

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO.425 OF 1999

JAZIRA AGENCIES (NAIROBI) LTD PLAINTIFF

VERSUS

NAZEEM AHMED DEFENDANT

RULING

Application dated 22nd July 2002 and filed on the same date is seeking mainly three orders and these are orders that there be ordered a stay of further execution pending the determination of prayer 3 herein below interpartes; that for sufficient reasons set out hereunder this court be pleased to review the ruling/or order of this court issued by Hon. Justice P. Waki on 14th December 2000 and allow the defendant a non conditional leave to defend, and lastly that the costs of the application be provided for. It is clear to me that as this application is now heard and this ruling is in effect determining it, the prayer for stay is no longer available as it depends on the decision for the prayer for review which is the third prayer herein and the first prayer seeking to have service dispensed with had been dealt with. Thus in effect only one prayer is before me and that is a prayer that the ruling and or order issued by Hon. Justice Waki on 14th December 2000 be reviewed and the Defendant be granted leave to defend unconditionally. The application is brought under Order 44 Rules 1 and 4 of the Civil Procedure Rules and under Section 3A of the Civil Procedure Act.

The grounds for the application are three and these are that:

- “1. The defendant had raised the issue of signatories, thumb print and passport not being the defendant’s, apparently on the face of the record, the trial judge never dealt with this issue to conclusion.*
- 2. Even though the promisory note did not specify the amount payable and though this issue was part of the defendant’s submissions and/or pleadings the defence counsel Mr. Gichana accidentally failed to argue the same before the trial Judge.*
- 3. Had the above been properly placed before the trial Judge, the defendant could have been given an unconditional leave to defend.”*

The Affidavit in support of the application is sworn by Lucy Nyamoita Momanyi, the Applicant’s Counsel and the same Affidavit repeats the same grounds in the application at paragraph 3 and goes further to state that the question of signature, thumb print and passport were on record but the learned Judge Hon. P. Waki through an oversight failed to adjudicate on them and that the defendant counsel had failed to raise the issue that the amount payable against the promisory note was not specified; the Judge noted it but made a surmative finding to doubt in favour of the defendant had this issue been raised. Other than those two aspects, the rest of the Affidavit in support deal with matters pertaining to stay of execution mainly. I note that only Ruling of Hon. Justice Waki was annexed as exhibit and not the order extracted from the same ruling as is required by law. I will however not attach much importance to the same omission as I note that a decree was drawn and there are copies in the same file.

The Respondent opposed the application maintaining that there is inordinate delay in filing the application; that the Applicant had filed Notice of Appeal in the matter; that the Applicant is not coming

to court with clean hands and the application is not bonafide; and that the issues raised for seeking review are not matters for review but are matters for appeal. First, under Order 44 Rule 1, it is clearly spelt out that application for review must be brought to the court without unreasonable delay. The order sought to be reviewed was delivered on 14th December 2000. This application is dated 22nd July 2002, well over one year and seven months after the order was issued. No reasons have been advanced for such inordinate delay and no attempt has been made to advance any reasons. In my humble opinion rules of the court are there to be followed and the court can only exercise its discretionary powers upon reason. If as is here an application for review is made over one year seven months later and no reasons are given for the inordinate delay in filing it then the court has no reasons upon which to exercise its discretion.

Secondly, I have gone through this file and perused it at length. I find the following inter alia: On 14th December 2000 Ruling sought to be reviewed was delivered. On 12th January 2001, Notice of Appeal was filed by the present Applicant against the same Ruling. It shows that it was lodged in the Registry on 29th January 2001, but it was filed in the High Court on 12th January 2001 and court fees was paid on the same day. Vide a letter dated 6th February 2001 Deputy Registrar High Court Mombasa forwarded the same copy of Notice of Appeal to the Registrar, Court of Appeal Nairobi. Respondent filed Notice of Address for service on 9th February 2002. Certificate of costs was issued on 27th March 2001 and Decree was executed by court on the same day. Proclamation was first prepared on 4.7.2001. There is Memorandum of Appeal dated 19th March 2001 in the file but there is no evidence that it was filed. It was however used as annexure in the application for execution dated 5th July 2001. Prayer (b) of that application states:

“That there be a stay of any further execution pending the filing and determination of the appeal herein.”

