



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 15 OF 2018

STEPHEN KIPKEMOI NGENOH T/A LISTERC

SYSTEM COMPANY LTD.....PLAINTIFF

VERSUS

ECOBANK (K) LIMITED.....1ST DEFENDANT

VALLEY AUCTIONEERS.....2ND DEFENDANT

RULING

1. These proceedings were instituted by the Plaintiff/Applicant seeking an order of permanent injunction restraining the Defendants from selling the property known as Land Reference Number 12715/8341 (original number 12715/36/25), a matrimonial property which was availed by the Plaintiff as security for a loan borrowed from the 1st Defendant by the Plaintiff. According to the Plaintiff, the loan arrears stood at Kshs 7,577,529.77 which he was willing and ready to pay.
2. Together with the plaint the Plaintiff sought vide his application dated 18th June, 2018 temporary orders of injunction restraining the disposal of the said property pending the hearing and determination of the suit herein.
3. When the said application came before **Kariuki, J** ex parte on 19th June, 2018, the Learned Judge granted the said temporary orders for 7 days pending the inter partes hearing on condition that the Plaintiff settles the auctioneers charges within the said period of 7 days. The matter was then fixed for mention on 27th June, 2018
4. It is clear that the said conditional order was not complied with.
5. In the instant application dated 25th July, 2018, the Plaintiff seeks that this Court enlarges or extends to him the time within which the said orders are to be complied with. In the meantime he seeks that there be an order restraining the Defendants from disposing of the suit property.
6. According to the Plaintiff, he served the said order on the Respondents on 20th June, 2018 and sent a reminder to them to furnish him with the fee note on 22nd June, 2018. However it was not until 28th June, 2018 after the date of the *inter partes* hearing of the application that he was served with auctioneers fee note. He however contended that due to the timelines, he was financially unable to comply with the conditions set by the Court.
7. The Plaintiff lamented that the orders of this Court made on 19th June, 2018 left him at the mercy of the auctioneers as both no room and opportunity were afforded to him to be provided with the auctioneers bill and the fee note as to challenge the same.
8. The application was however opposed by the Respondents.
9. According to them, they raised and shared the auctioneer's bill with the applicant which bill the applicant failed to meet. In their views, since the applicant has blatantly and without any reason disobeyed the conditional order, he is not deserving of audience before this Court. It was contended that as the conditional order had not been varied the same ought to have been complied with. It was contended that though the applicant admitted indebtedness to the 1st Defendant, he has not sought to offset the same.
10. It was disclosed that on 20th June, 2018, the Plaintiff visited the 2nd Defendant's offices to serve the Court order and on the same day he was furnished with the 2nd Respondent's invoice in the sum of Kshs 216,300.00 to which the Plaintiff was at his request given 20% discount. Thereafter the Plaintiff was not heard from and he never settled the said bill and has never done so todate.

11. It was therefore deposed that the Plaintiff's claim that he was never served with the invoice was untrue as he has admitted that he was unable to settle the Auctioneers fees due to financial constraints.

12. To the Respondents, as the order in question has lapsed there is nothing to be extended.

Determinations

13. I have considered the application, the affidavits in support and opposition to the application and submissions of counsel.

14. Section 95 of the *Civil Procedure Act* provides as hereunder:

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.

15. Order 50 rule 6 of the *Civil Procedure Rules*, on the other hand provides 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.

16. It therefore follows that as long as the justice of the case requires the Court may on its own motion or upon an application by a party enlarge time fixed for doing any act or taking any proceedings under the *Civil Procedure Rules*, or by summary notice or by order of the court and it matters not whether the time appointed or allowed has expired. It is therefore not correct as contended by the Respondents that this Court can only extend the time where the application is made before the expiry of the time allowed by the Rules or the Order of the Court. That discretion in such matters covers periods before or even after the set time has expired was appreciated by **O'kubasu, Mbito & Mwera, JJ** in **M'maitsi vs. Lusweti & Another [2008] 1 KLR 501.**

17. In my view when the time is extended, the period begins to run afresh with the period as extended. In other words where there was a conditional order as in this case, the order would still be deemed to be in force and there would be no reason to seek that the order be revived otherwise it would defeat the whole purpose of extending the time after the lapse of the prescribed or allowed period.

