REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL CASE NO. 106 OF 2009

SOLOMON KINOTI ……..……..... 1ST PLAINTIFF
DIRECTLINE ASSURANCE CO. LTD ..... 2ND PLAINTIFF

VERSUS

THE HONOURABLE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA *being sued for and on behalf of the* COMMISSIONER OF POLICE *and on behalf of the* DIVISIONAL TRAFFIC OFFICER, NANDI NORTH AND/OR THE OFFICER IN-CHARGE KITSONOI, KAIMOSI AND KAPSABET POLICE STATIONS …….....…….
……. DEFENDANTS

AND

JOSEPHINE A. KABOLE (ORIGINAL PLAINTIFF IN KAPSABET P.M.C.C NO. 23 OF 2008) AND 103 OTHERS …….....……
INTERESTED PARTIES

RULING

The first and second plaintiffs' Notice of Motion dated 11th April 2011 seeks the following orders:-

(1) That the application be certified urgent and be heard *ex-parte* in the first instance and on priority basis.

(2) That the Court be pleased to dispense with the service of the Notice in the first instance.

(3) That the Court direct and order the defendant, the interested parties and their respective advocates and the presiding Magistrates at the Hamisi Law Courts and Kapsabet Law Courts to comply with the directions and orders of the Court made on 18th June 2009 by the Hon. Lady Justice Mwilu.

(4) That the Court do grant an early date and/or give directs for the inter parties hearing of the Plaintiffs' Notice of Motion dated 16th June 2009 and filed in Court on 17th June 2009.

(5) That in terms of the existing High Court Order of 18th June 2009 made herein by Justice Mwilu,

this Court do grant a stay of proceedings in all the 104 cases mentioned in paragraph 12 of the plaint annexed to the Plaintiffs' Notice of Motion filed herein on 17th June 2009 and in particular 35 civil suits filed at Kapsabet Principal Magistrate's Court and 69 Civil suits filed at Hamisi Resident Magistrate's Court, pending the inter parties hearing and determination of the plaintiffs' suit as set out in the Plaint dated 16th June 2009 and filed in Court on 17th June 2009.

(6) That in the exercise of its constitutional supervisory jurisdiction over Subordinate Courts set out under Article 165 (6) and 165 (7) of the Constitution, this Court makes any orders or give directions it considers appropriate to the Hamisi and Kapsabet Magistrate's Courts in order to ensure the fair administration of justice and in particular, to give directions in respect of the meaning and purport of the High Court ruling dated 30th September 2010 and direct that the said ruling did not and has not set aside or vacated the earlier High Court's Order of 18th June 2009 by Lady Justice Mwilu staying proceedings in all the 104 cased filed at Hamisi and Kapsabet Magistrate's Courts.

(7) That costs of the application be in the cause.

The Notice of Motion contains the grounds for the application which are in turn supported by the facts contained in the lengthy supporting affidavit by the Plaintiff's legal advisor dated 11th April 2011.

Replying affidavits and/or grounds of opposition were filed by most of the respondent/interested parties in opposition to the application.

The arguments for and against the application were presented by way of written submissions duly filed herein by the plaintiffs, the defendant and the interested parties. The said rival submissions have been considered by this Court in the light of the grounds for the application and what becomes apparent as the basic point for determination is whether the plaintiffs are entitled to the prayers sought.

As regards **prayers (1)** and **(2)**, these have already been overtaken by events. The application was certified urgent and presented ex-parte in the first instance, service of the Notice of Motion having been dispensed with.

As regard **prayer (3)**, it is desired that this Court directs and orders the respondents and their respective advocates including the Presiding Magistrates at the Hamisi and Kapsabet Law Courts to comply with the directions and orders made by Mwilu J. on the 18th June 2009.

It is contended by the Plaintiffs that the said Orders were for stay of proceedings in all the 104 cases mentioned in paragraph 12 of the Plaint filed herein pending inter-parties hearing and determination of the suit.

An extract of the Order is annexed to the Plaintiffs' supporting affidavit and marked exhibit "*SK.2*".

Paragraph (2) of the Order shows that proceedings in the material 104 cases filed at both the Kapsabet and Hamisi Magistrate's Courts were stayed pending inter-parties hearing and determination of the suit. However, paragraph 4 of the Order indicated that the matter was to be heard inter-parties on 1st July 2009. It is the plaintiff's contention that the order remains valid and enforceable since it has neither been set aside and/or vacated and that the respondents/defendants/interested parties together with their respective Advocates and the Presiding Magistrates of the Hamisi and Kapsabet Magistrate's Courts who were all served have a duty to comply with the order but in utter disregard of the order most of the said 104 cases have been set down for hearing by the respondents/interested parties and their Advocates.

