

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ADOPTION CAUSE NO. 20 OF 2001

A A A.....PLAINTIFF

VERSUS

G F.....DEFENDANT

RULING

This is the notice of motion dated 29th April, 2014 by which the defendant/applicant seeks *inter alia* the following orders

- “1. **THAT** there be a temporary stay of execution of the consent dated 19th day of July, 2011 and/or the decree herein pending the hearing and determination of this application *inter partes*.
3. **THAT** time to comply with the decree herein be further extended for a period not exceeding six months.
4. **THAT** costs to this application be provided for.”

On 29th April, 2014 the court did grant a temporary stay of execution. The matter came up for *inter partes* hearing on 6th August, 2014. **MR. OTARA** for the applicant and **MR. ODIPO** for the respondent made oral submissions before the court.

The application arises from a consent entered into by the parties on 19th July, 2011. This consent was duly adopted as an order of the court. This is not the first time such an application is being made. On 7th January, 2013 the same applicant did approach the court by way of a Notice of Motion seeking a stay of execution as well as a setting aside of the consent order. In my ruling of 29th April, 2013 I did grant an extension to the applicant of the time to comply with the consent for a period of twelve (12) months upto 30th April, 2014. The applicant failed yet again to meet the terms of the consent. The respondent proceeded to extract a decree dated 16th May, 2014. A temporary stay of execution of that decree was granted by this court on 29th April, 2014. The applicant is now back before court seeking a further six (6) month extension. The actions of the applicant border on abuse of court process. As I stated in my ruling of 29th April, 2013 a consent is an agreement voluntarily entered into by the parties. It is legally binding and enforceable. A consent ought not be varied except on very serious grounds such as illegality or fraud. I have considered the submissions to counsel for the applicant. He submits that a sale is imminent and that the applicant is committed to paying the monies as set out in the consent. I have considered the submissions by counsel for the respondent in opposition to the application. I am also mindful of the fact that the respondent has now had to wait over one year for the fruits of the consent judgment. This notice of motion was filed in April, 2014 seeking a six (6) month extension. Thus the extension sought would run to October, 2014. This would mean that the respondent would have to wait even longer to realize the fruits of the consent. I decline to grant the six (6) month extension requested for in this Notice of Motion. As I stated earlier a consent is an agreement entered into voluntarily between the parties and is enforceable as a contract between the two. Courts should be slow to alter and/or vary the terms of only consent except in cases of fraud and/or illegality. By seeking an extension of time the applicant in effect is seeking to vary the terms of the consent. Having said that I am also

guided by the principles espoused by sections 1(a) and (b) as well as section 3A of the Civil Procedure Code. By these provisions courts are exhorted to act in ways to enhance the “*just expeditious, proportionate and affordable resolution of civil disputes*”. Section 3A allows a court the power to make any orders necessary to meet the ends of justice and to prevent abuse of the court process. Bearing the above in mind and for reason **only** not to jeopardize the intended sale of the property (which counsel assumed the court is due to be concluded in August, 2014) I will reluctantly allow a brief extension of time to comply with said consent. I hereby grant to the applicant a further extension of forty (40) days from the date of this ruling to comply with the decree herein. Execution is stayed for **only** a further forty (40) days from today’s date. Costs of this application to be met by the applicant.

Dated and delivered in Mombasa this 15th day of August, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Njenga h/b Otara for Applicant

Ms. Aruna h/b Mr. Taib for Respondent

Court Clerk Mutisya