers that despite compliance by the defendant the plaintiffs have reneged on the mediation agreement to date, and not made any payments to defray the balance nor communicated about the circumstances leading to non-payment. She further avers that before the matter could be mentioned for the court to confirm compliance, the plaintiffs filed an application dated 7th May 2021 in order to defeat the defendant's efforts to realize the fruits of the consent order.

8. She depones that the plaintiffs' application dated 7th May 2021 has not been brought in good faith . That the ex parte interim orders issued in respect to the said application should therefore be set aside. Secondly that the said orders were issued by a Judge who had previously recused himself from the matter.

9. She further depones that the plaintiffs entered the mediation agreement which was adopted as a consent order of the court and as such this honourable court being a court of law cannot purport to rewrite the contract between the parties, unless there is evidence of coercion, fraud or undue influence.

10. In opposing the plaintiff's application dated 7th May 2021 the defendant/respondent filed grounds of opposition dated 27th May 2021. It was stated that the application as drawn and presented is bad in law, incompetent, frivolous, vexatious, an abuse of the court process and should be dismissed. Further that there was nowhere in the consent order where it was indicated that the outstanding balance was to come from the estate of the deceased or from anywhere else other than from the plaintiffs themselves.

11. It is further argued that the plaintiffs entered into the mediation agreement while knowing well the responsibilities of the estate of the deceased and therefore they are estopped from trying to rely on the same to defeat the full implementation of the mediation agreement and consent order. That they have the option of recovering the amounts paid to the defendant from the estate of the deceased after clearing the bill.

12. In opposing the application dated 27th May 2021 the plaintiffs filed a replying affidavit sworn on the 9th June 2021 by Caroline Kalunde Muumbo the 3rd plaintiff. She avers that the application to set aside ex-parte orders is generally based on a misapprehension of the substance of the application dated 7th May 2021. That the advocate in giving evidence pursued the argument that the defendant's application was intended to vary or set aside the terms of the mediation agreement when no such prayer was contained in the application.

13. She avers that their application simply sought for extension of time for the execution of the mediation agreement and the good faith to pay the outstanding morgue charges has not been abandoned at all.

14. The 3rd plaintiff further responded to the defendant's grounds of opposition by filing a supplementary affidavit dated 27th May 2021. She deponed that the applicants relied on section 95 of the Civil Procedure Act in their application and therefore allegations of breach of law are without basis. Further, that the applicants have not made prayers to vary or set aside the consent agreement.

15. She depones that the contents of paragraph 8 of the grounds of opposition are based on the advocates own opinion or idea because the consent did not concern itself with sources of funds for payment of outstanding charges either from the estate or otherwise. She further depones that the valuation of the security deposited in court was to be done by a valuer appointed by the defendant/respondent with concurrence of the mediator which has not taken place.

16. She avers that the advocates acting for the defendants seek to take over or sell the security cited in the Mediation agreement without discharging their mandate of having the security valued to establish its proper value. She adds that the grounds of opposition fail the test of demonstrating that the advocates or the clients will suffer any loss if prayers in the application dated 7th May 2021 will be granted.

17. Its her disposition that the balance of convenience tilts in favour of the applicant's application dated 7th May 2021 and the prayers should be granted. She adds that the grounds of opposition should be dismissed with costs to the respondents for being filed by the wrong party and for lacking clarity, being obscure in substance as the applicants did not seek varying or setting aside of the mediation agreement.

18. The application was argued orally. M/s Kimaru for the plaintiffs submitted that in their application dated 7th May 2021 they were issued

with interim orders for prayers 1 and 2 but that their main prayer is No.2 and No.3. She submitted that the court has discretion to extend time under the Civil Procedure Rules.

19. She contends that the reason for the delay in paying the outstanding balance is that those administering the deceased's estate are yet to pay out the monies. That an application dated 17th November 2020 in the Succession Cause sought leave to pay after the body was released from the mortuary. Counsel further submits that the said application was slated for hearing on 13/7/2021, which is a clear indication of the applicants' willingness to pay the outstanding charges.

20. She also submits that they are only seeking more time to comply with the orders and in the event the extension is not granted the applicants will suffer loss as their property will be attached and sold. It's her argument that the defendant has not demonstrated or shown what loss it will suffer if the orders are granted.

