



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO 91 OF 2004**

**TAHIR SHEIKH SAID**

**TRANSPORTERS.....PLAINTIFF**

**VERSUS**

**INTERSTATES TWO THOUSAND**

**LTD.....DEFENDANT**

**RULING**

The application herein is a Notice of Motion dated 24<sup>th</sup> August 2011. The same is brought under Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, and Section 1A, 1B, 3A and 63(e) and 80 of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the law.

The applicant seeks for orders that:-

- (1) There by a stay of further orders herein pending the hearing and determination of this application.
- (2) That the Honourable Court be pleased to review, and set aside the orders made herein on 6<sup>th</sup> April 2011.
- (3) The suit herein be reinstated.
- (4) The costs of the application be in the cause.

The 1<sup>st</sup> prayer herein has already been dealt with as the matter was brought to court under a certificate of urgency dated 24<sup>th</sup> August 2011, and the same was granted.

In support of the application, the applicant has relied on several grounds which are detailed out on the face of the application. The Applicant has also relied on the affidavit sworn by one Michael Mutuku

Maweu and the annexures thereto. The application is opposed and in doing so, the Respondent has filed grounds of opposition.

In a nutshell, the Applicant submissions are that on the 6<sup>th</sup> June 2011, the parties entered consent to the Respondent's application dated 28<sup>th</sup> September 2010. That application was seeking for the dismissal of the suit. However, in the consent, the parties agreed that, the case be fixed for hearing within 90 days or it be dismissed for want of prosecution.

However, due to a directive by the PRESIDING JUDGE, barring the fixing of any hearing/trial dates (as the Court diary was full) as a result of inadequate Judges, the suit was not set down for hearing within the time set. As a result, by the 6<sup>th</sup> July 2011 the suit was deemed to be dismissed.

The Applicants depone that the Counsel who entered into the said consent, on behalf of Plaintiff did so without instructions and/or **honest mistake error** and/or in **ignorance** of the fact that the order was/is **unexecutable**.

That indeed at that time, there was a final **Judgment** against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

The applicants submit further, that they have been eager to prosecute the case. That they have filed a **list of documents** and **Statement of Issues**. That the suit is a claim for a substantial amount of Ksh.47,854.600 That the application is timeous in the premises. That, indeed the Respondent herein has threatened to file a Bill of Costs.

The application is opposed in the Grounds of Opposition. The Respondent submitted that the Plaintiff has not demonstrated efforts made to comply with the Consent Order. That, the Application herein is calculated to frustrate the Defendant, and delay the matter.

That the said Consent, was entered into by Counsels who had full capacity and authorities, hence there is no proper grounds or cause to violate the Consent so recorded. That the applicant should have applied for the enlongement of time if this was impossible to set the Suit down for hearing. The respondents thus submitted that the application herein is ill-conceived and it is otherwise unsustainable in law and ought to be dismissed accordingly.

I have considered the application in total and the grounds in opposition. I have also considered the affidavit in support of the application and the annexures. I find that the explanation given by the applicant that there was a directive by the PRESIDING Judge that no more matters should be fixed has not been rebutted. If that is the case, then the delay and/or failure to fix the matter is understandable. That directive seems also to have frustrated the parties' ability to adhere to the terms of the Const. Be it as it were, I think the Applicant should have followed up the matter thereafter. Therefore, the Respondents submissions that the matter is delayed is not in vain.

As regards the lack of authority by the Counsel for the Applicant (who entered into that Consent on their behalf), I find that Claim unsupported as the said Counsel has not supported, the same vide an affidavit or otherwise.

All in all, in the interest of justice, I order the Suit be and is hereby be reinstated. That the same be set down for hearing within two months/weeks of the Orders herein. That the costs of the application to the Respondent

**G.L. NZIOKA**  
**JUDGE**  
**19/10/2011**

Dated and delivered at Mombasa in an open Court.

**G. L. NZIOKA**  
**JUDGE**  
**19/10/2011**

In the presence of both Counsels for the parties

Oliver – CC

**G. L. NZIOKA**  
**JUDGE**  
**19/10/2011**