



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 97 OF 2014

RAINBOW ACRES LIMITED PLAINTIFF

VERSUS

NIC BANK LIMITED.....DEFENDANT

RULING

Extension of time

[1] On 4th March 2015, this court granted the plaintiff an injunction:-

“...on condition that the sum claimed in this case shall be deposited within 45 days, in a joint earning account in the names of the advocates for the parties and the Deputy Registrar, at KCB, Milimani High Court Branch, Nairobi.

[2] The Plaintiff did not comply with the said order, but has applied in a Motion dated 17th April, 2015 for extension of the said period by 60 days. The application is supported by the affidavit sworn by **CEASER NGIGE WANJAO**. The grounds upon which the said Application is based are set out in the face of the application as well as in the affidavit and submissions filed in court. The Plaintiff argued that Order 50 Rule 6 of the Civil Procedure Rules confers upon the court unfettered discretion to enlarge time Inter-alia where a limited time has been fixed by a Court Order. The major ground is that that the Plaintiff made concerted efforts to raise the amount of 1,841,844.90 claimed by the Defendant but was unsuccessful owing to bad business and other financial constraints. Again, the amount claimed by the Defendant is substantial. The Court found that the Plaintiff has satisfied all the requisite tenets for the grant of interlocutory injunction as set out in the case of *Giella vs. Cassman Brown*. Therefore, this Application to extend time is not an abuse of the court process.

[3] The Plaintiff was of the view that the defendant will not suffer any by if the extension is granted because the bank had been paid substantial amounts and that the sums being claimed consists in disputed amounts. In any case, the Defendant still has securities titles which are by far much more valuable than the amount of Kshs. 1.8 million that is being claimed. The defendant has offered to meet the costs of the application. This application was made timeously i.e. one day before the time allowed lapsed in line with the Maxim “equity aids the vigilant but not the indolent”. The Applicant refuted claims by the Defendant that the Plaintiff misled the court as the plaintiff is still “Ready and willing to deposit the entire sum allegedly due in court”.

Application was opposed

[5] The Defendant opposed the application and filed Grounds of Opposition on 12th April 2015. Their best arguments are; (1) that the Applicant misled the court that it was ready and willing to deposit the entire sum in court. See the Applicant's application dated 10th March 2014 at ground (f) thereof. The Applicant therefore misled the Court and has come to Court with tainted hands and equity should not come to its aid. Needless to state that injunctive relief is an equitable remedy. See the case of **Patricia Ennece Chuma & Another V Kenya Commercial Bank Ltd [2007] eKLR** where the court stated;

“The plaintiff had a duty to establish that she had made all the payments, and if she failed to do so, and failed to co-operate and provide the documents to show the source of her dispute or even to prosecute the matter are the plaintiffs entitled to continue enjoying the interlocutory order of injunction.

I am not satisfied that the conduct of the plaintiffs should be encouraged. It is a settled practice in matters of this nature that delay, acquiescence and unclean hands would disqualify an applicant from an equitable relief. In the present case, the applicant is right in invoking the provisions of Order 39 (4) and to seek for the discharge of the order of injunction because the applicant who is the beneficiary failed to comply with the condition of taking accounts”.

Further the Court relied in the case of **Malindi Air Services & Another -Vs- Halima Abdinoor Hassan Civil Appeal No. 202/1998 (unreported)** where it was held;

“Granting an interlocutory injunction is a matter of discretion of the court it is granted only when there is complete and utmost good faith and when there is no material truthfulness on the part of the party seeking assistance of the court at an interlocutory stage when the court cannot perceive or judge what the final result of the case is going to be. A mandatory injunction at an interlocutory stage is rarely granted; only when the plaintiff's case is clear and incontrovertible”.

[6] According to the Defendant, the Applicant has not demonstrated whether it sought to comply with the order of the Court and that it was unable to meet the condition. It is not enough just for the Applicant to state that it has made efforts, in vain, to raise the amount claimed by the Respondent within the period ordered by the Court owing to bad business and financial constraints. The Applicant has not demonstrated what efforts it made during the period of 45 days already granted. They cannot invoke the inherent jurisdiction of the Court in this case. See the decision of the Court of Appeal in the case of **Safe Rentals Limited V African Safari Club Ltd [2011] eKLR** that;

“...Its presence casts aspersions on the ubarrima fides of the appellant and its legal advisers. This or any other court will not properly allow its process to be abused. While the court has power under both Article 159 of the Constitution and Sections 3A and 3B of the Appellate Jurisdiction Act to bear in mind the overriding objective of civil litigation, namely to facilitate the just, expeditious, proportionate and affordable resolution of matters before it and to obviate over reliance on technicalities of procedure, it should not assist a party who seeks to mislead it, as in this case”.

The Defendant urged that this application is an abuse of the court process.

[7] The Defendant submitted that it will suffer substantial loss if the order is granted as the Applicant has already enjoyed the period of 45 days granted. The court should uphold the principle that justice delayed is justice denied. The Respondent will be prejudiced delay herein. See **Warsame J.** in the case of **London Distillers (K) Ltd V Philip Kipchirchir & 2 others [2007] eKLR**. For those reasons, the Defendant urged the court to refuse the extension sought.

DETERMINATION

[8] The court has power in law to extend time for doing any act ordered by the court previously. See Order 50 Rule 6 of the Civil Procedure Rules which reads as follows:-

“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 maybe ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”

The only consideration, however, is that the power is discretionary and has to be exercise judicially and judiciously; not whimsically, not capriciously. The defined principle of law and justice which should guide exercise of this jurisdiction is that the justice of the case as dictated by the facts thereto play almost singular role of shaping the remedy the court will give. I will look at the circumstances of the case.

[9] The Applicant herein has claimed that it faced difficulties in and had bad business. It has not exactly stated the circumstances it calls difficulties and bad business. Again, I note that the application was filed on 17th April 2015- over three months ago. And since the filing of the application, the Plaintiff has not shown the real efforts it has undertaken to comply with my order of 4th March 2015. I do not think the Applicant is serious about the order of this court and may be engaging the court process to delay this matter. Delay is loathed in administration of justice. I can do no better in enunciating on this than was done by Warsame J. (as he then was) in the case of **London Distillers (K) Ltd V Philip Kipchirchir & 2 Others [2007] eKLR** that;

“In my view delay is affront to the administration of justice, delay is something to be deplored, delay is repugnant to justice, delay spoils the image of the judiciary, delay ferments public outcry against the judiciary, delay creates disharmony between the consumers of justice and the courts. Delay is a disguised disinterest in the disposal of the suit. Delay creates desolate and despair in the minds of the party affected by the delay. It is a despicable attempt to enslave a party to an endless contest. That contest must come to an end if the instigator is unwilling to end it. In this case the plaint of the plaintiff is like a despotic ruler hanging over the head of the defendants”.

[10] All factors are against the Applicant, except, however, I am inclined to grant a reasonable extension for the sake of justice. Accordingly, I will extend the time herein by only 30 days from today. If the entire sum claimed will not have been deposited as earlier ordered by the court by 31st of August 2015, the injunction herein shall lapse automatically and there will be no necessity to apply for that purpose. In the event of default, the Defendant will be at liberty to execute the action that the conditional injunction had prohibited. Costs of the application are awarded to the Defendant. It is so ordered.

Dated, signed and delivered in court at Nairobi this 30th day of July 2015

F. GIKONYO

JUDGE