



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 113 OF 2012**

**KARACHIWALA NAIROBI LTD.....PLAINTIFF**

**- VERSUS -**

**SANJIVAN MUKHERJEE.....DEFENDANT**

**RULING**

1. On 3<sup>rd</sup> February 2015 the court delivered its Ruling on the defendant's application for stay of execution pending the hearing and determination of the appeal against the judgment.
2. By its Ruling, the court ordered the defendant to provide security for a sum not less than Kshs. 10,000,000/-. The court further directed that the security to be provided by the defendant could be in the nature of immovable property, whose Title documents and Valuation Report would be deposited with the advocate for the plaintiff.
3. The court went on to make it clear that the defendant could also provide security in the nature of a Bank Guarantee.
4. Finally, the defendant was told that he had 30 days within which to make available the security.
5. If the defendant defaulted, the order for stay of execution would stand discharged.
6. On 12<sup>th</sup> March 2015 the Defendant filed the present application, through which he was seeking an extension of the 30 days period, during which he was supposed to have made available the security, which was the pre-condition for the stay to remain in place.
7. Mr. Washe, the learned advocate for the Defendant, pointed out that his client had already obtained an immovable property which was to be offered as security. The property is said to belong to **BERNARD DANIEL OWINO JOSIAH**.
8. A valuer named **VALUE LINE CONSULTING LIMITED**, had provided a Valuation Report dated 10<sup>th</sup> March 2015, showing that the property was worth Kshs. 60,000,000/-.
9. However, the Defendant had not yet been able to obtain a Certificate of Official Search from the Lands Registry. For that reason, the Defendant asked the court to grant him an extension of 30 days, in order to enable him obtain the results of the search from the Lands Department.

10. It is the Defendant's contention that he had no control over the Lands Department, and that, therefore, he should not be blamed for the delay in issue.
11. In answer to the application, Mr. Hira, the learned advocate for the plaintiff, submitted that the application was frivolous, as the Defendant had other options which he could have utilized.
12. In particular, the plaintiff pointed out that the Defendant could have provided a Bank Guarantee. The plaintiff asked the court to note the failure by the Defendant to explain why he had not taken up the option.
13. Secondly, as the order which the Defendant wishes to have extended, had lapsed, the plaintiff submitted that it could not be extended.
14. Thirdly, because the applicant had not annexed to his application, the order which he sought to have extended, the plaintiff reasoned that the application could not be entertained.
15. Finally, the attention of the court was drawn to two things, as follows;
  - a. *The owner of the property has not been shown to have consented to having the property offered as security for the stay of execution of the Decree against the Defendant, and*
  - b. *There was no proof that the property was free from encumbrances.*
16. As there was no proof that there were no encumbrances against the title, the plaintiff urged the court to draw an inference that the title was not free of encumbrances. Therefore, as far as the plaintiff was concerned, the Defendant did not deserve the assistance of the court when he had not come to court with clean hands.
17. When called upon to reply to the plaintiff's submissions, the Defendant pointed out that on 12<sup>th</sup> March 2015, Ogola J. had extended the initial order.
18. At that point, Mr. Hira advocate protested about the fact that he had never been made aware of the alleged extension of the initial order.
19. But Mr. Washe advocate informed the Plaintiff's lawyer that the advocate for the Defendant had notified the plaintiff's advocate about the extensions of the initial order. He said that the defendant's advocate wrote to the plaintiff's advocate on 16<sup>th</sup> March 2015.
20. Finally, the Defendant submitted that the question as to whether or not there were any encumbrances against the title would be answered by the results of the Official Search. And, as regards the confirmation from the registered proprietor, that he was offering the property for security, the Defendant said that that would be made available when the Official Search was being provided by the Defendant.

21. In the case of **THE NATIONAL SOCIAL SECURITY FUND VS JOHN OCHIENG OPIYO HCCA NO. 510 of 2005**, O.K. Mutungi J. said;

*"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 herein above. The court cannot validate orders, which upon expiry, have ceased to exist.*

*Before concluding, the application and the submissions by the applicant's counsel operate under a misconception that the terms **extension** and **enlargement** mean the same thing. That is not the legal position.*

*In extension of time, the extension must be applied for before the time sought to be extended has expired, whereas in enlargement the application can be made any time, even after the time has long run out”.*

22. In that case, the appellant had sought an extension of time and reinstatement of orders which had expired.

23. It was in those circumstances that the learned Judge dismissed the application, because that which had expired could not be extended.

24. As the plaintiff herein was under the impression that the Defendant did not seek extension until after the order had expired, the plaintiff relied on the authority cited above.

25. I will revert to the issue later.

26. Meanwhile, in the case of **EDWARD KINGS ONYANCHA MAINA T/A MATRA INTERNATIONAL ASSOCIATES VS CHINA JIANGSU INTERNATIONAL ECONOMICS TECHNICAL CO-OPERATION CORPORATION HCCC NO. 1227** of 1997, Visram J. (as he then was) dealt with an application for Review. The Learned Judge said;

*“That aside, the plaintiff’s application must also fail since he did not annex to his application the order which was sought to be reviewed. Without the order which the plaintiff claims to be aggrieved with, how can the court exercise the discretion given to it in favour of the plaintiff? What will be the matter of reference?”*

27. I have no doubt that that constituted an accurate statement of law. However, the same has no application to the matter before me, which is an application for the extension of an order. There is no requirement in the Civil Procedure Rules that an application for extension of time must be accompanied with the order sought to be extended. Therefore, the failure to annex the order in issue cannot be fatal to the application.