21. She further submitted that the applicants have demonstrated good will and pray for their application to be allowed. On this she relied on the case of **Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] eKLR** where the court clarified what a ground of opposition is, as it must relate purely to a point of law and that's not the case here. Also see **Mukhisa Biscuit Manufacturing Co. Ltd vs West land Distributors Ltd (1970) EA 469**.

22. She therefore urged the court to dismiss the grounds of opposition and the notice of motion dated 27th of May 2021.

23. Mr. Omiti for the defendant submitted that the issue in contention is the consent order issued by this court which was done after a settlement agreement and the parties are bound by it. He therefore argued that it cannot be appealed against or reviewed or set aside. He further submitted that the orders obtained by the applicants were improperly obtained and they can't ask for variations. That timelines had been set for compliance which was six (6) months from November 2020, therefore what the plaintiffs are seeking for is variation of orders.

24. He contends that the applicants were not acting as administrators but as children of the deceased. They paid some money while the 2nd plaintiff gave out his land as security. Counsel submits that they can recover the monies from the estate of the deceased.

25. It is his submission that the plaintiffs have refused to pay the outstanding balance and that the succession proceedings referred to do not relate to the defendant. Further, the issue of the land being the 2nd plaintiff's home is not in any way the defendant's business and it will not be punitive for the defendant to sell the property as they had made an undertaking.

26. Counsel argues that there is no good will by the plaintiffs and the defendant is a business that needs money. He further stated that the 3rd plaintiff's affidavit is by an advocate and is related to the grounds of opposition. He argues that one chooses how to respond to an application and can't be forced to do it in a particular way. Learned counsel submitted that they are asking the court to set aside the interim orders which should not have been granted more so *ex parte*. That the consent order is clear that if there is no payment done then the documents should be released to the defendant.

27. On the issue of valuation, he submitted that it has not been done since they were waiting for the property to be due for sale. They have however appointed a valuer and informed the mediators and the plaintiffs' advocates about it.

28. M/s. Kimaru in response submitted that the agreement pursuant to mediation is not a consent *per se* as it becomes a court order once adopted and can be varied. In this case it warrants a variation. She relied on the following decided cases:

a) *Francis Kimutai v Kaisugu (Kenya) Limited. [2016] eKLR*

b) *International Community of Women Living With H.I.V and Others v Non-Governmental Organization Co-ordination Board [2019] eKLR*

c) *Advocates Act Cap 26 of the Laws of Kenya and Section 8 of the Advocates (Practice) Rules*

Analysis and Determination

29. Having keenly considered the applications, grounds, affidavits, submissions and authorities I find the main issue for determination to be whether the plaintiff/applicant has met required principles for expansion and/or extension of the time within which parties should comply with the consent orders.

30. The court's wide discretion to enlarge time is derived from **Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules** which provides:

Section 95. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Power to enlarge time [Order 50, rule 6.]

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.

31. When it was first called upon to consider the principles for extension of time the Supreme Court in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others APPLICATION NO. 16 OF 2014 [2014] eKLR** held that a court exercising its discretion to extend time had to consider the following factors;

- a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- f. Whether the application has been brought without undue delay; and

32. In the case of **Hirani v Kassam [1952] 19EACA 131** the statement in **Seton's Judgment and orders 7th Edition Vol. 1 page 124** was approved as follows:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an arrangement contrary to the policy of the court ... or if consent was given without sufficient material facts or in misapprehension or ignorance of such material facts, or in general for a reason which would enable the court to set aside an agreement.”

33. The issue at hand is that the plaintiffs had promised to pay the defendant the outstanding morgue charges amounting to Kshs. 2,197,500/= six (6) months after the release of the deceased's body from the morgue. After the consent was adopted by the court the 2nd plaintiff deposited his title deed as security in the presence of the deputy registrar.

34. The plaintiffs have not been able to pay the outstanding balance claiming that they had filed a succession cause in court to enable them access the deceased's property so as to pay the monies. They have not done so because two of the brothers who have been controlling the property are yet to comply with the court orders.

35. On the other hand, the defendant which is a business submitted that in their agreement it is nowhere stated that the plaintiffs were depending on the succession process to be able to pay them. They also believe that the security can be sold and the plaintiff recovers the same later from his father's estate.

