



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL APPEAL 254 OF 2007
INDUSTRIAL & COMMERCIAL DEVELOPMENT
CORPORATION1ST APPELLANT
JOSHUA OMUKANDA t/a
ESHIKHONY AGENCY2ND APPELLANT
AND
HANNAH MORAA BORUMA (suing as the Legal Representative of
PATRICK BORUMA MARANGA.....1ST RESPONDENT
RICHARD MIRIERI NYATWANGA.....2ND RESPONDENT

RULING

1. The application before court is the Appellant's Notice of Motion dated 19/08/2009. The same is brought under Order 49 Rule 15 of the Civil Procedure Rules and all other provisions of the law seeking an order for enlargement of time within which the Appellants can deposit the decretal amount in court.
2. The application is premised on 7 grounds on the face thereof, the chief of which is that the Appellant's advocate was unable to comply with this court's order (Hon. Mr. Justice Waweru) of 30/06/2009 for reasons that soon after the said orders were issued, counsel fell ill on 01/07/2009 and only returned to the office on Friday 17/07/2009 after the 14 days allowed for deposit of the decretal amount had expired. The Applicant says that the deposit was made on 20/07/2009 instead of 14/07/2009. The Applicant prays that the time for the making of the deposit of Kshs.500,000/= be enlarged from 14/07/2009 to 20/07/2009 when the deposit was made.
3. The application is also premised on the sworn affidavit of Elias Ngugi Mwenda, advocate who depones that the delay in making the deposit was caused by the fact that he was taken ill on 01/07/2009 though by that date he had already done a letter to the Appellants asking for remittance of the requisite decretal amount to facilitate compliance with the court's orders made on 30/06/2009. The said letter calling for the funds is annexed to the deponent's affidavit and marked "ENM 2". The receipt for the deposit of Kshs.500,000/= and another receipt for Kshs.1,500/= being Court Collection Fee are annexed to the deponent's affidavit and marked "ENM 4".
4. Order 49 Rule 5 of the Civil Procedure Rules provides as follows:-

"5. Where a time has been fixed for doing any act or taking any proceedings under these 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, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed;

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

5. Though the application was duly served upon the Respondents, there are no replying papers in opposition to the application.
6. The Applicant says that the cheque for the decretal amount was received by the Appellants' counsel on 14/07/2009, but that the deposit of the decretal amount could not be made because of counsel's illness.
7. I have now considered the application as filed and the fact that the application is not opposed. Rule 5 of Order 49 of the Civil

Procedure Rules gives this court wide power to grant prayers for enlargement of time upon such terms (if any) as the court may deem fit. In the instant case, I believe the Appellants' counsel when he says that he was taken ill a day after the court ordered for deposit of the decretal sum into court. This court is also empowered to grant such orders even in circumstances, such as in the present case, where the application for enlargement is made after the expiration of the time allowed or appointed for the doing of the act or complying with orders of court.

8. In the premises, I am satisfied that the reasons for failure to comply with this court's order made on 30/06/2009 were beyond the control of the Appellants and their counsel. The latter fell ill and he has produced documentary proof of that fact.
9. Accordingly, the Appellants' application dated 19/08/2009 is hereby allowed as prayed. The time for making the deposit of the decretal sum into court is enlarged to and including 20/07/2009 when the deposit was made into court. The said deposit be and is hereby deemed to have been made within the time ordered by court on 30/06/2009.
10. As the Respondents did not file any papers to counter the Appellants' application, the costs of this application shall be in the appeal.

Orders accordingly.

Dated and Delivered at Nairobi this 12th day of May, 2009.

R.N. SITATI

JUDGE

Read and Delivered in the presence of:-

Mr. Mwenda (present) For 1st and 2nd Appellant

No appearance For 1st and 2nd Respondent

Weche - court clerk