



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Suit 155 of 2008**

**PANKAJ NANALAL NATHWANI ..... PLAINTIFF**

**V E R S U S**

**BRANDED FINE FOODS LIMITED ..... DEFENDANT**

**R U L I N G**

The application before the court is brought by way of a Chamber Summons dated 4<sup>th</sup> March, 2009 and taken out under O.XXI rule 22; O. XLIV rule 1(1) (a) of the Civil Procedure rules, and Sections 3A and 63(c) & (e) of the Civil Procedure Act and all enabling provisions of the law. The first two prayers sought orders that the application be certified urgent and that the plaintiff be restrained from evicting the applicant pending the hearing of the application inter partes. Both prayers were granted, leaving the following prayers outstanding –

1. *THAT the Plaintiff whether by himself, his agents, servants and/or employee be restrained from evicting the Defendant from the suit premises on the basis of the eviction Notice issued by M/s MAKINI AUCTIONEERS AGENCIES dated 20<sup>th</sup> February, 2009 or any other unauthorized person.*
2. *In the alternative, this Honourable Court be pleased to review the Order issued herein on 5<sup>th</sup> November, 2008 and extend the time within which the Defendant ought to vacate.*
3. *THAT costs of this application be provided for.*

The application is supported by the annexed affidavit of Iqbal Valli, the defendant's managing director, and is based on the following grounds-

- (a) *THAT the Plaintiff has instructed an unauthorized person to carry out an illegal and/or irregular eviction against the Defendant.*
- (b) *THAT the intended eviction against the Defendant is therefore irregular and may result in loss and damage to the defendant if carried out irregularly.*
- (c) *No valid eviction order has been issued by this court.*
- (d) *THAT the Defendant's Director and his family are unable to move out of the house immediately*

as a result of issues that arose after the signing of consent in court.

For ease of reference, I feel constrained to set out herein the consent judgment between the parties which was in the following terms-

*I. That judgment be and is hereby entered*

*i. for the Plaintiff against the Defendant for the accrued mesne profits of Kshs. 255,000/- and further mesne profits accruing at the rate of Kshs. 85,000/- per month which sums should be paid to the Plaintiff within a period of 30 days from the date of such accrual.*

*ii. That the defendant vacates and hands over vacant possession of the suit premises on or before the 31<sup>st</sup> January, 2009, and in default an eviction order to issue immediately in terms of prayer 1(c) of the notice of motion dated 10<sup>th</sup> September, 2008.*

*iii. The defendant to pay costs of this suit and the costs of this application, which costs are to be agreed upon and in default the same to be taxed.*

*iv. That the Plaintiff be at liberty to execute the decree pursuant to this order in default of the terms of the order herein.”*

With the approval of the court, M/s Swaleh & Company, Advocates for the Defendant, and Muturi Gakuo & Kibara, Advocates for the Plaintiff, filed and exchanged written submissions. Having considered the pleadings, the submissions of counsel and the authorities cited therein, it seems to me that these raise three main issues for determination. These are whether Auctioneers can legitimately evict the defendants or whether this is the preserve of court bailiffs; whether O. XXI rule 30 of the Civil Procedure Rules has been complied with; and whether the defendants are entitled to a review of the consent judgment.

Regarding the use of Auctioneers to evict the applicant, it is significant that Section 34 of the Auctioneers Act, No. 5 of 1996, amended the Distress for Rent Act by deleting the word “*bailiff*” wherever it occurred and by substituting therefor the words “*licensed auctioneer*.” Whatever was the province of the bailiff under that Act is now the preserve of licensed auctioneers. Without attempting to anticipate what is likely to happen under O. XXI rule 30 of the Civil Procedure Rules or otherwise, it is to be hoped that all parties will obey the law to the letter until this matter is safely out of the way. It is premature to entertain anticipatory fears. The time for O. XXI rule 30 is still to come.

This leaves outstanding only the issue of review. The circumstances under which a court may undertake a review of its order are clearly set out in O. XLIV (1) of the Civil Procedure Rules. This rule is in the following words-

*“1. (1) Any person considering himself aggrieved-*

*(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed*

*and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”*

The first question that one asks oneself is whether the applicant is eligible to make an application for review of a consent order. Section 67(2) of the Civil Procedure Act does not sanction any appeal to lie from a decree passed by the court with the consent of the parties. At case law, Law, Ag P. of the then

*“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani v. Kassam (1952)19 EACA 131 where the following passage from Seton on Judgments and Orders, 7<sup>th</sup> Edn., Vol. 1, p. 124 was approved:*

*‘Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement’.*”

Since an appeal cannot lie against the consent order, the applicant falls under O. XLIV rule 1(1) (b) and qualifies to apply for review.

