



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 423 of 2005

§ *Order XLIV, rule 1, Order XLIX rule 5 of the Civil Procedure Rules*

§ *Sections 3A, 63(e) and 80 of the Civil Procedure Act*

§ *Enlargement of time for furnishing of security*

§ *Review of the order of this court*

§ *Principles applicable*

TANGANYIKA INVESTMENTS &

TRANSPORT COMPANY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

MOBIL OIL LIMITED 1ST DEFENDANT/RESPONDENT

MOBIL OIL EAST AFRICA LTD.....2ND DEFENDANT/RESPONDENT

MOBIL OIL AFRICA SALES INC... ..3RD DEFENDANT/RESPONDENT

BENJAMIN G. KINGORI.....4TH DEFENDANT/RESPONDENT

MACHARIA IRUNGU.....5TH DEFENDANT/RESPONDENT

SAMUEL NJOROGE.....6TH DEFENDANT/RESPONDENT

MRS. NDERITU.....7TH DEFENDANT/RESPONDENT

RULING

This is a Chamber Summons application dated 17th April, 2009 expressed to be brought under Order XVIX, rule 1, Order XVIX rule 5 of the Civil Procedure Rules, Sections 3A, 63(e) and 80 of the Civil Procedure Act. It seeks three prayers:

b) THAT this Honourable Court be pleased to order that the time fixed for providing and or furnishing security in respect of the Defendants'/Respondents' costs as directed by Honourable Lady Justice Mwilu on 04/04/2008 be enlarged by a further period of three (3) months.

c) THAT this Honourable Court be pleased to review the order issued by Honourable Lady Justice Mwilu on 04/04/2008 and provide for a reasonably lower figure as security for the Defendants'/Respondents' costs.

d) THAT the costs of this application be in the cause.

The application is grounded on six grounds which are cited on the face of the application. The gist of these grounds are that an order was made by this Court on 4th February 2008, directing the Plaintiff to provide security for the Defendants' costs in the total sum of Kshs.11,802,187/- within 21 days from the date of the issuance of the aforesaid order. The Plaintiff contends that it was not made aware of the existence of the said order due to lack of communication from its previous Advocates then on record, and therefore the lack of compliance within the time ordered.

The other ground is that the sum ordered to be provided as security is large, nearly punitive and may prevent the Plaintiff from ventilating his claim, and therefore the Plaintiff's prayer that the sum be reduced.

The application is supported by an affidavit sworn by Ali Said Alguthmy, who has a Power of Attorney dated 7th November, 2006 giving him the authority to swear the affidavit on behalf of the Plaintiff. The affidavit is dated 17th April 2009. The gist of this affidavit is to demonstrate the efforts made by the Plaintiff to get a communication of the progress of the instant case from its previous Advocates, Messrs Khaminwa and Khaminwa Advocates, between 2006 and 2009. It also avers that the Plaintiff eventually instructed a new firm of Advocates, Messrs Wekesa & Co. Advocates, who took over the case on behalf of the Plaintiff on 4th March, 2009. It is deposed that it is after the new firm of Advocates took over the conduct of this suit that it was brought to the attention of the Plaintiff that an order had been made by the court directing the Plaintiff to provide security to the Defendants in the suit within 21 days from the date of the issuance of the order. The order itself was made on the 4th April, 2008. The deponent also avers that the sum ordered to be furnished as security was quite high and may lock out the Plaintiff from accessing justice and pursuing his claim, which is against the interest of justice.

The application is opposed. The 1st, 4th, 5th, 6th, and 7th Defendants filed a statement of grounds of opposition citing three grounds to the effect that the Plaintiff's application herein is frivolous, an abuse of the court process, vexatious, and filed to frustrate the Respondents. The 2nd and the 3rd Defendant have also filed a statement of grounds of opposition in which four grounds are cited to the effect that the Plaintiff's application is defective, incompetent and bad in law and procedure, that it is an abuse of the court process and that it seeks this court to sit on appeal against its own decision for which the court has no jurisdiction.

I have considered the submissions made in this case by Mr. Simiyu on behalf of the Plaintiff, Mr. Amin on behalf of the 2nd and 3rd Defendants and Mr. Okeyo on behalf of the 1st, 4th to 7th Defendants. Having considered these submissions, together with the cases upon which the Advocates relied, I formed the following opinion of the matter.

It is not contested that on the 4th April 2008, this court made an order directed at the Plaintiff to furnish the costs of the all the Defendants in the suit. The security was ordered to be furnished within 21 days from the date of the issue of the order. The date of the issue of the order is 6th May, 2008 and the order is annexure 2 in the supporting affidavit.

