Oduol v Nation Media Group Limited (Civil Suit 71 of 2017)
[2024] KEHC 15175 (KLR) (Civ) (2 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15175 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 71 OF 2017

CW MEOLI, J

DECEMBER 2, 2024

BETWEEN

JAMES OCHIENG ODUOL ..... PLAINTIFF

AND

NATION MEDIA GROUP LIMITED ..... DEFENDANT

RULING

1. What has been presented before this Court for determination is the motion dated 21.06.2024 by Nation Media Group Ltd, the Defendant (hereafter the Applicant). Seeking inter alia that the time within which the Applicant should deposit the sum of Kshs. 2,000,000/- in the joint interest earning account in the name of the parties advocates as set out in the order of 16.05.2024 as read with the order of 19.03.2024 be extended to 05.06.2024; and the order of stay of execution pending appeal granted on 19.03.2024 continues to subsist. The motion is expressed to be brought pursuant to Order 42 Rule 6(2) and Order 50 Rule 6 of the Civil Procedure Rules (CPR), among others, and based on grounds on the face of the motion. And as amplified in the supporting affidavits sworn by Queenton Ochieng, counsel on record for the Applicant and Peter Ayoma, a clerk employed at the law firm representing the Applicant.

2. The gist of counsel's deposition is that judgment was entered against the Applicant on 16.02.2023 in the sum of Kshs. 7,000,000/- together with costs and interest whereupon the Applicant applied for stay of execution pending appeal. And that the Court granted interim orders of stay of execution on condition that the Applicant deposits the sum of Kshs. 2,000,000/- into Court. That subsequently, the application for stay of execution was heard and determined on 19.03.2024 and allowed on condition that the Applicant deposits the judgment sum of Kshs. 7,000,000/- in a joint interest earning account in the name of the parties' advocates within sixty (60) days. The court contemporaneously ordering that the sum of Kshs. 2,000,000/- earlier deposited in Court, be released to the Applicant for that

purpose. That a joint interest account was opened and the sum of Kshs. 5,000,000/- therein deposited on 17.05.2024, but despite attempts to follow up on release of the funds deposited in Court, the registry insisted that the funds could not be released to the Applicant's advocate as the order of 19.03.2024 stated that the refund should be made to the Applicant.

3. Counsel further deposed that his firm wrote to the Court disputing the registry's interpretation of the order, eventually leading to the matter being listed before this Court on 16.05.2024. Resulting in a consent order directing that the funds be released to the Applicant's counsel on record and the time within which the released sums were to be deposited in a joint interest account extended for a further period of seven (7) days thereof. He states that despite extracting the order it was not until 03.06.2024 that the Kshs. 2,000,000/-, initially deposited in Court was released. The extension period accorded by the Court having already lapsed on 23.05.2024.

4. That his firm immediately instructed the bank to invest the released funds into the earlier opened joint interest account while seeking to engage counsel for James Ochieng Oduol, the Plaintiff, (hereafter the Respondent) on an extension of time to deposit, without success. He asserts that approaching the Court for extension before the lapse of the seven (7) days granted on 16.05.2024 would have only disrupted the payment process by having the file move from the finance office to the registry for purposes of listing before a judge thereby compounding the delay in the release of funds deposited in court.

5. On the part of Peter Ayoma, the gist of his deposition was that upon grant of this Court's order on 16.05.2024 he was tasked to follow up on the release of the Kshs. 2,000,000/- and did so between 17.05.2024 and 31.05.2024, until the sums were eventually released on 03.06.2024.

6. The Respondent opposed the motion through a replying affidavit dated 02.07.2024. Confirming the respective orders of 19.03.2024 and 16.05.2024, he states that on account of initial non-compliance by the Applicant, he agreed to an extension of seven (7) days lapsing on 23.05.2024. That admittedly, the Applicant had not complied with the said order, and as such, the stay of execution automatically lapsed. He avows that the Applicant had absolutely no reason why it did not deposit the Kshs. 2,000,000/- into the joint account and thereafter obtain a reimbursement once the sum was released by the Court. More so as the Applicant earlier asserted to hold a cash reserve in excess of 2,000,000,000/-. That the Applicant and or counsel did not take any steps between 23.05.2024 to 18.06.2024 when it claims that a clerk within the law firm came across an application for garnishee orders. He goes on to depose that there is further no explanation why it took Applicant two (2) weeks after the order had lapsed to write to his counsel seeking an extension, pointing out that the instant motion was filed one month after the order for stay had lapsed. Adding that the Applicant has equally not complied with directions on filing of submissions issued by the Court of Appeal towards disposal of the appeal. And is therefore undeserving of the orders sought, there being no reason why he should be kept from the proceeds of the judgment.