The only grounds alone under which an application for review may be preferred are-

- (i) *discovery of new and important matter or evidence which was not within a party’s knowledge at the time when the decree was passed or the order made;*
- (ii) *an error apparent on the face of the record.*
- (iii) *any other sufficient reason.*

No matter the ground under which the application was made, this must be done without unreasonable delay. Whether delay is unreasonable or not will depend on the circumstances of each particular case.

On the facts of this case, the consent orders sought to be reviewed were made on 5<sup>th</sup> November, 2008. Under Clause 2 of the consent, the applicant was required to vacate and hand over vacant possession of the suit premises on or before the 31<sup>st</sup> January, 2009, and in default an eviction order to issue forthwith. The applicant did not vacate the premises on or before 31<sup>st</sup> January, 2009. It took him a notice from some Auctioneers to react, and his reaction was not to comply with the notice, but to fight it. The Notice was dated 20<sup>th</sup> February, 2009, and this application is part of that fight. The Auctioneers Notice gave the applicant 14 days within which to vacate the suit premises, and instead of reacting promptly, the applicant filed this application on 4<sup>th</sup> March, 2009, just two days before the expiry of the 14 days’ notice. Against that background, it is my considered opinion that this application was filed after unreasonable delay. In the first instance, the period within which the applicant was supposed to vacate the suit premises had already expired by 31<sup>st</sup> January, 2009. And after the auctioneer gave the applicant 14 days to vacate, the applicant did not file this application promptly. Instead, he waited until 2 days before the expiry of the Auctioneers Notice to challenge it. If the applicant genuinely needed a review of the consent orders, he ought to have filed this application well before 31<sup>st</sup> January, 2009, but not 2 days before the expiry of the 14 days notice served upon him on 20<sup>th</sup> February, 2009. In that context, the delay was unreasonable. One of the grounds for the review of the order is therefore unsatisfied.

If the application had been filed without unreasonable delay, the applicant would have had to demonstrate that there was discovery of new and important matter which was not within his knowledge at the time when the consent order was entered into, or that there was an error apparent on the face of the record, or any other sufficient reason. The applicant’s reasons for wanting an extension of time to stay in the suit premises are set out in paragraph 8 of his supporting affidavit in which he deposes-

*“THAT I require more time before I can move out of the house due to the following reasons-*

- (a) *THAT my father who is presently aged 83 years came to visit me and my family late last year but his medical condition worsened requiring him to be placed on bed rest. It is therefore almost impossible*

*for us and my sick father to move out of the suit premises immediately in view of his condition. Annexed hereto is a true copy of a medical report marked as "I.V.2"*

*(b) THAT our Son Aleem Valli Iqbal who is presently a final year candidate at the Agakhan Academy Mombasa will be sitting for his examination in May/June 2009 and any movement to another house may affect his preparation for and performance in his examination. Annexed hereto is a true copy of a letter from the School marked as "I.V.3."*

The applicant says that his aged father came to visit him "late last year." It is very significant that he does not disclose the exact date when his father came to visit. "Late last year" could mean any time including October, November and December. Whenever it was, the applicant knew well before 5<sup>th</sup> November, 2008, that he had until 31<sup>st</sup> January, 2009, to vacate the suit premises. And yet he does not seem to have made any effort to find any alternative accommodation. Whether his father came before or after the date of the consent orders, the applicant knew all along that his time to occupy the suit premises was limited. His father's condition is not a reason but an excuse for overstaying his welcome. And his doctor's letter does not help matters. It says that the applicant's father "arrived back to Kenya early this year." But the doctor's letter is not dated! What year is he talking about? And if by "early this year" was meant early in 2009, that would be at variance with the applicant's version of the date since he says on oath in paragraph 8(a) of his supporting affidavit that his father came to visit "late last year." It is obvious that one of these two versions is not true, or even possibly both of them.

Secondly, the applicant says in his affidavit that his father was placed on bed rest. And then the doctor says that he has asked the old man "to come for periodic review." If he is "on bed rest" as deposed by the applicant, how does he go to see the doctor for periodic review? One would have thought that it would be the doctor who would be going to see him. If the patient is going to see the doctor for periodical review, then he must be in a position to travel, and that means he can also move to another house.

As for the applicant's son being a final year candidate who is sitting his examination in May/June, 2009, this fact was known a long time before November 5, 2008, when the consent orders were signed. The applicant probably knew that fact even before he registered his son in that School. The timing of those examinations cannot, therefore, be used as an excuse for not complying with the consent orders.

Finally, the applicant states in paragraph 11 of his supporting affidavit that the plaintiff will not suffer any prejudice if the time to vacate is extended. I cannot pretend to know what the plaintiff plans to do with his property, but since he was expecting the applicant to vacate the premises by 31<sup>st</sup> January, 2009, he would almost certainly have made arrangements to lease the property to someone else, and an extension of time is clearly prejudicial to the plaintiff.

For the above reasons, this application lacks merit and it is hereby dismissed with costs.

Dated and delivered at Mombasa this 3<sup>rd</sup> day of April, 2009.

L. NJAGI

JUDGE