The Plaintiff has clearly shown why that order was not complied with. The explanation given is that the Plaintiff's previous Advocates, Messrs Khaminwa & Khaminwa Advocates failed to communicate with the Plaintiff at all on the progress of this case between 2006, a year after the suit was filed, and 2009 when it took on the new Advocates, Messrs Wekesa & Co. Advocates. The Plaintiff contends that it was unaware of the order to furnish security until the new firm of Advocates took over the matter and passed over that communication to them. Mr. Amin for the 2nd and 3rd Defendants has raised a query why the current Advocates took one and half months since being seized of this matter to bring the current application. Mr. Khaminwa has urged that the delay in bringing the application from the time the current Advocates came on record was inordinate and that therefore this application should be dismissed. Mr. Okeyo for the rest of the Defendants has associated himself with the submissions by Mr. Amin.

I note that the Plaintiff is a company which is incorporated in the Republic of Tanzania, and which is based in Tanzania. I think that one and half months taken by the current Advocate to bring this application is not inordinate considering that the Advocate had to communicate with their Clients who are not based within the country, and that time was required to get instructions and to file the application. In the circumstances the one and half months taken to bring this application is not inordinate and I find so.

The Respondents do not raise issue with the delay in complying with the court order of 4th April 2008 and it is therefore taken that the explanation given by the Plaintiff why there was lack of compliance was reasonable and sufficient which I so find.

The Respondents have raised issue with the orders invoked in bringing this application as being the wrong orders. The application is expressed to be brought under order XVIV rule 1 and Order XVIX rule 5 of the Civil Procedure Rules. No such orders exist. A clear consideration of the orders invoked will show that the 2nd letter in both orders must have been intended to read L and not V. This is clearly because an order for review is provided under Order XLIV rule 1 while an order for enlargement of time is provided for under order XLIX rule 5. The application seeks orders of review and of enlargement of time. I believe this was a typographical error. In fact in the submissions by Mr. Simiyu for the Plaintiff, he stated clearly that the application was brought under order XLIX rule 5 of the Civil Procedure Rules. I believe that the orders cited on the application are not just an error or mistake but are typographical in nature, which are curable. I believe that the error which has occurred should not be visited against the Plaintiff to deny them an opportunity to have a determination of their application on the merits. I believe that among the orders intended to be cited or invoked is order XLIX rules 1 and 5. Order XLIX rule 5 provides as follows:

“5. Where a limited 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 any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

This court has power to enlarge time for compliance of its orders upon such terms as the justice of the case may require. On the prayer for enlargement of time, I am satisfied that a good cause has been shown why time should be enlarged in order to give the Plaintiff an opportunity to comply with the orders of the court.

The second prayer sought in this matter is for a review of the order of Hon. Mwilu, J. made on the 4th April 2008 by lowering the sum ordered to be furnished as security of the costs of the Defendants. Order XLIV rule 1 provides:

“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 review of judgment to the court which passed the decree or made the order without unreasonable delay.

The Respondents have opposed the review of the order. Mr. Amin on his part has urged that the amount ordered by the court was based on the prayers in the plaint and was the legal costs based on the Advocates (Remuneration) Order for defending the action. Mr. Amin submitted that the amount ordered should not be varied. In addition Mr. Amin also urged that the prayer for review is a back door way of appealing against the order of the court and that this court lacks jurisdiction to determine that prayer.

Mr. Okeyo also associated himself with the submissions of Mr. Amin and contended that the prayer seeking a review of Hon. Mwilu, Js’ orders was actually seeking an appeal against the orders of the court. Surprisingly from the submission of Mr. Simiyu, emphases were laid on the prayer to enlarge time to comply with the order of the court, but none were based on the prayer for the review of the order of the court.

I have considered the supporting affidavit sworn on behalf of the Plaintiff company. The only reason given to support the prayer for the review of the order of the court is that the sum ordered was quite large and nearly punitive and may lock out the Plaintiff from pursuing its claim in the Kenyan Judicial System, since the Plaintiff is a foreign company. With due respect to the Applicant, a prayer to review an order of the court can only be made where the Applicant has shown that there has been a discovery of a new and important matter or evidence which was not within its knowledge or which the Applicant could not have produced at the time when the decree or the order sought to be reviewed was made. Alternatively the Applicant should demonstrate that the review is sought on account of some mistake or error apparent on the face of the record or show any other sufficient reason why the review should be granted.

The Applicant has not based its prayer on the discovery of a new or important matter or evidence or on account of error or mistake apparent on the face of the application and therefore the Applicant needed to show that the review of the order made by the court was sought for any other sufficient reason. No sufficient reason has been given by the Plaintiff why

the review is sought to be made, and neither is any sufficient reason alleged or proved either in the supporting affidavit or on the face of the application. The Plaintiff has therefore not brought itself within the conditions which justify review to be made and therefore that prayer is unmerited.

Having considered this application, I find merit in prayer (b) of the notice of motion application dated 17th April 2009. I will allow this prayer and enlarge time within which the Plaintiff should furnish security for the costs of the Defendants by a period of three (3) months from the date of this ruling.

These are the orders of the court.

Dated at Nairobi, this 19th day of June, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Maina holding brief Mr. Simiyu for the Plaintiff

Mr. Amin for the 2nd and 3rd Defendants

Mr. Okeyo for the 1st, 4th to 7th Defendants

LESIIT, J.

JUDGE