



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 179 OF 2014

GANESH ENGINEERING WORKSLIMITED.....1ST PLAINTIFF/RESPONDENT

BANSON HOLDINGS (KENYA)LIMITED.....2ND PLAINTIFF/RESPONDENT

BHANDERI ENTERPRISES LIMITED.....3RD PLAINTIFF/RESPONDENT

DIPAK BHANDERI.....4TH PLAINTIFF/RESPONDENT

VERSUS

YAMINI BUILDERS LIMITED.....DEFENDANT/APPLICANT

RULING

1. This ruling is derived from the Notice of Motion dated 20th January, 2020 brought by the defendant/applicant in which it sought for the following orders:

i) Spent.

ii) THAT this Honourable Court be pleased to review its order of 28th November, 2019 directing that the defendant's/applicant's director, Joshnaben Dipak Kerai deposits her passport in court.

iii) THAT this Honourable Court be pleased to release the passport of Joshnaben Dipak Kerai.

iv) THAT costs of the application be in the cause.

2. The Motion stands supported by the grounds laid out in its body and the facts stated in the affidavit of Joshnaben Dipak Kerai.

3. The deponent asserted that following her compliance with this court's order made on 28th November, 2019 requiring her to deposit her passport in court, she received an invitation to attend her daughter's (Krushita Kerai's) graduation ceremony at Edith Cowan University in Australia on 1st February, 2020.

4. It was the deponent's averment that being the only surviving parent, it is imperative that she travels to Australia and further, that she makes the necessary arrangements for the return of her daughter to Kenya thereafter.

5. The deponent therefore urged this court to exercise its discretion in making an order to the effect that her passport be released to her to enable her travel.

6. The 4th plaintiff/respondent swore a replying affidavit in resistance to the Motion, stating that the deponent has not satisfied the grounds to warrant a review of this court's earlier order and that in any event, the deponent's attendance of the graduation ceremony is not a mandatory requirement.

7. It was the 4th respondent's assertion that the deponent's intentions of travelling are suspect and she has not offered anything to guarantee her return once she is permitted to travel, given that she is required to be examined at a later date in respect to the applicant's assets and/or means.

8. The 4th respondent finally averred that should this court be persuaded to grant the orders being sought, then the deponent should be compelled to deposit any form of security that will guarantee her attendance for examination as and when required.

9. This court heard the oral submissions presented by the parties' respective counsels on the Motion. *Mr. Kenneth Wilson* learned advocate for the applicant argued that this court has discretion to review its earlier order, relying on the case of **John Simiyu Khaemba & another v Cooperative Bank of Kenya & another [2019] eKLR** where the court exercised its discretion in reviewing its orders on the ground of 'sufficient reason.'

10. The advocate further argued that the respondents have not brought any evidence to show that the deponent has a fixed abode outside of the country to support their assertions that the deponent may fail to return once she is permitted to travel. Counsel submitted that his client will be back in the country during the second week of February.

11. *Mrs. Rotich* counsel for the respondents retorted with the submission that the documentation annexed to the application makes no indication that attendance of the graduation is a mandatory requirement.

12. The counsel ensured to convey her clients' apprehension that the deponent may abscond this court's jurisdiction and may in fact be intending to relocate to Australia. Further to this, *Mrs. Rotich* clarified that the authorities of **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR** and **Kakamega Paper Converters Ltd v Mohanlal Arora & 4 others [2015] eKLR** which the respondents relied on appropriately define what constitutes sufficient cause.

13. *Mr. Wilson* rejoined by contending that it is of crucial importance that the deponent demonstrates support for her daughter by being present during her graduation ceremony especially since she is the sole parent, further maintaining that there is no reason for the deponent to elude this court's jurisdiction since she is both a Kenyan citizen and resident.

14. I have carefully taken into consideration the grounds featured in the body of the Motion, the facts deponed in the affidavits for and against the Motion, and the rival oral arguments alongside the authorities quoted by the parties' advocates.