7. By way of a further affidavit counsel for the Applicant summarily asserted that the Applicant had already complied with directions by filing submissions before the Court of Appeal.

8. The motion was canvassed by way of written submissions. Counsel for the Applicant began by setting out the history of the matter. He based his submission on the provisions of Order 50 Rule 6 of the CPR and the decision in Kensilver Express Limited & 137 Others v Commissioner of Insurance & 4 Others [2014] eKLR on the factors to be considered in a motion such as before the court. Counsel contended that the delay between 23.05.2024 when the subject monies were to be deposited and 05.06.2024 when the deposit was actually done, was not inordinate. And reiterating the explanation in his affidavit, asserted that the delay was beyond the Applicant's control. He pointed out that part of the security in

the sum of Kshs. 5,000,000/- was promptly deposited and citing the case of Njoroge v Kimani [2022] KECA 1188 (KLR) stated that the Respondent should not take advantage of Court processes to justify levying execution. And faulted the argument that the Applicant ought to have applied its own funds to deposit the sum of 2,000,000/- as untenable since the process of release of the deposited funds had already been initiated.

9. On prejudice, counsel called to aid the decision in Bernard Njoroge Gathua v Mwanzia Mutiso (suing through his next friend and father) Gideon Mutiso Mukali [2015] eKLR to posit that the Respondent has not demonstrated the prejudice he likely to suffer if the motion is allowed, whereas the entire security for the judgment has already been deposited in a joint interest account. Lastly, concerning the interest of justice, counsel relied on the decisions in Savings and Loans Kenya Limited v Odongo (1987) KLR 294, Microsoft v Mitsumi Computer Garage (2001) KLR 470 and Jonathan Mange'ere v Fridah Chebet [2018] eKLR. To submit that given that delay herein is not inordinate and no prejudice is likely to be visited on the Respondent, the Court is under Article 159(2) of *the Constitution* enjoined to ensure see that justice is done by way of extension of time by allowing the motion with costs.

10. On behalf of the Respondent, counsel relied on the decision in Flora Wasike v Wamboko (1988) KLR 429 to assert that a consent judgment or order has contractual effects and can only be set aside on grounds which would justify setting aside a contract. Stating that by 16.05.2024 when the consent order was recorded, there was no formal application for extension of time, and therefore the order for stay of execution immediately lapsed through default on the part of the Applicant. In response to the Applicant's reliance on the provisions of Order 50 Rule 6 of the CPR, counsel cited Section 95 of the CPA to submit that as at 16.05.2024 there was no formal application for extension of time. Meaning that the consent order entered was agreed and recorded by the parties but not as an order issued by the Court in exercising of its powers or discretion to enlarge time.

11. Counsel underscored that the extension period of seven (7) days was neither fixed nor granted by the Court. That the powers of the Court to enlarge or extend time under Rule 6 of Order 50 relates to limited time under the rules by summary notice, or by order of the Court. While calling to aid the decisions in CIC General Insurance Co. Limited v Phyllis Mbula [2019] eKLR and Nyoike Njenga Hinga v John Muthutho [2016] eKLR counsel contended that the power under Rule 6 of Order 50 does not vest the Court with the power to alter the terms of a consent entered into by parties , whereas the motion has not advanced any grounds on which a contract may be set aside. Reiterating the contents of the Respondent's affidavit material, counsel maintained that there is manifest indolence and non-compliance on the part of the Applicant and no reasonable explanation has been offered for its delay. In conclusion, counsel dismissed the Applicant's reliance on Article 159 (2) of *the Constitution* and the cited decisions on grounds that these were inapplicable where parties consent on extension of time and not by an order of the Court. He therefore urged the Court to dismiss the motion with costs.

