



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 157 OF 2004

PETERSON KAMAU 1ST APPELLANT/OBJECTOR

VICTOR MAJANI 2ND APPELLANT/OBJECTOR

VERSUS

DANIEL MULI MULWA 1ST RESPONDENT/DECREE HOLDER

AND

LONRHO MOTORS E. A LTD 2ND RESPONDENT/JUDGMENT DEBTOR

STEPHEN DEREVA 3RD RESPONDENT/JUDGMENT DEBTOR

BERNARD GICHERU 4TH RESPONDENT/JUDGMENT DEBTOR

THE ATTORNEY GENERAL 5TH DEFENDANT/JUDGMENT DEBTOR

RULING

This Application, here before me under a Certificate of Urgency, is for **extension of time** stipulated in the Court Order of May 25, 2004 to deposit the decretal amount in the joint accounts of advocates at a bank; release of motor vehicles held by the auctioneers; for an order that the Plaintiffs be condemned to pay any additional charges levied by the Auctioneers; and for costs.

It is brought mainly under Sections 95 and 3A of the Civil Procedure Act, and arises from a Consent Order recorded by the parties on May 25, 2004.

On that day, the following Order was recorded:

“(i) Upon payment of the Auctioneers charges of Kshs.79,570.00 and the storage charges of Kshs.70,528.00 the motor vehicles be released immediately.

“(ii) The Objector’s Advocate undertakes to deposit the decretal sum into the joint account of the Advocates on record within 7 days as per the Order of 26 th April, 2004, failing which the stay Order made on 26 th April, 2004 shall lapse.”

Following the above Order, on May 26, 2004 the Applicant’s Counsel paid the Auctioneer’s and storage charges, and thereby fully complied with the first part of the Court Order. There is no dispute about that.

However, despite the payment, the first Respondent did not comply with his part of the Order, and failed to have, and to this day has failed to have, the motor vehicles released. In fact, he has admitted in paragraph 13 of his Replying Affidavit that he indeed instructed his Advocate not to release the said motor vehicles. And his reasons for giving such instructions? That he “suspected that the Objectors are not keen to deposit the Decretal sum ...”

Meanwhile, the Objector/Applicant made every effort to deposit the decretal sum in the Bank as per the 2nd part of the Court Order. Evidence shows that he tendered the funds to the Kenya Commercial Bank on May 27, 2004. But because of the Bank’s internal procedures relating to the opening of new accounts, a joint account as envisaged in the Court Order could not be opened within the stipulated seven days. Evidence also shows that the Respondent did absolutely nothing to assist in the expeditious opening of the account, and simply waited for the seven days to expire, so that he could take advantage of what he believed was a lapsed court order. Because that is exactly what he did.

The Respondent’s behaviour is arrogant, capricious, arbitrary and completely against the spirit of the Court Order of May 25, 2004. The first part of the Court Order is independent of the second part. Upon payment of the auctioneers and storage charges, the Applicant was entitled to “**immediate**” release of the motor vehicles. With regard to the second part of the Order, the Applicant’s duty was to “tender” the amount, which he did on May 27, only two days after the Order was made. He had absolutely no control over the bank’s internal procedures and red tape. And there is nothing shown to demonstrate that he neglected to act within the terms of the Order.

The Applicant is, therefore, entitled to all the Orders sought. The only real argument advanced by the Respondent’s Counsel is that Section 95 of the Civil Procedure Act does not apply to Consent Orders. He has not produced any authority for that proposition. In any event, the Applicant here is not asking for a “variation” of the terms of the Order, only an extension of time for its fulfilment because of events outside his control. This Court has inherent powers to meet the ends of Justice.

The Applicant has made a good case for all the Orders sought in the application dated 4th June, 2004 which I hereby allow with costs as prayed. I hereby extend the time sought to be extended by two weeks from today.

Dated and delivered at Nairobi this 15th day of July, 2004.

ALNASHIR VISRAM

JUDGE