36. The defendant also believes that the orders the Plaintiffs obtained on 10th May 2021 before Justice Serگون were improper and they can't ask for variations. On the other hand the plaintiff's argument is that they are praying for extension of time for compliance and not variation which is allowed in law. That the court also has jurisdiction under **Order 50 rule 6, Civil Procedure Rules (formerly order XLIX rule 5) Civil Procedure Rules** to enlarge time limited by the Rules or by Order of the court even though the application for enlargement of time is made after the expiration of the time appointed or allowed.

37. It is very clear that what the plaintiffs are praying for is more time to enable them pay the outstanding morgue charges. On the other hand the defendant which is a business wants its money here and now which it is entitled to. What would the interest of justice dictate?

38. The plaintiffs are on the wrong for not at least approaching the defendant and seeking for more time to get a buyer/buyers for the security. Now that they have come to court can they just be dismissed without any hope?

39. **Gogardhan –Vs- Barsati AIR 1972 ALL. 246**, an Indian case, also dealing with a rule identical to Rule 6 of Order 50 of the Civil Procedure Rules held thus: -

“Even in cases where an order is made by the court for doing a thing within a particular time and order further provides that the application, a suit or appeal shall stand dismissed, if the thing is not done within the time fixed, the court has jurisdiction, if sufficient cause is made out, to extend the time even when the application for extension of time is made after the expiry of the time fixed. It is not the application for grant of further time, whether made before or after the expiry of the time granted, which confers jurisdiction on the court”.

40. Moreover, although a court has no jurisdiction to re-write a contract between parties or vary the terms of the consent judgment it nevertheless has jurisdiction as a court of justice to relieve a party from the rigors of a penal or forfeiture clause even in a consent judgment

or order.

41. I am persuaded by the Ruling of Ringera J (as he then was) in **June Jebet Moi Vs Fuelex Oil Company Limited and two others – HCCC No. 305 of 2000 (Milimani Commercial Courts)**. In that case a consent order requiring the Plaintiff in that suit to supply particulars was recorded on 24th May 2001. The Plaintiff defaulted and later applied for extension of time within which to file the particulars under Order XLIX Rule 5 XLIX (now Order 50 Rule 6) CPR. The application was opposed on the ground that a consent order could not be varied unless it is shown, among other things, that, it was obtained by misrepresentation, fraud or undue influence. Mr. Mungu the plaintiff's counsel in support of the application contended that the issue was not the setting aside of the consent order but rather the extension of time to comply with the said order. He contended that the court had inherent power to extend time. Justice Ringera (as then was) allowed the application saying: -

“In my opinion the court has power on plain wording of Order 49 rule 5 to extend such time. And even if such power were not conferred by the rule, it would be within the courts inherent power for purposes of securing the rights of justice to extend such time if reasonable cause were shown. I agree with the submission of Mr. Mungu that this is not a case of setting aside or varying a consent judgment. It is a case of extension of time to comply with a court order and the court has jurisdiction to extend such time”.

42. The above case is identical to the present one in so far as it only relates to the extension of time within which to comply with an order made by consent and adopted as an order of the court. I would respectfully construe **Section 95 of Civil Procedure Act** under which the present application is made in the same manner as orders made by consent. The fact that the 2nd plaintiff offered his title deed as security, is a clear indication that the plaintiffs are willing to pay the outstanding morgue fees. The only thing delaying them is the Succession Cause where they hope to get the cash to pay the defendant. The succession cause relates to their deceased father to whom the morgue Charges relate.

43. In the interest of Justice, the court will give the plaintiffs 4 (four) months from now to sort themselves out and pay the defendant the money owing plus interest from the date of default. In the event of failure to comply the defendants will proceed with the disposal of the security given by the 2nd defendant without any further reference to this court.

44. The defendant had sought to have the interim orders set aside. The said orders were interim and were extended to today. Upon the delivery of this Ruling there are no more interim orders to extend or set aside.

45. The upshot is that the plaintiff's application dated 7th May 2021 is allowed for the extension of time by further four (4) months only. There shall be no further extensions by this court. The defendant's application dated 27th May 2021 is disallowed. All parties to bear their own costs.

Orders accordingly

DELIVERED ONLINE, SIGNED AND DATED THIS 30TH DAY OF SEPTEMBER, 2021 NAIROBI.

H. I. ONG'UDI

JUDGE