



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

Civil Appeal 141 of 2006

JOHNSON KOBIA M.APPELLANT

VERSUS

ALOISE RENTARE NYAMU.....RESPONDENT

R U L I N G

On 12th March, 2008, a consent order was recorded by the parties herein in the following terms: -

1. *the application by notice of motion dated 27th September, 2007 be and is hereby allowed in prayer No. 2 thereof upon the following terms: -*

“(a) The appellant shall within 45 days of today deposit the sum of Kshs.400,000/= in an interest earning account to be opened in the joint names of the parties’ advocates on record at the consolidated Bank Ltd, Koinange Street Branch.

(b) The said sum of Kshs.400,000/= shall include the Kshs.100,000/= already deposited in court herein by the appellant. For the purposes of this order, the said sum of Kshs.100,000/= shall be forthwith released by the court in the joint names of the parties’ advocates on record.

(c) The Kshs.400,000/= shall remain so deposited in the joint account as above until disposal of the appeal or the further order of the court.

2. *Costs of the application shall be in the cause.”*

The appellant has now come to this court under Order XLIX Rule 5 of the Civil Procedure Rules, Section 3A and 95 of the Civil Procedure Act seeking orders that: -

·That there be a stay of execution of the consent orders recorded on the 12th March, 2008 pending the hearing and determination of this application.

That the appellant herein be allowed to deposit his land title deed for a parcel of land known as LR No. Mikinduri/Athwana/583 in lieu of the remaining Kshs.300,000/= to comply with the order dated 12th March, 2008.

That in the alternative this court be pleased to enlarge time by six months within which the appellant is to comply with the terms of the consent order recorded on the 12th March, 2008

The costs be in the cause.

The appellant explained that he has been unable to raise the balance of Kshs.300,000/=, within the required time despite his concerted efforts and due diligence. The appellant prays that he be allowed to deposit title deed to his land known as Mikinduri/Athwana/583 as security for the decretal sum instead of the deposit of Kshs.300,000/=. The appellant maintains that his advocate did not consult him regarding his ability to raise the required sum of Kshs.300,000/= within the stipulated period.

Relying on the case of *Irene Wangari Matu & Another vs Thomas Thairu Gakuru 2005(eKlr)* it was submitted that the court has discretion to make an order for enlargement of time or alternative security. The case of *Sajan Building Contractors Ltd vs Margaret Oparanya High Court Bungoma Civil Appeal 55 of 2003* was also cited in support of the proposition that the court has discretion to vary the consent order.

The application is opposed by the respondent on the grounds that it is incompetent, misconceived, fatally defective, an abuse of the court process and also offends the provisions of the Civil Procedure Rules. It is maintained that the applicant has come to this court with unclean hands and that the application lacks merit. It was submitted that the application offends Section 6 of the Civil Procedure Act as it is rearguing a matter previously determined by the court through the consent order. It was maintained that the request to deposit the title deed as security had already been considered and rejected by the court.

The following cases were relied upon by the respondent: -

·Wangethi Mwangi and another vs J.P. Machira T/A Machira & Co. Advocates. Civil Application Nai 211of 2003.

Gulbux Singh Suri & Another vs Royal Credit Ltd. Civil Application Nai 281 of 1995.

Flora N. Wasike vs Estimo Wamboko 1KAR 265.

It was submitted that no valid grounds had been laid before the court to justify the setting aside of the consent order.

It is obvious that the consent order recorded on the 12th March, 2008 was entered into pursuant to an application for stay of execution and or any further proceedings in CMCC No. 13936 of 2004 pending the hearing and determination of this appeal.

During the negotiations leading up to the consent, the issue of the appellant's ability to pay the decretal sum came up as did the issue of the deposit of security. The parties therefore entered into the consent after having taken into account all their options. Although the appellant is now attempting to distance himself from the consent, signed on his behalf by his counsel, that consent remains binding upon him as there is no evidence of vitiating factors such as fraud, collusion or misrepresentation.

The appellant has not satisfied this court that he has made any efforts to comply with the consent order with regard to the deposit of the balance of Kshs.300,000/=. The money was required to be deposited within 45 days from 12th March, 2008. To date, more than 75 days later, this money has not been paid.

The applicant has not satisfied this court that there is any justification for the court setting aside or varying the consent order. For this reason, I find no merit in the application and do dismiss it. For the avoidance of doubt, I order that unless the applicant complies with the consent order within the next 7 days respondent shall be at liberty to proceed with the execution without further reference to this court.

Those shall be the orders of this court.

Dated and delivered this 5th day of June, 2008

H. M. OKWENGU

JUDGE