In their respective grounds of opposition and submissions, the interested parties/respondents contend that the Order granted by the Court on 18th June 2009 lapsed on the 29th July 2009 as it was not extended.

If indeed the Order remains valid to date as contended by the plaintiffs then it would be utter

contempt of a valid Court Order if the interested parties through their respective Advocates have gone ahead or are in the process of setting down any of the material 104 cases for hearing before the Magistrate's Courts at Kapsabet and Hamisi.

Disobedience of a Court Order is actionable and a matter not to be taken lightly. It matters not that the order was rightly or wrongly issued. It must be obeyed until such time it is vacated and/or set aside. The interested parties maintain that the material Order made on 18th June 2009 is no longer valid in as much as it lapsed on the 29th July 2009.

For this Court to determine whether or not the Order is still valid, guidance has to be derived from the Court's own record.

It was indicated hereinabove that paragraph (4) of the Order showed that the matter was to be heard inter-parties on 1st July 2009.

This was a clear implication that the Order granted on the 18th June 2009 was temporary pending the hearing and determination of the application dated 16th June 2009 which prompted the granting of the order in the first place.

The inter-parties hearing of the application was expected to confirm the validity and operation of the order pending the hearing and determination of the suit. The extracted order annexed to the plaintiffs' supporting affidavit and which is also contained in the court record implied that the application dated 16th June 2009 was heard inter-parties and the ex-parte interim orders validated and confirmed pending the hearing and determination of the suit.

It is this Court's view that the extracted Order was misleading and erroneous. It did not take into account the true and actual intention of the Court when it made its order on the 18th June 2009. It is obvious that the Court could not have intended that the interim order would remain in force pending the hearing and determination of the suit. Otherwise, paragraph (4) of the order would have been omitted.

The said paragraph presupposed that the application dated 16th June 2009 was yet to be heard inter-parties for confirmation of the interim order until the hearing and determination of the suit. To date, the application has not been heard inter-parties and this explains the reason behind prayer (5) of the present application. The prayer is an attempt by the applicant to obtain what could have been obtained two years back when there was adequate opportunity to do so.

It would not be far-fetched for this Court to opine that the plaintiffs were all along aware of the error pertaining to the disputed order but opted to lay back and partake full advantage of the order much to the detriment of all the other parties interested in this matter. Such conduct amounted to an abuse of the Court process.

Be that as it may, the plaintiffs' application dated 16th June 2009 was for "inter-alia" an Order to stay proceedings in 104 civil cases filed at the Kapsabet and Hamisi Magistrate's Courts. The same prayer is repeated herein (i.e. prayer 5). Prayer (4) herein is a request to have the application dated 16th June 2009 accorded an early hearing date. The Court record shows that the application was heard ex-parte in the first instance on 18th June 2009 when the disputed order was granted. It was then that the application was slated for inter-parties hearing on 1st July 2009 on which date it was placed for hearing before **Osiemo J,** (as he then was). However the application was not heard on that date due to the preliminary objections lodged by some of the respondents. Both the application and the preliminary objections were stood over to the 29th July 2009 but in the meantime, the parties agreed to have the issue relating to the extension of the interim orders be determined on 15th July 2009. The said interim orders are those issued ex-parte on 18th June 2009. They were accordingly extended to the 15th July 2009.

This consensus by all the parties to have the issue pertaining to the disputed orders be determined

on 15th July 2009 and the extension of the interim orders to that date was a clear and logical demonstration of the fact that the orders made by the Court on 18th June 2009 in relation to stay of proceedings were to operate pending the hearing inter-parties of the application dated 16th June 2009 rather than pending the hearing and final determination of the suit. This was also a further demonstration that the prayer for stay of proceedings in the application dated 16th June 2009 was framed in a way intended to mislead the Court into granting an interim order pending inter-parties hearing and determination of the suit rather than the application. Indeed, the Court was misled such that the extracted order showed that it was to operate until the hearing and final determination of the suit.

When the matter came up before Osiemo J, on the 15th July 2009, the parties yet again consented to have the interim orders extended upto the 29th July 2009 when the preliminary objections and the application dated 16th June 2009 were expected to be heard in the presence of all the parties.

On that 29th July 2009, the first preliminary objection raised by the learned Counsel, **Mr. Wafula**, was orally heard at length by Osiemo J. However, it was not concluded and was adjourned to the 28th September 2009 to be heard for three days.