15. It is apparent that the substantive prayer being sought in the Motion concerns itself with the subject of review. The applicable principles to guide the courts in determining whether to review their decisions are provided for under **Order 45** of the **Civil Procedure Rules, 2010** and are as follows:

a) the discovery of new and important matter or evidence, or

b) some mistake or error apparent on the face of the record, or

c) any other sufficient reason.

16. The above provision also requires that applications seeking an order for review must be brought without unreasonable delay; this was buttressed by the Court of Appeal in the case of **Francis Origo & another v Jacob Kumali Mungala [2005] eKLR** when it held thus:

"...most importantly, the applicant must make the application for review without unreasonable delay."

17. On the subject of unreasonable delay, I have considered that the present application was filed slightly short of two (2) months from the date on which the order in question was made. While this court was not informed as to when exactly the deponent received the invitation to attend her daughter's graduation ceremony, I am satisfied that there has been no unreasonable delay in bringing the application.

18. Having settled the above, I will now consider the subject to do with whether the deponent has satisfied any of the principles set out hereinabove, more specifically the principle on 'sufficient reason' on which the application rides.

19. That said, what then constitutes 'sufficient reason?' The courts have acknowledged that the definition of the term runs far and wide. Nonetheless, courts are called upon to apply their interpretation of the term in tandem with judicial principles and germane legal provisions. In so finding, I stand guided by the reasoning adopted in the case of **Josiah Mwangi Mutero & another v Rachael Wagithi Mutero [2016] eKLR** and echoed in **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR** cited by the respondents where reference was made to the following definition offered by the Supreme Court of India in **Ajit Kumar Rath v State of Orisa & Others 9 Supreme Court Cases 596 at Page 608** in respect to Rule 47 of the Indian Civil Procedure Rules which is the equivalent of Order 45 of our Civil Procedure Rules:

"It may be pointed out that the expression "any other sufficient reason" means a reason sufficiently analogous to those specified in the rule"

20. The above position was advanced by the court in the authority of **John Simiyu Khaemba & another v Cooperative Bank of Kenya & another [2019] eKLR** in this sense:

"The Registered Trustees of the Archdiocese of Dar-es-Salaam v Chairman of Bunju Village Government & Others Civil Appeal 147 of 2006 C.A. observed;

"It is difficult to attempt to define the meaning of the words sufficient cause. It is generally accepted however, that the words

should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the Appellant.” ”

21. On the one hand, I have taken into account the fact that there was compliance with the order issued by this court directing the deponent to deposit her passport in court. I have also taken into account the reasons given by the deponent for bringing the present application and I have looked at the documentation annexed to the Motion in support of the said reasons.

22. On the other hand, I am alive to the fact that the respondents have in place a lawful decree in their favour and against the applicant in the sum of Kshs.6,557,173.20, an evidently colossal amount which is yet to be satisfied. It is not in dispute that the deponent is the only director accessible to the respondents. It is also not in doubt that she previously acknowledged that the applicant has no known assets.

23. Suffice it to say that having considered the reasons given by the deponent coupled with the earlier compliance, I find the same to be sufficient in the circumstances, though I might add that I am alive to the fears portrayed by the respondents and which I find to be equally reasonable.

24. As earlier indicated, I am required to exercise my discretion in balancing the interest of the parties in a fair manner.

25. In the end therefore, I will allow the Motion as prayed and make the following orders:

a) The order made by this court on 28th November, 2019 stopping Joshnaben Dipak Kerai, a director of the defendant/applicant from leaving the jurisdiction of this court and further ordering her to deposit her passport in court is hereby reviewed and varied with an order granting the release of her passport on the condition that she deposits a portion of the decretal sum (Kshs.3,000,000/) in court and executes a bank guarantee for the remaining balance of Kshs.3,557,173.20 before the release of her passport can be effected.

b) The Deputy Registrar-Civil Division to be responsible for ensuring the release of Joshnaben Dipak Kerai's passport upon satisfying herself that the two (2) conditions stipulated in a) above have been complied with.

c) In the circumstances of the application, I am convinced that each party should meet its own costs.

Dated, Signed and Delivered at Nairobi this 29th day of January, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiffs/Respondents

..... for the Defendant/Applicant