



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**Civil Appeal 314 of 2004**

**IRENE WANGARI MATU**

**PAULINE WANJUGU MURIITHI ..... APPELLANTS**

**VERSUS**

**THOMAS THAIRU GAKURU ..... RESPONDENT**

**RULING**

On 19th January, 2005 this court ordered, by consent of the parties, stay of execution of the lower court's Judgment on condition that the decretal sum of Kshs.172,840/= was deposited in an interest earning joint account of both advocates on record within 21 days of that date. Despite their best efforts, the Appellants were unable to make the said deposit within the said 21 days, but were ready to do so within 23 days, that is two days late. The time period having expired, the Respondent refused to co-operate in establishing the joint account, and threatened to execute the Judgment. Whereupon, the Applicants filed this application seeking mainly an enlargement of time to comply with the Orders of this Court made on 19th January, 2005.

The Respondent did not file any replying affidavit, admitting, therefore, the facts outlined above. His Counsel, Mr Mungai, simply argued that the Order of 19th January, 2005 being a Consent order, it could only be varied by Consent of the parties (See *Kenya Commercial Bank vs Specialised Engineering Ltd* (1982) KLR 485; and submitted further that the affidavit in support of the application, having been sworn by the Applicant's advocate, the same ought to be struck out (See *East African Foundry (k) Ltd vs Kenya Commercial Bank (HCCC 1077 of 2002, Milimani)*).

I would disagree with both the arguments preferred by Mr Mungai. The Order of 19th January, 2005, although by consent of the parties, is an Order of this Court. Orders XLIX Rule 5 of the Civil Procedure Rules allows the court to enlarge time which has been fixed for doing any act or taking any proceedings under the rules or by any order of the court as the justice of the case may require and the enlargement can be ordered even after expiry of the appointed or allowed time.

The delay here of only two days in compliance of the Court Order can hardly be said to be inordinate. It has been explained. It was absolutely unfair of the Respondent to refuse deposit of the funds, only because of a two-day delay, especially when the spirit of the Order was not being altered. The applicant was not asking for a reduction in the amount of deposit, or such fundamental variation of the Order – he was simply late by 2 days.

There is, therefore, no basis to the argument that a Consent Order may be varied only by the consent of the parties. Secondly, the affidavit in support, sworn by the Applicant's advocate, is not on contentious matters. The facts are pretty straight forward, and have not been controverted. I would, therefore, refuse to strike out that affidavit. Accordingly, I allow this application, with costs to the applicant, and hereby enlarge the time for the compliance by the Applicant of this Court's Order of 19th January, 2005 by another 30 days from today's date.

Dated and delivered at Nairobi this 19th day of September, 2005.

**ALNASHIR VISRAM**

**JUDGE**