REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL 71 OF 2011

BETWEEN

KALENJIN AUTO HARDWARE LIMITED::::::::::::::APPELLANT

AND

CHARLES OMONDI DHATO::::::::::::::::::::::::1ST RESPONDENT

RHODA ATHIENO ODUOR (suing as the legal representative of the estate of)

GODFREY ODUOR OCHIENG(DECEASED):::2ND RESPONDENT

RULING

By its Notice of Motion lodged on 27th January, 2012 the appellant/applicant primarily seeks enlargement of time within which to comply with the consent dated 17th November, 2011. That consent was in the following terms:-

"By Consent the applicant's application dated 3rd June, 2011 be allowed on the following terms:-

(a) The appellant/applicant do deposit the entire decretal sum as security in a joint interest earning account in the names of Advocates onrecord for the parties herein within 30 days from the date of filing this consent.

application dated 3rd June, 2011 to stand dismissed and the respondent to be at liberty to execute the decree in Eldoret CMCC No.36 of 2008

The consent was then filed on 2nd December, 2011. The period within the deposit was to be made expired hence the application.

In the grounds on the face of the application, the applicant states that before the deposit could be made there were negotiations which did not bear any fruit thereby necessitating this application; that no prejudice will be suffered by either party should the application be allowed and that the order sought will serve the interests of justice.

The application is supported by an affidavit sworn by one **Mansoor Gulamali Sorathia,** a director of the applicant. There is also a further affidavit sworn by **A.K. Nyairo** counsel for the applicant. The substance of both affidavits is that negotiations delayed compliance with the consent and that the enlargement of time to make the deposit shall be in the best interests of justice.

The application is opposed and there is a replying affidavit sworn by **Francis Omondi,** counsel for the respondent. In the affidavit, the negotiations to settle the matter are denied and the jurisdiction of the court to grant the order sought is challenged.

I have considered the application, the affidavits filed both in support of the application and in opposition thereto. I have also given due consideration to the submissions of counsel. Having done so, I take the following view of the matter. Order 50 Rule 4 of the Civil Procedure Rules, which is one of the provisions of the law that has been invoked by the applicant, provides that where a limited time has been fixed for doing any act or taking any proceedings under the 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. The rule also makes it clear that such enlargement may be ordered although the application for the same is no made until after the expiration of the time appointed or allowed.

I would have thought that once the consent order was adopted by the court, it became an order of the court and the provisions of Order 50 Rule 4 would apply. The court would therefore retain the power to enlarge the time appointed or fixed upon such terms (if any) as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

In **Samuels -Vs- Linzi Dresses Limited [1980] All E.R. VOL 1 Roskill L. J.** cited with approval **Lord Denning MR** who had rendered himself as follows in **Republic -Vs- Bloomsbury and Marlebone County Court, Exparte Viller West Limited:-**

"I have one further observation to make. It is about whistler -Vs- Hancock. It seems there to be suggested that if a condition is not fulfilled

the action ceases to exist as though no extension of time can be granted. I do not agree with that line of reasoning. Even though the action may be said to cease to exist, the court always has power to bring it to life again, by extending the time.

In my opinion, the county judge had ample jurisdiction to make the order he did."

Roskill L.J. concluded his judgment in **Samuel -Vs- Linzi Dresses Limited (supra)** as follows:-

"In my judgment, therefore the law today is that a court has power to extent the time where an "unless" order has been made but not been

complied with; but that it is a power which should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored. Primarily it is a question for the discretion of the master or the judge in chambers whether the necessary relief should be granted or not."

I am persuaded by the decision in **Samuels -Vs- Linzi Dresses Limited (supra)** and agree in principle with the dissenting decision of **Githinji JA** in **Gateway Insurance Company Limited -Vs- Aries Auto Sprays Nairobi C.A. No. 317 of 2004 (UR).** In that case the question arose as to whether a court which had entered a consent judgment or made a consent order in which time for taking certain actions or steps

had been stipulated has jurisdiction to extend time so stipulated on application by a party to the consent judgment or order. The learned judge held that the consent order did not finally determine the dispute and that time could validly be extended.

In this case however, the applicant has alleged that failure to comply with the consent was caused by negotiations to settle the matter which event is denied by counsel for the respondent. I would have expected the attempt at settlement to have documentary support. Unfortunately nothing has been exhibited committing the respondent to such attempts. Besides, the applicant's director, **Mansoor Gulamali Sorathia,** acknowledged that he forwarded the cheque for the deposit to his advocates on 5th January, 2012. The actual deposit in compliance with the consent, in reality, would have had to be made after 5th January, 2012. The consent was filed on 2nd December, 2011 and the deposit should have therefore been made on or before 2nd January, 2012. So the applicant was clearly in default of the consent regarding the deposit even before the alleged negotiations were attempted. The applicant has not explained the delay before the commencement of the alleged negotiations.

As already observed the power to extent the time where an "unless" order has been made but not been complied with should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored. As the applicant in this case has not explained the delay in making the deposit, it is not entitled to the exercise of the court's discretion in its favour. In the premises, I decline to grant the order sought, not because I have no jurisdiction to wake the order, but because I am not persuaded that in the circumstances of this case the applicant is not entitled to the relief sought.

The respondent shall have the costs of the application.

It is so ordered.

DATED AND DELIVERED AT ELDORET

THIS 22ND DAY OF MAY, 2012.

F. AZANGALALA
JUDGE

Read in the presence of:-

F. AZANGALALA
JUDGE

22ND MAY, 2012