



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

Civil Appeal 510 of 2005

THE NATIONAL SOCIAL SECURITY FUND.....APPELLANT

VERSUS

JOHN OCHIENG OPIYO..... RESPONDENT

RULING

On 2/11/05, the appellant/applicant moved to this court seeking orders that:

2. The court do validate and extend the interim orders herein, until the next hearing date.
3. Costs of the application.

The application by way of a Notice of Motion, is brought, purportedly under Section 3A and 63(e) of the Civil Procedure Act.

At the commencement of the hearing of the application, Learned Counsel for the Respondent, Mr. Odera, raised Preliminary Objections on the following grounds:

- a. The application does not invoke the court's jurisdiction, which is provided for under Section 3 of Cap. 21, Laws of Kenya, not Section 3A. The Learned Counsel for the Respondent submitted that Section 3A deals with the inherent powers of the court, while Section 3 provides for the procedure of approaching the court. No order or rule is shown as to how the application is brought.
- b. The Supporting Affidavit, JKI relates to certain consent orders recorded on 20/7/05 before Mr. Justice Ransley. No consent orders were recorded before Ransley J. Hence the document is either strange or cant be understood.
- c. This Court is being asked to extend and re-instate orders which expired on 26/10/05. Learned Counsel further submitted that c) above cant be done except under discretionary powers of the court which must be judicious.
- d. When the orders were issued, it was the Respondent who was in possession of the suit premises. The orders, purportedly made by Ransley J are idle because even as of today the premises are still in the possession of the Respondent, as per the Lower Court's orders. The learned Counsel submitted that the application should be dismissed.

In opposition, Mr. Kituku learned counsel for the appellant/applicant submitted that the points raised go beyond the scope of a Preliminary Objection as they touch on factual, as opposed to legal points. There are no provisions in the orders on how to approach the court when orders have expired and, hence, the invocation of Section 3A for the court to administer justice; under Order 50 rule 12 an application is not fatal simply because of failure to cite the right rule; and under Order 6 rule 12 technical rules should not be invoked to defeat the application.

Finally, counsel for the appellant/applicant submitted that the application cannot be struck out for quoting wrong legal provision because that can be amended and that is the discretion of the court. The Respondent was a party to the consent orders of 20/7/05 and the consent issue is not a point of law, but a matter of fact.

On Mr. Justice Ransley's order being idle, learned counsel submitted that the appellant/applicant was in constructive possession and that is not a point of law, but a matter of evidence. Then he cited the MUKISA BISCUIT case [1969] E.A. 696, on what a Preliminary objection should be and do – dispose of the suit, if upheld.

Appellant/applicant's counsel submitted that the court should validate the orders that have expired.

The Preliminary Objection hinges on two core issues, in my view. These are whether the application was properly brought before the court, which raises the issue of jurisdiction and whether the court can grant the prayer sought that is validate and extend an expired order.

On issue No. 1, I have no doubt that Section 3, not 3A, of the Civil procedure Act, Cap. 21, Laws of Kenya, lays down the manner of approaching the court. Only where there are no specific provisions, can other statutes granting special jurisdiction to the court be invoked.

Irrespective of the validity of the orders issued by this court – Ransley J – the orders expired and the appellant/applicant could apply for enlargement of that order/time granted therein under Order 49 rule 5 of the Civil Procedures Rules.

In other words, it is not true that there is no procedure by which to come to this court on the relief prayed for by the applicant/appellant. On this ground alone, I would dismiss the application on the basis that the jurisdiction of this court has not been properly invoked.

However, I need to address the issue of this court validating the order, which has lapsed. I know of no law under which an issue which has died/lapsed/expired can be validated other than under the Order referred to herein above. The court cannot validate orders, which upon expiry, have ceased to exist.

Before concluding, the application and the submissions by the applicant's counsel operate under a misconception that the terms **extension** and **enlargement** mean the same thing. That is not the legal position.

In extension of time, the extension must be applied for before the time sought to be extended has expired, whereas in enlargement the application can be made any time, even after the time has long run out.

For all the foregoing reasons, the Preliminary Objection is upheld, and the application is dismissed with costs to the Respondent and against the appellant/applicant.

DATED and delivered in Nairobi this 15th day of March, 2006.

O.K. MUTUNGI

JUDGE