28. **The plaintiff cited the case of BARCLAYS BANK OF KENYA LIMITED VS PATRICK NJUGUNA KUBAI HCCC No. 52 of 2012** (at Milimani), to back its opposition to the application.

29. In that case, the applicant had asked the court to review, set aside or vacate the orders that had been issued on 24<sup>th</sup> January 2014, together with all other consequential orders.

30. J. Kamau J. made the following observation when determining that application;

*“Courts have wide and unfettered discretion to enlarge time to allow parties to do certain acts where time limitations have been given and to proceed to determine matters without undue regard to technicalities as provided for in Article 159 (2) (d) of the Constitution of Kenya, 2010. However, courts have to be careful when balancing this discretion by considering the consequences of certain acts which are not done within the stipulated period, in particular where there are express and clear provisions of the law regarding those time lines”.*

31. I am in complete agreement with that pronouncement of my learned sister. But I also pause to indicate that in the case at hand; there was no question about any provisions of law that governed the time-lines in relation to the orders which the Defendant was seeking an extension of. It is the court which fixed the period within which the Defendant should have made available the security which was required as a foundation upon which the order for stay of execution would be anchored.

32. In the case of **ARBUTHNOT EXPRESS SERVICES LIMITED VS MANCHESTER OUTFITTERS SUITING DIVISION LIMITED & ANOTHER [1989] KLR 5515**, which was cited by J. Kamau J. (in the case of *Barclays Bank of Kenya Limited Vs. Patrick Njuguna*

**Kubai)** (above), the court said;

*“The general principle of law is that as far as possible, the courts should lean in favour of the trial and determination of proceedings on merit. There are yet other principles viz that delay defeats equity and that he who comes to equity must come with clean hands. The court is duty bound to balance the application of all the principles by weighing one thing against another to see which way the balance tilts”.*

33. In this case, the plaintiff submitted that the Defendant had not come to court with clean hands. However, I was unable to appreciate the manner in which the Defendant has soiled his hands.
34. The court had ordered the Defendant to provide security in the form of an immoveable property. However, the Court also indicated that the Defendant had the option of providing a Bank Guarantee.
35. By choosing to pursue one form of a security, whilst not appearing to give similar attention to the other option, the Defendant cannot be said to have soiled his hands. He had simply made an election, from the options which were available.
36. I will now revert to the issue regarding the validity of the order which the Defendant wishes to have extended. I do so by, first, making reference to the following words of Rawal J. (as she then was) in the case of **JULIUS NJOROGE MUIRA VS HARRISON KIAMBUTHI MBURU [2011] e KLR**
- “...I shall thus, without hesitation, find that the Original Summons is not in existence and all efforts to revive the same by re-issuance were null and void. The Original Summons which has lost its life cannot be resurrected... I shall quote the passage by Lord Denning in the case of **Macfoy Vs. United African Limited [1961] 3 All E.R 1169** at 1172;*
- ‘if an act is void, then it is, in law, a nullity and not a mere irregularity. It is not only bad but incurably bad... And every proceeding which is founded on it is also bad and incurably bad. It will collapse?’.*
- The non-compliance of the process of renewal is a fundamental defect which cannot be cured by inherent powers”.*
37. In this case, the Defendant has explained that his efforts to get the security was hampered by circumstances which were beyond his control. The said circumstances were the delay by the Department of Lands to make available a Certificate of Official Search.
38. Obviously, the Defendant could not take control of the Department of Lands, to ensure that he got the Certificate sooner.
39. But I also believe that the Defendant could, possibly, have gone to the Department of Lands sooner than 25<sup>th</sup> February 2015, to seek the certificate. I say so because the Defendant was well aware that he had only 30 days within which to procure the requisite security.
40. According to the Defendant, the order in issue was made on 9<sup>th</sup> February 2015. If that be correct, it implies that the Defendant waited for 2 weeks before asking for the certificate of Official Search. There has been no explanation by the Defendant for that delay.
41. In any event, by my calculations, the period of 30 days, which begun to run from the date when the court granted the stay of execution, lapsed on 11<sup>th</sup> March 2015. Therefore, by the time the Defendant came back to court, on 12<sup>th</sup> March 2015, the orders dated 9<sup>th</sup> February 2015 was no longer in force: They could not, therefore, be extended.

42. For that reason, the application fails, and is therefore dismissed.

43. But even because of the failure by the applicant to explain why he waited until 25<sup>th</sup> February 2015, to commence the process of the official search, the application would have failed.

44. Finally, I am aware that, in reality, the defendant has already had more than 30 days from the date when he brought his present application. Therefore, if he had been serious about his request, he would have already made available the security.

45. Nonetheless, the application dated 12<sup>th</sup> March 2015 is dismissed, with costs to the plaintiff.

**DATED, SIGNED and DELIVERED at NAIROBI this 17<sup>th</sup> day of April 2015.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

..... for the Plaintiff

..... for the Defendant.