



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Appeal 14 of 2007

INVESCO ASSURANCE COMPANY LTD. APPELLANT

VERSUS

CHARLES KABURU RESPONDENT

RULING

On 21st February, 2007 the applicant brought a motion in which it sought that orders of SRM's court in Tigania Civil Suit No.92 of 2005 and the sale of the applicant's goods be stayed pending the hearing of appeal against the decision of the lower court.

On 27th March, 2007 the parties recorded a consent in the following terms;

‘By consent there be a stay of execution of the decree in Tigania SRMCC No.92/05 pending the hearing and determination of appeal. Appellant to deposit the decretal amount in the interest-earning account in the names of the advocates of the parties within 21 days –in default execution to proceed. The attached goods to be released forthwith to the appellant. The appellant to pay auctioneer's charges to be agreed upon or assessed by the court’.

This consent was recorded in court in the presence of both counsel for the applicant and respondent. On 27th April, 2007, ten days after the expiration of the date the applicant was expected to deposit the decretal sum in a joint account, in terms of the consent herein, the applicant brought the present motion in which it is seeking that the time for depositing the decretal sum be extended and that execution be stayed.

The application is based on the grounds that the delay has been caused by the misfiling of a letter advising the applicant of the terms of the consent order. That only when they got another letter from their advocates two days after the date set for depositing the decretal sum that the terms of the consent order was brought to the applicant's attention.

A cheque was immediately prepared and this application to extend time filed. The case of Geoffrey Muriithi Mworira and 2 others V Martin Muthaura HCC 46 of 2006 was cited. The respondent contests the application on the grounds that the order in question being by consent, the same cannot be adjusted in the manner sought in the application. In support of this proposition counsel cited the cases of Flora N. Wasike V Destimo Wamboko 1982 -88 1 KAR 625, Brooke Bond Liebig(T) Ltd V Mallya (1975) EA 266 and Anthony Chuma Goiti V Kieru Goiti & Another, Civil Application No.Nai.29/2006.

The case of Geoffrey Murithi (supra) is distinguishable from the present one because the former was an application for stay to the High Court following orders of the subordinate court dismissing an application

for extension of time. Under Order 41 rule 4 (1) of the Civil Procedure Rules the applicant in that application was free to apply for stay of execution to the High Court.

Regarding the case of Anthony Chuma(supra) the decision is based on order 4 of the Court of Appeal Rules, although the consideration for extending time under the Court of Appeal Rules, is equally applicable in the High Court. The cases of Flora Wasike and Brooke Bond deal with circumstances in which a consent order may be varied or set aside.

It has been argued for the respondent that this application is really for the variation of the terms of the consent order, and therefore must be considered within the principles stated in the above authorities, namely whether the consent was obtained by fraud, collusion, or by an agreement contrary to the policy of the court, or that consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or for a reason which would enable the court to set aside an agreement.

Although the application is not in its terms seeking to vary the order, its effect, strictly speaking would be to vary the terms of the consent order, which can only be done if any of the foregoing conditions are satisfied.

At the same time the law vests in the court unfettered discretion to extend time limited by the law or an order of the court. So, the court is faced with a situation that allows the court to vary a consent order when certain conditions are met on the one hand allowing for extension of time on the other hand.

It is a scenario of substantive law versus judicial authority. Section 95 of the Civil Procedure Act provides that;

“95. Where any period is fixed or granted by the court for the 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”

Order 49 rule 5 of the Civil Procedure Rules also provides for enlargement of time subject only to the justice of the case and costs to the respondent. Similarly Section 80 of the Civil Procedure Act and Order 44 rule 1 donates discretionary powers to the High Court to review its orders for any sufficient reason.

It is common ground that once a consent of the parties has been adopted, it becomes an order of the court in terms of order 24 rule 6 of the Civil Procedure Rules.

No distinction is drawn between an order entered by court in a contested application and one entered by consent. Both are orders of the court which can be reviewed, varied or discharged as provided for under the rules. The substantive law allows review of court's order and enlargement of time. It has been noted that the delay was for only ten days which has been explained. A stay of execution is always granted in order to avoid substantial loss to the applicant while he is pursuing an appeal.

If the decretal sum is paid over to the respondent, the applicant has argued, the former will not be able to refund in case the appeal is successful. The respondent on his part has averred that as a teacher he has salary and other assets which he can liquidate to refund the applicant.

On the authority of ILRAD V Kinyua (1990) KLR 403, it was incumbent upon the respondent to rebut, by evidence, the allegation that he is impecunious. The respondent has failed to do this. I am satisfied that this application has been brought timeously and that the applicant has a cheque ready to deposit in a joint account as agreed.

For these reasons I grant the application and order

- (1) that the decretal sum be deposited as earlier agreed within 7 days from the date of this order
- (2) that there will be a stay of execution and the attached goods be released to the applicant forthwith.

- (3) that the applicant shall pay the auctioneers costs
- (4) the applicant to pay the costs of this application.

DATED AND DELIVERED AT MERU THIS 8TH DAY OF JUNE 2007

W. OUKO

JUDGE