12. In a brief rejoinder, counsel for the Applicant cited the decision in Brooke Bond Liebig (T) Ltd v. Mallya [1975] E.A. 266 and Ismail Sunderji Hirani v Noorali Esmail Kassam (1952) 19 EACA 131 to argue that even though the extension was by consent, the moment it became an order of the Court, the provisions of Rule 6 of Order 50 became applicable. Counsel concluded by submitting that the reasons advanced in the affidavit in support of the motion warrant the Court to set aside the order and extend time.

13. The Court has considered the material canvassed in respect of the motion and perused the Court record. The events leading to the present motion have been captured in part by the parties in their respective affidavit material outlined above. As earlier noted, the Applicant's motion inter alia seeks extension of time. This application arises pursuant to an order of this Court issued on 16.05.2024, when as rightly argued by the Respondent, the matter came up for mention before this Court. By way

of context, the proceedings of 16.05.2024 arose from the ruling delivered on 19.03.2024, in respect of the Applicant's motion seeking stay of execution pending appeal. The Court granted the said motion on condition. At paragraph 23 thereof, the Court stated that: -

> " 23. In the circumstances, and in order to preserve the rights of both parties pending appeal, the Court will allow the motion dated 27.03.2023 on condition that the Applicant, shall deposit into a joint interest earning account in the names of the parties' advocates, the sum of Kes.7,000,000/- (Seven Million) as security, within 60 days of today's date. For this purpose, the court makes an order that the sum of Kes. 2,000,000/- already deposited into the court by the Applicant shall immediately be released to them. The costs of the motion shall abide the outcome of the appeal in the Court of Appeal."

14. The above direction seemingly created difficulties as to the payee of the released funds, the parties eventually appearing before this Court on 16.05.2024. The record of the day's proceedings shows that when counsel for the respective parties appeared before the court, the file was placed aside until 10.45am. Later, at 12.07pm, the matter was called out and the following consent order was recorded:-

> " By consent, the order in paragraph 23 of the ruling delivered on 19.03.2024 is varied so that the subject deposited monies are to be released to the depositor HHM Advocates."

15. The court also extended time for compliance by a further 7 days. The Court's power to enlarge time as invoked by the Applicant, is donated by Order 50 of Rule 6 the CPR which provides that; -

> " Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
>
> Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

16. The foregoing provision is anchored on Section 95 of the CPA which states that: -

> " Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired".

17. What then are the applicable principles in respect of the forestated provisions? In the case of Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission and 7 Others [2014] e KLR, the Supreme Court stated that: -

> " This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:
>
> Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
>
> A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court

Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

Whether there will be any prejudice suffered by the respondents if the extension is granted;

Whether the application has been brought without undue delay; and

Whether in certain cases, like election petitions, public interest should be

a consideration for extending time".

18. The Respondent disputes the applicability of Order 50 Rule 6 of the CPR to the consent order in question here. Citing the decision in Flora N. Wasike (supra). On the basis that as of 16.05.2024 when the consent was recorded, there was no formal application for extension for enlargement of time. Hence the court was not exercising its powers or discretion to enlarge time. Further that, Rule 6 of Order 50 does not vest the Court with the power to alter the terms of a consent entered into by parties whereas the motion has not advanced any grounds on which a contract may be set aside. The Applicant's retort is singular, that even though the extension was by consent, the moment it became an order of the Court, the provisions of Rule 6 of Order 50 became applicable.

19. It is trite that a consent judgment or order may be set aside only in certain circumstances, for instance, of fraud or collusion, misrepresentation of the facts, lack of consensus, public policy or for such reasons as would normally lead to the setting aside or rescinding of a contract. The Court of Appeal in Samson Munikah Practising as Munikah & Company Advocates v Wedube Estates Limited [2007] eKLR cited the decision of the Court of Appeal for Eastern Africa in Brooke Bond Liebig (T) Ltd v. Mallya [1975] E.A. 266 where it was stated that: -

> " The circumstances in which a consent judgment may be interfered with were considered by this Court in Hirani v. Kassam [1952] 19 EACA 131 where the following passage from Seton on Judgments and Orders, 7th Edn., Vol 1, P. 124 was approved:

Prima facie, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.

No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion.

All material facts were known to the party who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. As Windham, J. said in the introduction to the passage quoted above from Hiranis' case, a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding it. ..."