It is instructive to note that when the preliminary objections and the application 16th June 2009 were adjourned to the 28th September 2009, the interim orders in place and valid at the time were not extended. Neither was there an order by the Court for the existing status quo to be maintained. Therefore, by the time the matter came up for further hearing on the 28th or 29th September 2009, the interim orders issued on 18th June 2009 had already lapsed and ceased to be valid for any meaningful enforcement.

On 29th September 2009 when the parties again appeared before Osiemo J, they agreed to file written submissions on the preliminary objection and have the matter mentioned on 11th November 2009 to take a date for the Court's ruling. Nothing was said or mentioned about the interim orders which had since lapsed on 29th July 2009. This implied that the parties were satisfied with the existing state of affairs otherwise the issue of the interim orders would have been raised to erase any doubt regarding the invalidity thereof at that juncture and beyond.

On 11th November 2009, the matter was mentioned before **Mwilu J**, who fixed it for further mention on 16th December 2009.

Somehow, the matter was never mentioned as scheduled. Instead, it was mentioned on 17th February 2010 when Osiemo J, intimated that the pending ruling would be delivered on the 24th March 2010. However, the ruling was not delivered on that date. It was delivered on 15th December 2010 by **Angawa J**, after she had ordered that the proceedings be typed. This was done on 21st July 2010 and on the 15th December 2010 the ruling was delivered on the basis of the arguments presented by the parties before Osiemo J.

In effect, the preliminary objections raised by some of the respondents were dismissed. This paved the way for the hearing inter-parties of the plaintiffs' application dated 16th June 2009 which was the genesis of the disputed orders made on the 18th June 2009.

After the dismissal of the preliminary objections nothing was heard of this matter until the 11th April 2011 when the present application was filed and heard ex-parte in the first instance by this Court which granted fresh interim orders pending the hearing inter-parties of the application. In that regard, the parties agreed to present their respective arguments by way of written submissions. To date, the hearing inter-parties of the application dated 16th June 2009 has not commenced but the plaintiffs purported to continue enjoying the interim orders granted on the 18th June 2009 which orders were deemed and did in fact lapse when they were not extended by the Court on the 29th July 2009.

In the circumstances, it would be improper and unlawful for this Court to give directions and orders as prayed by the plaintiffs in prayer (3) of the present application. The plaintiffs are not entitled to the orders sought therein.

As regards prayer (4), it is an acknowledgement by the plaintiffs that the application dated 16th June 2009 is still pending for hearing inter-parties. It is that application which will decide whether or not there would be stay orders in the material 104 civil cases pending the hearing and determination of the suit.

Since it is apparent that the plaintiffs went into a deep slumber after the dismissal of the preliminary objections to the application dated 16th June 2009, it would be unjust and unfair to favour them with a hearing date for the same on priority basis. They have to take a date in the registry in the normal manner. Consequently, prayer 4 must also fail.

As regards **prayer (5)**, it is an outright abuse of the Court process. The plaintiffs were granted all the opportunity to prosecute their application dated 16th June 2009 and obtain the orders being sought but they failed to do so despite the fact that all along they enjoyed the interim orders granted on 18th June 2009 even after they had expired on the 29th July 2009. They are now seeking the same orders in this application. This is conduct unbecoming and would not attract favourable exercise of discretion.

The plaintiffs are not therefore deserving of prayer (5). As regards **prayer (6)**, this Court would not exercise its jurisdiction conferred by the Constitution to aid a party who has been indolent and abusive of the Court process. It did not matter that there was an Order made by the High Court in Nairobi staying all suits and proceedings against the plaintiffs. This case was alive at the time and the application dated 16th June 2009 was pending for inter-parties hearing. The plaintiffs were not precluded from setting a date for the hearing of the application if not a mention date for the Court's direction in view of the Nairobi High Court Order.

It would appear that the plaintiffs operated under the false notion that the interim orders granted by the Court on 18th June 2009 were still valid even after the Court failed to extend them on the 29th July 2009. As of the time of the dismissal of the preliminary objections to the application dated 16th June 2009, the interim orders had since lapsed on the basis that they were not extended as required on 29th July 2009 when the hearing of the first preliminary objection commenced and adjourned to 28th, 29th and 30th September 2009. The plaintiffs did not on that date or any other date move the Court for the extension of the interim orders. The Orders became stale and expired.

The plaintiffs would also not be entitled to the orders sought in prayer (6).

As regards **prayer (7)**, costs follow events and may not be in the cause in the present circumstances. In the end result, this application is in its entirety devoid of merits. It must and is hereby dismissed with costs to all the respondents/defendants/interested parties.

J. R. KARANJA
JUDGE

[Delivered and signed this 7th day of July 2011]