



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 2 OF 2017 (O.S)**

**IN THE MATTER OF AN APPLICATION FOR ORDERS**

**SEEKING THE DELIVERY OF A CASH ACCOUNT**

**WANYORORO FARMERS CO. LTD.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**EZEKIEL EVANS WAFULA SIMIYU T/A**

**WAFULA, WASHIKE & ASSOCIATES**

**ADVOCATES.....DEFENDANT/APPLICANT**

**RULING**

1. This a ruling on the defendant's application dated 3<sup>rd</sup> January 2021. It seeks extension of time to comply with court orders issued on **3<sup>rd</sup> December 2021**. Grounds on the face of the application is that the applicant has encountered difficulties in sourcing money but he can comply with the court order.
2. The applicant seeks extension of time under **Order 50** which gives discretion to this court to grant orders of this particular nature; the applicants seeks 120 days to be able to comply with the said court order.
3. The applicant raised issue with the deponent of affidavit filed by the respondent on ground that the CR12 attached is for the year 2009 and they are not therefore certain whether the deponent is a director now and submitted that **Section 3 of the Companies Act** says an officer can be a director or manager or secretary of the company and submitted that this is not a technicality and the respondent should not rely on article 59 to correct the error; that there was need for a resolution and in light of that the affidavit has failed the test and ought to be struck out.
4. The applicant's advocate further submitted that without prejudice to the submissions on affidavit above, the allegation that the respondent has sent letters and applicant has failed to respond is not true as the letter was not sent to their client and even if it was sent, he was making efforts to comply with the court order but it became difficult.
5. Counsel for the applicant submitted that the respondent will not suffer any prejudice and they are paying, that they are asking for time to pay; that they are asking for 120 days.
6. In response counsel for the respondent submitted that the issue of deponent was raised in the trial and determined by this court; that it was raised in respect to affidavits filed in the suit and has been determined by this court. Counsel submitted that the section that relate to the order sought is **order 50 rule 6** and not **rule 5** and party approaching the court must be deserving. She submitted that no evidence efforts made by applicant. Further that counsel now on record came after judgment had been entered and never deponent that they never received their letters and the 120 days they are asking is prejudicial to their client; that the applicant has been given 45 days to comply but failed to comply and 120 days are too many as they already had 145 days.
7. The respondent submitted that the applicant is not acting in good faith and if this court is to grant extension the applicant be granted not more than 60 days.
8. In a rejoinder counsel for the applicant submitted that the applicant has explained the difficulties he encountered in paragraph 4 of his affidavit.

**ANALYSIS AND DETERMINATION**

9. I have considered submissions by both counsels herein and averments in affidavits filed. I do agree with counsel for the respondent that issue of directorship and authorization of documents executed on behalf of the plaintiff were canvassed in the hearing. I will delve into the issue but I believe the main issue is whether the applicant has demonstrated the reason for delay in complying with the court order issued on 3<sup>rd</sup> December 2020 and whether he deserves extension of time.

10. The applicant has given reason for failure to comply with orders issued on 3<sup>rd</sup> December 2020 as financial difficulties set out in paragraph 4 of his affidavit.

11. On the other hand, counsel for the respondent argues that the applicant has had 145 days already from the date of the order and they have failed to demonstrate that they have made efforts to comply; further that they have not even responded to their correspondences and not therefore deserving orders sought as he has already had 154 days yet he was granted 45 days to comply further that he has not demonstrated that he has made efforts to comply.

12. I have considered the reasons given by the application for delay in complying with court orders. I also take note of the fact that many people and entities were affected by Covid 19 pandemic but the applicant should have communicated his difficulties to the respondent. I will however give him the benefit of doubt; but however take note of the fact that he has had about 90 days now from the date of orders issued on 3<sup>rd</sup> December 2020. Giving him another 120 as per his request will amount to over 300 days cumulative. In my view that will be unfair to the respondents; while granting orders, the court has to look at a balance between the interest on warring parties to ensure fairness to each of them. In view of the above, I consider an extension for 60 days reasonable in the circumstances.

**13. FINAL ORDERS**

**1. The applicant is granted an extension of 60 days from the date of this ruling to comply with orders issued by this court on 3<sup>rd</sup> December 2020.**

**2. Costs of this application to the respondent.**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 5<sup>TH</sup> DAY OF MARCH 2021**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Schola/Jeniffer - Court Assistant

Ms.Wangare counsel for appellant

No appearance for respondent