



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCA NO. 48 OF 2018**

**CIC GENERAL INSURANCE CO. LTD.....APPELLANT**

**-VERSUS-**

**PHYLLIS MBULA.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 24/09/2018 the Applicant seeks orders:-

1) Spent.

2) **THAT** the Application be heard ex-parte in the first instance due to the urgency of the reliefs sought and there be an enlargement of the Orders issued on 23/08/2018 pending inter-parties hearing and determination of the Application.

3) **THAT** pending the hearing and determination of the Application there be a stay of execution of the judgment and decree issued at Makindu Law Courts by Hon. A. Ndungu (SRM) in Makindu PMCC No. 397 of 2016 on 28/06/2018.

4) **THAT** pending the inter-parties hearing and determination of the Application temporary injunction do issue restraining the Clear Real Auctioneers, its agents, servants and/or employees from attaching, moving, selling and/or interfering in any way with the Applicant's goods.

5) **THAT** the costs of the Application be provided for.

2. The same is anchored on provisions of Order 42 Rule 6, Order 40 Rule 1 & 2, Order 51 Rule 1, Section 3A CPA. It is based on grounds on the face of the Application and it is supported by the Affidavit of Lydia Mwangi sworn on 24/09/2018.

3. The same is opposed by way of a replying affidavit of Phyllis Mbula sworn on 01/10/2018.

4. The parties agreed to canvass same via submissions.

**APPLICANT'S SUBMISSIONS**

5. The Appellant submits that, there is no express provision of law and more specifically the Civil Procedure Act and Rules that provides that the exercise of opening a joint bank account should be borne by the Appellant. It is only that as a matter of practice that the Appellant often initiates the process of opening the joint bank account.

6. Equally, the order issued on 23<sup>rd</sup> August, 2018 and which emanated from the consent was silent on which party was meant to facilitate in opening the joint bank account and that is the reason as to why Appellant through its Advocate went ahead to inquire from the Respondent's Advocate via a phone discussion as to whether they were willing to facilitate the process and the feedback was that they shall facilitate.

7. It is out of that gentleman's agreement that the Appellant knew that the process of opening the joint bank account was well taken care of by the Respondent's Advocate.

8. It is now clear that the Respondent's Advocate deliberately and tactically delayed the process so that time may run out and move to effect clause 3 of the Order.

9. Indeed the Respondent's Advocate acted with malice and took hostage of the process of opening the joint account only to come out executing upon the Appellant.

10. It is worth noting that the Appellant moved to this Appellate court after being dissatisfied with the judgment of the lower court and therefore in the quest of seeking justice the Appellant was desirable and ready to comply with the orders issued by this court.

### **RESPONDENT'S SUBMISSIONS**

11. The Respondent submits that, there are no orders issued on 23/08/2018 that can be extended as prayed. The Appellant/Applicant herein, under prayer 2 of their Application, seeks enlargement of the Orders issued on 23/08/2018 and therefore this Honourable Court cannot extend and/or enlarge what is not on record.

12. The orders of stay of execution were recorded by consent on 31/07/2018 and adopted as an order of the court on the same day.

13. It is only the written order that was extracted on 23/08/2018. The Applicant herein therefore ought to have sought for the enlargement of the Orders issued on 31/07/2018 and not 23/08/2018 and thus for this reason alone the Application is defeated and ought to be dismissed.

14. Further the respondent argue that, in any event the said consent orders issued on 31/07/2018 were for thirty (30) days and thus they expired on 31/08/2018, while the Applicant filed the instant Application three (3) weeks after expiry of the said orders, on 25/09/2018 and thus there is nothing to extend and/or enlarge since under the law, the court cannot extend a non-existent order.

15. Respondent relies on the case of **Board of Trustees of African Independent Pentecostal Church of Africa Church –Vs- Peter Mungai Kimani & 21 Others, Nairobi HCCC. No. 285 of 2014**, R.E. Aburili J. 14/03/2016 where by the Honourable Judge relied upon the finding of Justice Mutungi in **NSSF –Vs- John Ochieng Opiyo (2006) eKLR** where the learned Judge stated that:-

*“However, I need to address the issue of this court validating the order which has lapsed. I know of no law under which an issue which has died/lapsed/expired can be validated other than under the order referred to hereinabove. The court cannot validate orders, which upon expiry, have ceased to exist.”*

### **ISSUE AND DETERMINATION**

16. The sole issue is **whether should vary the consent order and add appellant time to comply with the consent order?**

17. In the case of **Brooke Bond Liebig Ltd vs Mallya [1975] EA 266** where the Court stated that:-

*“a consent order cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”*

18. And the, **Flora Wasike vs Destimo Wamboka (1988) 1 KAR 625** the court held that;

*“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.... In Purcell vs F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676;*

*“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”*

19. The parties herein recorded consent on 31/7/018 and same was adopted as court order for stay of execution on condition that the decretal amount was to be deposited within 30 days from dates thereof. The orders were extracted on 23/8/018.

20. A joint account of the parties' advocates was to be opened in the same period to implement consent order. The appellant concedes that as a matter of practice, the Appellant often initiates the process of opening the joint bank account.

21. However the applicant thought that, it was out of gentleman's agreement that the Appellant knew that the process of opening the joint bank account was well taken care of by the Respondent's Advocate. Thus he went into a slumber.

22. The Applicant filed the instant Application three (3) weeks after expiry of the said orders, on 25/09/2018 and now seeks an enlargement of the Orders issued on 23/08/2018 pending inter-parties hearing and determination of the Application.

23. The Respondent responds that, there were no orders of 23/8/018 31/7/018 and in any event the orders lapsed on 31/8/018 and thus court cannot enlarge lapsed orders.

24. In the case of in **NSSF –VS- JOHN OCHIENG OPIYO (2006) EKLR** the learned court stated that:-

*“However, I need to address the issue of this court validating the order which has lapsed. I know of no law under which an order which has died/lapsed/expired can be validated other than under the order referred to hereinabove. The court cannot validate orders, which upon expiry, have ceased to exist.”*

25. To grant the orders sought would be varying parties' consent of depositing decretal sum in joint account within 30 days. The Appellant was the one who was in need of stay orders and who ought to have been pro-active in implementing the consent orders.

26. He cannot say that after getting consent reorder he waited the respondent to open account and then notify him. The usual practice was for the appellant to get a cheque from his client and then open account or invite respondent for opening of the joint account to deposit the money therein.

27. The elementary factors for setting aside or varying consent namely fraud or collusion, or consent obtained by an agreement contrary to the policy of the court, or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts have not been demonstrated.

28. In any event the order sought to be enlarged lapsed long time and court cannot enlarge a lapsed order vide the holding in NSSF –VS- JOHN OCHIENG OPIYO (2006) ECLR.

29. Thus the court is left with no option but to dismiss the application herein with costs to the respondent.

**DATED, DELIVERED, SIGNED THIS 30<sup>TH</sup> DAY OF JANUARY, 2019 IN OPEN COURT.**

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**HON. C. KARIUKI**

**JUDGE**