



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 144 OF 2018

TITUS KILONZO MASYA.....RESPONDENT

VERSUS

1. SALALA LOGISTICS CONSULTANTS

2. KAMANDE OSCAR NZOMO

T/A SALALA LOGISTICS CONSULTANTS.....APPLICANTS

RULING

1. The Applicants filed a notice of motion application dated 2nd May, 2015 seeking stay of execution and leave to file appeal out of time. A ruling was on the 4th of June, 2018 delivered allowing the application and conditional orders granted in the following terms. That the Applicants do file appeal within 14 days from the date of the ruling and that the Applicants do deposit the entire decretal sum in a joint interest earning account in the names of the Advocates of both parties herein within the next thirty (30) days failure to which the stay shall lapse.

2. The Applicants have now filed a notice of motion dated 23rd July, 2018 seeking that this court varies the orders issued in the ruling of 4th June, 2018 and order that the entire decretal sum be deposited in court accounts pending the outcome of the appeal.

3. The grounds upon which the motion is based are in the body of the motion and the supporting affidavit of Kelvin Nguire who is the Senior Claims Officer at Directline Assurance Limited who is said to be the Insurer of the subject motor vehicle. It was contended that subsequent to the delivery of the ruling of 4th June, 2018, the Applicants filed the appeal on 18th June, 2018 and later wrote to the Respondent's advocates vide a letter dated 20th June, 2018 with attachments of account opening forms which letter required information from the Respondent in a bid to jointly open a bank account and deposit the decretal sum as directed. The Respondent's advocates responded to the letter vide theirs dated 26th June, 2018 expressing their reservations with the bank the Applicants' advocates had chosen and stated that they preferred Co-operative Bank of Kenya. It was contended that despite so indicating, the Respondent's advocates did not attach any account opening forms to the letter dated 26th June, 2018. The Applicants' advocate wrote back on 3rd July, 2018 requesting for account opening forms from the Respondent's advocates to no avail. The Respondent instead instructed auctioneers who have served the Applicants with a proclamation of the Applicants' goods which is due for attachment on 23rd July, 2018. It was contended that it is clear that the Respondent is intent on derailing the Applicants' compliance with the orders of this court and seeks to unfairly and unprocedurally execute against the Applicants. It was stated that the parties will require additional time to engage over the opening of a joint interest earning account and having the same deposited as ordered in the ruling of 4th June, 2018 and require extension of the granted period of thirty days to enable full compliance.

4. In opposition thereto, Francis Mulu who is the advocate in conduct of this matter on behalf of the Respondent filed a replying affidavit on 31st July, 2018. In it he contested that the Applicants only complied with the first limb of the orders. That the Applicants sat on their laurels and did not make any effort to open the joint account. That it is only through their letter dated 20th June, 2018 but only served on 26th June, 2018 did they purport to avail account opening forms. That the Respondent responded immediately through a letter dated 28th June, 2018 stating their preferred bank. That in the letter dated 3rd July, 2018 and received on 5th July, 2018, the Applicants asked for the account opening forms from Co-operative bank. That contrary to the false allegations by the Applicants, the Respondent availed the account opening forms together with all the accompanying documents vide a letter dated 9th July, 2018 and received on 10th July, 2018. He contended that the Respondent has in no way frustrated the opening of the joint account and stated that there is no basis for variation of the orders of 4th June, 2018.

5. The application was canvassed by oral submissions. The said were a reiteration of the averments in the affidavits and I shall not rehearse the said. I have given due consideration to the parties' dispositions, particularly the letters annexed to the affidavits. The first letter was written by the Applicants' advocates to the Respondent's advocate on 20th June, 2018 forwarding documents in respect to account opening.

The said letter was responded to by the Respondent's advocate's letter dated 26th June, 2018 indicating their preferred bank. This was followed by the Applicants' advocates letter dated 3rd July, 2018 seeking Co-operative Bank forms. By a letter dated 9th July, 2018, the Respondent's advocate forwarded the forms to the Applicants' advocates. The letter is in the following terms:

"...We refer to the above matter and enclose herein.

- 1. Account opening forms for Co-operative Bank.*
- 2. Practicing certificate for 2018*
- 3. Certificate of Registration*
- 4. Identity card*
- 5. P.I.N. Certificate..."*

6. From the content of the letter, account opening documents were sent to the Applicants' advocates. The Applicants have further not rebutted this assertion or denounced the letter dated 9th July, 2018. The record also reveals that the said letter was received by the Applicants' advocates on the 10th July, 2018 since their stamp is affixed on the letter. It is not clear why the Applicants' advocates chose to withhold this information from the court and this leads the court to draw an adverse inference against the Applicants' advocates. I however note that the Applicants' advocate acted diligently initially by filing the appeal and calling for documents before the Respondent's advocates expressed their discomfort with the Applicants' choice of bank. In the circumstances, I find that both parties are guilty of occasioning delay in the process of opening the joint interest earning account. I therefore find that it is in the interest of justice to allow the application herein all factors and or circumstances considered and vary this court's orders of 4th June, 2018 in the following terms:

- a) The Applicants' advocates do deposit the entire decretal sum in Machakos Law Courts bank account within seven (7) days pending the outcome of the appeal failure to which execution to automatically issue.
- b) The costs hereof shall be to the Respondent.

Dated and delivered at Machakos this 21st day of September 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Nagwere for Morara - for the Applicant

Mutia for Mburu - for the Respondent

Josephine - Court Assistant