



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Suit 56 of 2006

PHYLIS JEROTICH KIMUTAI

HENRY KIPKORIR KIMUTAI(Suing as personal representatives of the Estate of Jeremiah Cheuiyot Kimutai).....PLAINTIFFS

VERSUS

KENINDIA ASSURANCE CO.

LTD.....DEFENDANT

RULING

The Notice of Motion dated 25/4/2012, is brought pursuant to **Sections 1A, 1B, 3A, 63(e), 95** and **Order 50 Rule 6** of the **Civil Procedure Rules**. The applicants seek an order of temporary stay of execution of part of the order made by the court pending the hearing of the application and that the court be pleased to enlarge time fixed for opening of a joint account and depositing of cash by a further 120 days or such period as the court may deem just and expedient.

On 23/3/2012, this court granted an order of stay of sale of the applicant's property on condition that the applicant deposit Kshs.4 million in an interest earning account of both counsel of the applicant and respondent within 30 days. The applicant has been unable to comply with the said order for reasons that the applicant did not anticipate that the court would make such an order; that the amount is colossal and efforts are being made to raise the said sum. Phyllis Jerotich Kimutai depones that she is engaged in subsistence farming which does not generate much income and the estate of her late husband does not have much income; that the family has been able to raise Kshs.1.2 million and she requests the court to allow her time to get the balance so that it can be invested as ordered by the court. She further deponed that the suit property is worth about Kshs.60 million and if sold, the applicants are bound to suffer substantial loss.

Praful Damji, the Senior Assistant General Manager with the respondent swore a replying affidavit dated 7/7/2012 in which he states that the application is an abuse of the court process, unmerited as this matter is 6 years old; that the applicants have the means and ability to deposit the said sums and comply with the court order; that the applicants have failed to comply with the courts' order and the same cannot be extended, as this court is *functus officio* and that no good reason has been adduced to warrant the

extension of time.

Under **Sections 1A, 1B, 3A, 63(3)** of the **Civil Procedure Act** this court is enjoined to ensure that the court does substantive justice to the parties without undue regard to technicalities. The applicant is invoking the court's inherent jurisdiction.

The court does admit that Kshs.4 million is indeed a colossal sum and the applicant is not refusing to comply with the court's order but is seeking the court's indulgence to be allowed time to reorganize themselves to comply with the court's orders. The subject property is said to be worth Kshs.60 million. If it were to be sold, the applicant will indeed suffer substantial loss. This matter has been pending since 2006. Even if the court grants the prayer sought, a period of 120 days would not make much difference. In any event, the respondent can be compensated in terms of costs.

I do appreciate that the respondents have their rights too to protect but this court has to maintain that delicate balance so that **Sections 1A** and **1B** of the **Civil Procedure Act** are not applied to defeat the purpose for which they were enacted. In the end, I do find that if I do not grant the order sought the prejudice that the applicants may suffer will far outweigh that of the respondent. Therefore this court does exercise its discretion and will allow the applicant 90 days from today's date, within which to deposit the sum of Kshs.4 million in a joint interest earning account of both counsel for the applicant and the respondent. In default, the orders do lapse automatically. The applicant will bear the costs of this application.

DATED and DELIVERED this 27th day of July, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Weda for the applicant

N/A for the respondent

Kennedy – Court Clerk