20. Ag. Vice President Mustafa stated in his judgment that:

> " The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between

the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could have been no mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed." (Emphasis added).

21. As rightly pointed out by the Respondent, the Applicant had not moved the Court by way of any formal application in respect of the proceedings of 16.05.2024. Meanwhile, on the said date parties voluntary consented to vary paragraph *23* of this Court ruling delivered on 19.03.2024. Without going into the merits of the Applicant's explanation, the provisions of Order 50 Rule 6 of the CPR, as advanced by the Applicant, would not apply in the instant matter notwithstanding the fact the resultant consent translated into an order of the Court. The consent was as a result of negotiations between counsel for the parties that purportedly transpired between 10.45am and 12.07pm on 16.05.2024, with no input or influence from this Court whatsoever. The dicta in Brooke Bond Liebig (supra) still holds true that a consent order can only be set aside in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract.

22. Having settled the above, it would be remiss if this Court were not to address the interest of justice element and whether stay of execution pending appeal granted on 19.03.2024 can still subsist. By this Court's ruling on the latter date, the Applicant was granted conditional stay of execution orders, terms of which have earlier been addressed in this ruling. That said as at 23.05.2024, when the consented conditional stay orders lapsed, the Applicant had not complied. The Respondent's contestation that the Applicant was in default therefore cannot be faulted.

23. However, by the Applicant's supporting affidavit and bundle of exhibits attached thereto marked "QO-1", as at 05.06.2024 the sum of Kshs. 2,000,000/- was equally deposited into the already operational joint interest earning account and the Respondent's advocate duly notified of the fact on 10.06.2024. Therefore, as matters stand, the entire sum of Kshs. 7,000,000/- that this Court had initially directed to be deposited in a joint interest earning account has been deposited, albeit late. The initial delay resulted from the wording of the order, leading to a dispute as to which person the released monies were to be paid. The consent subsequently recorded was to resolve that question; it was not the Applicant's fault that the question and administrative court processes delayed compliance.

24. Secondly, from the material before this Court and record herein, it would seem that following the Applicant's subsequent default in depositing the last tranche of the security, the Respondent initiated garnishee proceedings in respect of the joint interest earning account. Hence the proceedings before the Deputy Registrar and resultant decision of 18.06.2024 from which the Respondent has preferred an appeal dated 19.07.2024, pursuant to Order 49 Rule7(2) & (3) of the CPR. Further, while matters relating to the pending appeal in the Court of Appeal are outside the remit of this court, the Applicant has already complied by filing submissions, a copy being exhibited here as annexure marked "QO-1" in the further affidavit.

25. While the Applicant's compliance with deposit directions in respect of the judgment sum was late, it would not serve the interest of justice to penalize the Applicant. More so where part of the delay may be attributed to court processes. Besides, in the court's view, the Respondent has not been so unduly prejudiced that costs would not be adequate compensation. In giving meaning to the spirit of the law and not just the letter of the law, and for the ends of justice, the court is persuaded that this is a deserving situation for the invocation of the attenuating aspects of Section 3A of the *Civil Procedure Act*. Which provision reserves "the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court".

26. The Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR while addressing the provision stated that: -

> " Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In Equity Bank Ltd versus West Link Mbo Limited [2013], eKLR, Musinga, JA stated inter alia, that, by "inherent power" it means that
>
> "Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."

The Supreme Court went further in Board of Governors, Moi High School Kabarak and another versus Malolm Bell [2013] eKLR, to add the following: -

> " Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just." (Emphasis added).

27. In the circumstances, the court will allow the motion dated 21.06.2024 on terms that the time for compliance is accordingly extended so that the Applicant's late deposit of the sum of Shs. 2000,000/- is regularized, and consequently, the court's order of 19.03.2024 granting stay of execution pending appeal upon deposit of the entire security, deemed to continue to subsist as if it had never lapsed. The Respondent is granted the costs of the motion in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 2ND DAY OF DECEMBER 2024.

C. MEOLI

JUDGE

In the presence of

Mr. Aden holding brief for Mr. Ochieng for the Defendant/Applicant:

Mr. Otieno holding brief for Mr. Echesa for the Plaintiff:

C/A: Erick