

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COURTS

MISC. APPLICATION NO. 176 OF 2010

PATRICK KIMATHI MUCHEN

T/A ARIMI KIMATHI & CO.ADVOCATE.....APPLICANT/ADVOCATE

VERUS

MICHEAL MWASA KILONZO.....RESPONDENT/CLIENT

RULING

Before me is a Notice of Motion dated the 25/3/14. It is brought under Order 45(1) (a) & (b) 45(2) (1) and 51 of the Civil Procedure Rules 2010, section 3A of the Civil Procedure Act Cap 21. The judgment debtor/applicant is seeking orders that pending the hearing and determination of the suit the court be pleased to waive the condition that the applicant deposits Kshs. 1 Million within 21 days otherwise the respondent will execute the orders on 22nd March 2012 and 14th March 2013 and that the costs of the application in the cause.

The application is supported by four grounds on the face of the application together with the supporting affidavit of Mr. Michael Mwasa Kilonzo the Judgment debtor. His grounds are reiterated in the supporting affidavit. He depones as follows; that this Court gave a stay of execution of the orders of 22/2/12 and 14/3/14 on condition that he deposits one million failure to which the stay order lapses. That on the 4/10/12 he was a victim of a gun shot through the roof of the neck and he was rendered disabled. That he does not have any source of income and neither does his wife thus he is not able to raise the sum of one million. That the respondent Patrick Muchena auctioned his properties and belongings that were values in excess of 4 million and that since he is unable to raise the said amount he asks the court to waive the same and allow him to defend the suit. That the property to be sold L. R No. 337/1580 at Athi River is where he has built his home and stays with his family and is the only property he has and that if the property is sold then his family will be rendered homeless.

The respondent filed a statement of grounds of opposition under order 51 rule 14 (1) (c) of the Civil Procedure rule. The grounds are that; the application is brought to merely delay the execution process and without offering anything in furtherance of the Court orders, that the reasons given by the applicant have all been encompassed in the ruling date 5th March 2014; that litigation must come to an end and that the application is incompetent and bad in law and that the applicant has not annexed the application/affidavit, ruling/order thereof sought to be reviewed and that the application ought to be struck out with costs.

The matter was argued by both counsel in Court on the 8/4/14. Counsel for the applicant reiterated what is deponed in the applicant's affidavit. Mr. Kimanathi opposed the application. He argued that the applicant has not given any sufficient reason as the Court did note in its ruling that the applicant has not adduced any evidence of being incarcerated. Counsel submitted that the current application seeks a similar order and that the court is being asked to act in futility as far as the decree holder's position is concerned and that the judgment debtor is making no offers. He urged the Court to note that at that the time the decisions were made the applicant was disable and that he should at least settle a portion of the amount.

The application before me is brought under Order 45 of the Civil Procedure Rules that deals with Reviews. Under Order 45(1) (b) a person considering himself aggrieved by a decree or order from which

no appeal is allowed can seek a review of the order or decree if he considers that there is discovery of new and important matters, evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed on the order made or on account of some mistake or error apparent the face of the record or for any other sufficient reason.

The applicant has failed to show that his case falls under any of the said categories. Even if I were to take the last one ‘for any other sufficient reasons”, in my ruling dated 5/3/14 I analyzed the applicant’s conduct and gave a fair ruling. The applicant has made no offers at all. He knows the consequences of not complying with a Court order. This Court was aware of his condition at that time it made the order. I wonder how does the applicant survive? Has he made full disclosure of his financial status? Am in doubt. I therefore find that the applicant has not shown any sufficient cause to warrant the waiver of the condition imposed in my ruling dated 5th March, 2014. I will however give him a further 7 days from the date of this ruling to comply failure to which the respondent may proceed with execution.

Orders accordingly.

Dated signed and delivered this **17th** day of **April** 2014.

R. E OUGO

JUDGE

In the presence of:

.....Applicant /Advocate/Respondent

.....Respondent/Client/Applicant

.....Court Clerk