18. However it is clear from both the Act and the Rules that in exercising its powers to extend time the Court exercises a discretionary power. This being an exercise of judicial discretion, like any other judicial discretion must be exercised judicially. Accordingly, it has to be exercised on fixed principles and not on private opinions, sentiment and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. In **Rev. Peter Indalo & Another vs. Fanana Investments Civil Applications No. NAI. 119 of 1994,** it was held by the Court of Appeal that the applicant must place before the Court sufficient materials to enable the Court exercise its discretion in his favour. It was similarly held by in **Kimani vs. Kirimi & Another [2008] 1 KLR 515,** by **O'kubasu, Mbito & Mwera, JJ** that:

“We have now considered the arguments by learned Counsel in this matter and while it is not in dispute that there was non-compliance with court orders, we must hasten to add that we have discretion to extend or enlarge time...That discretion wide as it is may, must be exercised judicially. It is not automatic. The Court must consider the reasons advanced for non-compliance the duration of the delay and the petitioner's conduct...Convincing and reasonable cause should be laid before the Court.”

19. In **Mwakalu vs. Timamy & Another Nairobi HCEP No. 18 of 1993 [2008] 1 KLR 464,** the same bench held that:

“We were requested to exercise our discretion and enlarge time within which the plaintiff could file and serve the particulars. Granted, even with the strictness and necessity attending the compliance with our orders, on reasonable cause, we may consider to exercise our discretion and enlarge time. But this should be in deserving cases only. The discretion too should be exercised judicially, considering whether or not in a given case it is reasonable and just to do so...In this case we have not been given circumstances that are deserving of our exercising the discretion to enlarge time within which the petitioners should file the particulars. He had all the time from the date of a request for particulars were served on him. We were told that the petitioner is in fact outside the Country engaged in research. And he will come back sometime later to furnish fuller particulars. Even the particulars so far filed are said not to be adequate. We cannot enlarge time in such a case such as this. We are not satisfied that time should be enlarged for a party who had all the time allowed to him to do what was ordered and he did not comply.”

20. In this case the reasons advanced by the Plaintiff for not complying with the Court order was firstly that the timelines given for compliance with the Court order were not sufficient to enable him do so. The Respondents however aver that despite discussions having taken place the Plaintiff has still not shown readiness and willingness to comply with the condition. It is true that the Plaintiff herein has not given any reason why he has not complied to date. A party who seeks discretionary relief must always show that he is honest in his dealings and where indulgence is sought with respect to compliance with timelines it is always helpful if the applicant shows that he has complied with the order albeit belatedly.

21. In this case I agree with the Respondents that the conduct of the plaintiff falls below the expectations and brings into question his candidness in seeking the discretion he seeks.

22. However, this Court takes into account the fact that the Court ordered the Plaintiff to settle auctioneers fees within 7 days. Obviously at the time of the issuance of the order the Plaintiff was not aware of how much was payable to the auctioneers though the Respondents contend that the said sum became known to the Plaintiff the following day. While the Plaintiff has not denied this fact, he claims that he was financially constrained. It was therefore held by **Torgbor, Amin & Couldrey, JJ** in **Omamo vs. Oyoo & Another [2008] 1 KLR 483**, that every application to enlarge time is to be considered in the circumstances peculiar to it and that no two applications are identical.

23. While I am not entirely satisfied with the explanation given, this Court cannot shut its eyes from the allegation that the property in question is matrimonial property and that this Court (**Kariuki, J**) in the exercise of his discretion did in fact grant conservatory orders. In such matters, **Lakha, JA** held in **Touring Cars (K) Ltd & Anor vs. Ashok Kumar N. Mankanji Civil Application No. 78 of 1998** that the rule (permitting extension of time) confers the widest measure of discretion in an application for extension of time and draws no distinction whatsoever between the various classes of cases but clearly requires the Court to look at the circumstances and recognises the overriding principle that justice must be done and that prejudice or lack of it is a highly relevant matter in considering the justice; it may be an all-important one. The Learned Judge appreciated that to construe the rule with exceptional rigidity of its requirements would contrast most forcibly with the flexibility which is now a general characteristic of the rules and which ensures that justice is done.

24. It is therefore my view that in the wider interest of justice and in the unique circumstances of this case where the amount to be paid was not ascertainable until after the issuance of the Court order, time should be enlarged to to the Plaintiff to comply with the order in question.

25. However the Rules provide that such enlargement ought to be on such terms as are just. As part of the debt is admitted, I hereby direct the Plaintiff to pay the 1st Defendant the sum of Kshs 7.5 million as well as settle the auctioneers agreed fees in the sum of Kshs 151,410.00 within 14 days as a condition for enlargement of time and in default the injunctive orders issued herein will automatically lapse.

26. The costs of this application to be borne by the Plaintiff.

27. It is so ordered.

Read, signed and delivered in open Court at Machakos this 26th day of July, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Langalanga for Mr Kiget for the Plaintiff/Applicant

Mr Mugishia for the Defendants/Respondents

CA Geoffrey