In the supporting Affidavit for that application filed by Lucy Nyamoita Momanyi, the deponent stated clearly that they were lodging an Appeal and had applied for proceedings for that purpose. That application was under certificate of urgency and the application was placed before Hon. Justice Hayanga on 5th July, 2001. Stay was granted ex-parte upon conditions that a written undertaking was filed as to payment of auctioneers expenses. That application was fixed for hearing on 11th September 2001 but was apparently not heard on that day. Clearly the ex-parte order expired as it had to expire after 14 days. The Respondent proceeded to execute but on 29th November 2001 a certificate of urgency was filed by Applicant and on 6th December 2001, the Applicant filed a Notice of Motion dated 6th December 2001 seeking reinstatement of interim orders granted on 5th July 2001. That application was placed before Khaminwa, Commissioner of Assize and the Applicant got temporary orders again. This was notwithstanding that on 4th December 2001 a similar application seeking extension of the orders of 5th July 2001 had been dismissed by Hon. Justice Onyancha. That application was again not heard inter-partes as on 18.12.2001 when it came up for hearing Mrs. Momanyi sought adjournment and got it and got another stay which was extended for 14 days to enable her file supplementary Affidavit. Again on 11.2.2002, the Applicant came to court again under certificate of urgency and again got another extension of the stay orders. The application for stay was never heard by that time but it was used at various time to have stay orders extended. Eventually, I heard that application dated 5th July 2001 on 11th July 2001 and delivered a Ruling on it on 18.7.2002. It is after that Ruling that this application for review was filed four days after my Ruling.

I have gone into all this trouble to try to trace the history of this matter for only one main reason. It will be clear from the same history that the Applicant has been with the Ruling of Hon. Justice Waki all along. Its counsel has remained the same throughout. It had preferred to take other proceedings such as filing a notice of appeal, filing Notice of Motion for stay of execution and making a candid attempt to perpetuate that stay and have it extended from time to time without doing anything about it or have it heard inter-partes till at long last it was heard. After the Ruling with which ended against the Applicant, then and only then did the Applicant realise that it needed to have the Ruling delivered on 14th December 2000 to be reviewed. Clearly the Applicant cannot be coming to court with clean hands. It is in my mind not being honest and it is not acting in good faith. This application is an abuse of the court process. It is unhappy but it is a continuation of the abuse of the court process that has continued as can be seen throughout this file. I am, on my side not prepared to encourage such an action. I think the Respondent having obtained

judgment way back on 14th December 2000, has been denied the fruits of the sweet judgment for too long and that denial must come to an end. The end is now.

Thirdly, the matters raised for seeking review are in my mind matters for appeal and not for review. If Hon. Justice Waki noted as he did the matters raised but notwithstanding his touching on them, he still granted the order for summary judgment, then it meant he considered those aspects and he was not satisfied that they would militate against his allowing the application. I have no jurisdictions to interfere with such a decision as it is not a mistake on the face of the record nor does it fall under matters that could require review under any other reasons and certainly they were not matters that could not with due diligence have been discovered at the time of the submissions or when the orders were given. They were matters that the learned Judge noted in his Ruling (including matters that were allegedly omitted by Mr. Gichana) and he was aware of them when he made his Ruling. For me to revisit them it would mean my sitting on appeal on a fellow Judge. That would be wrong. The only court that can now decide on them is the Kenya Court of Appeal. For example, the court did see a copy of the Promisory note which not only contained the signature of the defendant but his thumb print, name and passport number, the amount and dates were as stated by the Plaintiff but the promises was “cash” and not the Plaintiff’s name. How do I challenge that finding of a fellow Judge. He also referred to what Gichana should have said and analysed the Applicant’s affidavit before he made his decision. Any interference with the same findings can now only be done by the Court of Appeal on appeal.

This application lacks merit and I have no hesitation in stating so. It is dismissed with costs to the Respondent. Orders accordingly

. Dated and delivered at Mombasa this 30th Day of August, 2002.

J.W. ONYANGO OTIENO

JUDGE