



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Misc. Case 834 of 2006

THE BOARD OF GOVERNORS ST. JOHNS COLLEGE.....PLAINTIFF/RESPONDENT

VERSUS

JOHN NGANYI LUGOYI.....DEFENDANT/APPLICANT

R U L I N G

This is a Chamber Summons application brought under Rule 4(3) of the Foreign Judgments (Reciprocal Enforcement) Rules, Order XXI Rules 22 and 25, Order XIA Rules 10 and 11 of the Civil Procedure Rules. The application is dated 18th December, 2008 and seeks the following orders:

- 1. That this Honourable Court be pleased to extend the period for making an application to be set aside registration of foreign judgment.**
- 2. That this Honourable Court be pleased to set aside the judgment entered herein.**
- 3. That this Honourable Court be pleased to grant an order for stay of execution.**
- 4. Costs of this application be provided for.**

That application is supported by grounds on the face of the application as follows:

- (i) That the Applicant's Advocate could not file this application within 14 days from 3rd November, 2008 the date of notification of judgment herein as he had traveled up-country on urgent family matters and therefore unavailable to prepare the requisite Court papers to facilitate filing the application.**
- (ii) That the Applicant was never served with Court summons to enter appearance in this suit.**

The application is supported by an affidavit sworn on 18th December, 2008 by JOHN NGANYI LIBOYI the Defendant/Applicant.

The application is opposed. There are 6 grounds of opposition as follows: -

- 1. That the application is fatally and incurably defective.**
- 2. That the defendant's application is misconceived, frivolous, devoid of merit, incompetent and malafides.**

3. **That the application seeks orders incapable of being granted since this is not a property case for setting aside as arguments were done inter parties and judgment has been delivered in the presence of the parties.**
4. **The intended application is res judicata.**
5. **That the application is bad in law and an afterthought.**
6. **The Honourable Court lacks jurisdiction since it is functus official and the intended application is meant to deprive the plaintiff the fruits of his judgment.**

I have considered the application together with the grounds of opposition and submission by Mrs. Keya for the Applicant and Mr. Mutisya for the Respondent. Considering the chamber summons filed herein, it is quite obvious that it is overloaded. The Applicant is seeking for an extension of time for making an application to set aside the registration of the foreign judgment entered in this case. At the same time, the Applicant has in order 2 and 3 sought to set aside the same judgment and to stay execution of the same judgment. To include order 2 and 3 in the same application in which an order for extension of time to file an application in respect of the same order is sought herein renders the application defective. I notice that the grounds for the application cited on the face of the application are in support of the prayers sought in order 1 as they give reasons why the Applicant did not file the application to set aside the judgment within the stipulated time.

Regarding the application itself, rule 4(3) of the rules made under the Act provides:

“The period within which an application may be made to set aside registration for the purposes of paragraph 2 shall unless the court extends the period, be 14 days from the date on which the judgment debtor is served with a notice of registration, where the application was ex parte and in all other cases 14 days from the date of registration.”

The judgment in this case was entered by Hon. Khamoni Judge, on the 26th October, 2007. That judgment was entered after both parties were heard on the originating summons dated 14th August, 2006 in which the registration of the foreign judgment was sought. For purposes of computation of time, the Applicant who is the judgment debtor herein had 14 days from the date of registration of the judgment, which is 26th October, 2007, to make an application to set aside. It is very clear that at the time this application was filed in court on 18th December, 2008 the 14 days period within which to file an application to set aside the judgment had long lapsed.

Rule 4 of the rules under the Act has not specified the grounds upon which the court may extend the period for the filing of an application to set aside the registration of a judgment. It then follows that the court has wide discretion and unlimited powers to extend the time. This powers must however be exercised judicially and for good cause shown.

The ground cited on the face of this application was that the Applicant was notified of the judgment on 3rd November, 2008 and on that date the Applicant’s advocate who is seized of the matter had traveled upcountry on urgent family matters, and therefore was unavailable to prepare requisite papers to facilitate filing of the application. In the supporting affidavit, the Defendant/Applicant has deponed that he was not personally served with the notification of registration of judgment as required and that the same was sent to his advocate.

Mr. Mutisya for the Respondent was of the view that the Applicant was within time to file the application under consideration because time lapsed on the 17th November, 2008 while according to Mr. Mutisya, the application was filed on 5th November, 2008. Mr. Mutisya was ill informed. It is very clear from the application that it was filed in court on 18th December, 2008.

The entry of the judgment herein was made inter partes after the judge heard both parties. The learned

Judge read his ruling on 26th October, 2007 in which he allowed the originating summons and entered judgment in the case in the presence of both parties. I do not think in the circumstances that the Applicant herein needed any notice of the entry of judgment since the judgment was entered in the presence of his counsel. The period of 14 days for purposes of filing an application to set aside the judgment must be computed from the 26th October, 2006 and not from the date of service of the notification of entry of judgment. Rule 4 (2) and (3) of the rules under the Act are very clear on that point.

The Applicant was two (2) years late from filing an application to set aside. The Applicant is also two years late in making an application to extend time to file an application to set aside. The reasons given by the Applicant for the delay in filing both applications are without merit. The counsel alleged to be seized of the matter, could not have gone upcountry for two years. In fact the Applicant is very clear that his counsel went upcountry in November, 2008 and so could not file the application before 18th December, 2008 when it was filed. There is absolutely no explanation given for the period between October, 2006 and November, 2008.

Having considered this application, I find no good ground to warrant this court to exercise its discretion in the Applicant's favour. No reasonable explanation has been given or good cause shown why the Applicant was late in filing the application to set aside. In any event, the Applicant is not without recourse since under rule 7 of the Rules under the Act, he has an automatic right of appeal as of right from the order registering the judgment.

Having come to this conclusion, the application dated 18th December, 2008 in terms of prayer 1 is dismissed with costs to the Respondent.

Dated at Nairobi, this 6th day of February, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

N/A for Mrs. Keya for the Applicant

Kamande holding brief Mr. Mutisya for the Respondent

LESIIT, J.

JUDGE