



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Case 5 of 2007**

**JIMMY MUKORA NJOROGE t/a MT. LONGONOT HOTEL.....PLAINTIFF**

**VERSUS**

**GEDION LETUYA HAPU.....DEFENDANT**

**RULING**

On the 2<sup>nd</sup> February 2007 this court allowed the application for injunction which had been filed by the plaintiff restraining the defendant from interfering with his possession of L.R. No. Kijabe/Kijabe Block 1/4301 and 4302 pending the hearing of the main suit on condition that the plaintiff deposit in a joint interest earning account in the names of the counsels of the parties to the suit the sum of Kshs 2,230,000/= within thirty (30) days of the date of the delivery of the ruling. In the event that the plaintiff was to default in depositing the said decretal sum, the order of injunction granted pending the hearing and determination of the suit would automatically lapse. On 2<sup>nd</sup> March 2007, the plaintiff filed a notice of motion purportedly under Sections 3A and 95 of the Civil Procedure Act and Order XLIX rule 5 of the Civil Procedure Rules seeking the following orders of the court;

- (i) That there be a temporary stay of execution herein pending the hearing and determination of the application *inter partes*.
- (ii) The period of thirty (30) days granted by this court on the 2<sup>nd</sup> February 2007 to (*sic*) the plaintiff to deposit Kshs 2,230,000/= in a joint interest earning account of the counsels of the parties herein be enlarged by another sixty (60) days.

The grounds in support of the application are on the face of the application. The application is further supported by the annexed affidavit of Jimmy Mukora Njoroge, the plaintiff. In summary, the plaintiff has deponed that since the court issued the said order he has managed to raise the sum of Kshs 700,000/= which he has deposited with his counsel. He has pleaded with this court to extend the period in which he is to deposit the balance of Kshs 1,530,000/= by a further sixty (60) days. The period in which the plaintiff is seeking extension of time would enable him to dispose off some of his livestock and properties so as to comply with the order of the court. The application is opposed. The defendant has filed grounds in opposition to the application. In the said grounds of opposition, the defendant has stated that the application had been overtaken by events and further that if this court granted the said application, the defendant would be prejudiced.

At the hearing of the application I heard the submission made by Mr. Kayai on behalf of the plaintiff. He basically reiterated the contents of the application and the supporting affidavit of the plaintiff. He submitted that the plaintiff required a further sixty (60) days to enable him look for the balance of the sum of Kshs 1,530,000/= by disposing off of some of his properties. He submitted that the plaintiff intended to comply with the order of the court because he was interested in pursuing the hearing of the suit to its conclusion. Mr. Ojienda for the defendant opposed the application. He submitted that the plaintiff had abused the due procedure of the court in his application. He submitted that the plaintiff ought to have made an application to review the ruling of the court instead of making an application for extension of time. He submitted that the plaintiff's application was a mischievous attempt to seek the review of the ruling of this court by the backdoor. He further submitted that it was not open for the plaintiff to apply for stay of execution since no decree had been extracted. He submitted that the defendant would be prejudiced if the application is granted because he is repaying the bank a loan which he had borrowed on

the security of the suit property. He urged this court to dismiss the application with costs.

I have carefully considered the rival arguments made by the parties to this application. I have also read the pleadings filed by the parties in support of their opposing positions. Section 95 of the Civil Procedure Act provides that;

*“Where any period is fixed or granted by the court for doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”*

This court did on the 2<sup>nd</sup> February 2007 order the plaintiff to deposit the sum of Kshs 2,230,000/= in a joint interest earning account in the joint names of the counsels of the parties to this suit within thirty (30) days of the delivery of the said ruling. The plaintiff has made effort, and at the time of filing this application (*i.e.* 2<sup>nd</sup> March 2007), he had raised the sum of Kshs 700,000/= which he has already deposited with his counsel. He has annexed a copy of the banker’s cheque of the said sum of Kshs 700,000/= issued in the name of his counsel as proof of his sincerity. The plaintiff has deponed that he requires another two months to enable him secure the balance of Kshs 1,530,000/=. Although the defendant is opposed to the plaintiff being granted extension of time to secure the balance of the amount ordered deposited, this court will exercise its discretion in favour of granting the application by the plaintiff to have the time by which he is to comply with the order of this court extended. This court takes judicial notice of the fact that for an ordinary ‘*mwananchi*’ like the plaintiff to raise the sum of Kshs 2,230,000/= in a period of one (1) month could be difficult. The plaintiff has clearly shown that he is interested in having the said orders of injunction issued in his favour maintained pending the hearing and determination of the main suit. He has already raised the sum of Kshs 700,000/= which he has deposited with his counsel in partial compliance with the order of this court. The defendant has not put forward any compelling ground that would make this court not exercise its discretion in favour of granting extension of time.

In the premises therefore, the application for extension of time by the plaintiff has merit and is hereby allowed. The plaintiff is hereby granted an extension of forty five (45) days from the date of the delivery of this ruling by which to comply with the order of this court to deposit the sum of Kshs 2,230,000/=. The plaintiff is ordered to have the initial deposit of the sum of Kshs 700,000/= deposited in a joint interest earning account in the names of the counsels for the plaintiff and the defendant within seven (7) days of today’s date. In default thereof, as stated in the ruling of the 2<sup>nd</sup> February 2007, the order of injunction granted shall automatically lapse. The defendant shall have the costs of this application since it is the plaintiff who inconvenienced the defendant by filing the present application.

DATED at NAKURU this 9<sup>th</sup> day of May 2007.

**L. KIMARU**

**JUDGE**