



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO.60 OF 2001

DR. PAUL MUBIA MATHU.....Plaintiff

VERSUS

IBRAHIM KARIUKI GICHIMU.....Defendant

R U L I N G

The Defendant filed an application dated 28th October, 2004 seeking the following orders;-

- (i) That the attachment of the applicant's moveable goods be declared unlawful, irregular and unwarranted and the attached goods be released to the applicant unconditionally.*
- (ii) That this Court be pleased to extend and/or enlarge time within which its orders dated 29th September, 2004 were to be complied with and deem compliance of the same as properly done.*
- (iii) That this Court be pleased to review and or vary its orders dated 29th September, 2004 and in particular limp "c" of the conditions therein.*

On 29th September, 2004 this court allowed an application for extension of time within which the Defendant was to comply with the court orders issued on 16th July, 2004. The court ordered that a fresh guarantee for Ksh.5,226,473/= be filed within 14 days and clause (c) thereof was to the effect that it was to remain in force until the applicant's appeal was heard and determined or until such further orders of the court would be given.

The court also ordered that in the event the applicant defaulted in filing the fresh guarantee within the stipulated period of time the respondent was to be at liberty to execute the decree for recovery of the balance of the judgment sum plus costs and interest.

Mr. Machage for the applicant stated that proclamation of the applicant's goods was done without any notice. He said that the auctioneer should have given 7 days notice of proclamation of the applicant's goods. He termed the execution as unjustified and said it was done in bad faith.

Regarding the prayer for enlargement of time, he stated that the defendant was not able to raise the additional amount of approximately Ksh.400,000/= within 14 days due to economic hardships but he had already done that, albeit late. He submitted that if time was not enlarged, the appeal would be rendered nugatory.

with regard to the bank guarantee, he stated that Barclays Bank of Kenya Limited does not issue open ended guarantees as per regulations of the Central Bank of Kenya but the guarantee was renewable for a period of another 12 months after expiry of the current one on 19th October, 2005.

He urged the Court to allow the Defendant's application since he had met all the conditions set by the court, though late, saying that there would be no prejudice if the applicant's application was granted.

Mrs. Magana, learned counsel for the respondent opposed the application terming it as an omnibus application because of the multiplicity of orders which were being sought through one application, saying that different applications should have been filed. She further submitted that the orders given by the court on 29th September, 2004 had already lapsed and could not be reviewed.

She submitted that the applicant's first prayer challenging the attachment of the applicant's goods was based on the wrong provisions of the law and so the orders sought could not be granted. She cited the decision of Keiwua J, as he then was in **KARIUKI VS COUNTY COUNCIL OF KIAMBU AND ANOTHER [1995-1988] I E.A. 90** where it was stated that if a statutory provision was available to an aggrieved party seeking to invoke the jurisdiction of the court, that party could not properly invoke the inherent power of the court under Section 3A of the Civil Procedure Act.

With regard to the assertion by the applicant that notice of proclamation should have been given by the auctioneer before the attachment, counsel submitted that there was an express order allowing execution after expiry of 14 days from 29th September, 2004 if the terms stated in the ruling of that date were not met. In any event, she submitted, a notice of proclamation had been issued earlier and therefore there was no need of issuing another one.

Regarding the prayer for enlargement of time, Mrs. Magana submitted that the applicant had made a similar application on 2nd September, 2004 which had been granted and so she termed the subsequent application as an abuse of the court process. She further observed that there was nothing in the affidavit to show that Blue Shield Insurance Company Limited had any difficulties in raising the additional sum since it was not the applicant in person who was to procure the bank guarantee.

And regarding the applicant's prayer for review and or variation of its orders of 29th September, 2004 with specific reference to the bank guarantee, counsel submitted that the application did not meet the requirements of order XLIV and further, the same arguments now raised by the applicant had been canvassed earlier and the court had given its considered ruling on the issue. She said that no statutory regulations had been quoted to show that an open ended guarantee could not be issued by the bank. The present bank guarantee showed that it could be renewed at the instance of the applicant only.

I have carefully considered all the submissions made by counsel. It is not in dispute that the applicant herein is guilty of laches and cannot fault the respondent for the steps which he has taken towards recovery of the decretal amount.

On 2nd September, 2004 the applicant made more or less a similar application as the present one and this court in its ruling delivered on 29th September, 2004 granted conditional orders of enlargement of time and in particular stated:-

“In the event that the applicant defaults in filing a suitable bank guarantee in compliance with the above directions within the stipulated period of time, the orders granted herein shall be deemed as having been vacated and the respondent shall be at liberty to execute for recovery of the balance of the judgment sum plus costs and interest.”

The stipulated period was 14 days from 29th September, 2004 and this means that the new bank guarantee should have been provided and filed in court by 13th October, 2004. That was not done until 19th October, 2004.

The bank guarantee was to be procured by Blue Shield Insurance Company Limited and not by the applicant personally and therefore the averment by Ibrahim Kariuki Gichimu the Defendant/Applicant in his affidavit in support of the application to the effect that he was unable to raise the additional sum of money in time and that caused the delay in obtaining the guarantee is a false statement and quite deplorable. There should have been an affidavit sworn by a responsible officer from the insurance

company to explain the delay.

In the circumstances, there was nothing unlawful or irregular about the attachment of the applicant's goods by the respondent in light of breach of the clear court orders of the 29th September, 2004.

I therefore dismiss the applicant's first prayer to the extent that the attachment of the applicant's moveable goods was unlawful and irregular and unwarranted.

I now turn to consider the second and the third prayers together since they relate to the bank guarantee. Order 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.

It is not in dispute that the time that was allowed by the court for filing the fresh bank guarantee was not met.

I am alive to the fact that the applicant has filed an appeal against the judgment of this court and the effect of refusing this prayer may be to render the appeal nugatory. The delay was for a period of six (6) days and that is not inordinate. The justice of the case requires that the applicant be allowed to proceed with his appeal and in the circumstances, I will allow the application for extension of time since the bank guarantee is already in place.

The same is for the required amount of money as ordered by the court in its aforesaid ruling. The same is for a period of one year but is renewable on request by the applicant. The court can also order its renewal any time before its expiry date. The bank in its letter dated 26th October, 2004 stated that it does not issue open ended guarantees and I believe that is the general banking practice with regard to guarantees even though no specific statutory regulation was cited to that effect. For these reasons I will vary clause "c" of the conditions set out in the ruling delivered on 29th September, 2004 to admit the guarantee as it is provided that the same will be renewable on application by the respondent in the event that the appeal is not determined by 19th October, 2005 and

M/S Blue Shield Insurance Company Limited fails to apply for its renewal for any reason.

Having allowed the last two prayers as aforesaid, the interests of justice require that the applicant's attached goods be released to him and I so order but he has to pay the auctioneer's charges as the attachment was lawful.

The applicant will also pay the costs of this application in any event and I assess the same at Ksh.7000/=. It is so ordered.

DATED, SIGNED AND DELIVERED at Nakuru this 26th day of November, 2004.

DANIEL MUSINGA

AG. JUDGE

26/11/2004