



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 85 OF 2019

ELDORET WATER

& SANITATION CO. LTD.....APPELLANT/APPLICANT

VERSUS

ELIZABETH CHEPTOO BIAMA (legal rep. and administrator

of the estate of Henry Tirop Korir-deceased).....1ST RESPONDENT

RONALD KIPTANUI.....2ND RESPONDENT

COUNTY GOVERNMENT OF UASIN GISHU.....3RD RESPONDENT

RULING

1. **ELDORET WATER & SANITATION CO. LTD** (the applicant) has by an application dated 10.9.2019 sought to review orders of the trial court in CMCC no. 471 of 2018 issued on **23.8.2019**. Counsel representing the parties had apparently entered into a consent on 23.9.2019 compromising the application. It was a term of the agreement that the applicant pays half the decretal amount to the plaintiff, through their advocates within 14 days and the other half to be deposited in a joint interest earning account within 60 days of the date of the consent.

2. The applicant paid half the decretal sum of **Ksh. 5,767,820/-**, but contends that the 1st respondent **ELIZABETH CHEPTOO BIAMA (legal rep. and administrator of the estate of Henry Tirop Korir-deceased)** through her advocate has refused to open a joint interest earning account, the decretal sum continues to accrue interest and there is imminent danger that the 1st respondent may execute. This prompted the filing of the instant application seeking:

a) Grant of stay of execution of the judgment issued on 5th June 2019 and any subsequent orders pending hearing and determination of this application.

b) A declaration that the appellant/applicant herein complied with the terms of the consent having paid half the decretal sum within the timelines contemplated in the consent order of 23.9.2019.

In the alternative and without prejudice to the forgoing

i. That the court grants an extension of time of 2 days for compliance with the consent order of 23rd September 2019

ii. Costs of the application.

3. The basis for this application is that the applicant paid **Ksh 5,767,820/- on 7.10.2019** as shown in the direct credit payment advice printed on 15.10.2019. The respondent has however declined to open a joint interest earning account despite the many reminders. The other half decretal sum has in the meantime accrued interest and as at **8.10.2019** the sum was **Ksh. 5,856.127.00/-**.

4. **LOICE SAWE** (the applicant's legal officer reiterates he same averments, pointing out that they had paid half of the decretal sum of Ksh. 5,767.820/- to account no. 1005263065 in the name of **NABASENGE & CO. ADVOCATES held at NIC bank**, within the specified timelines of 14 days from the 23.9.2019. Through advice from their advocate she learnt that 14 days from the 23.9.2019 lapsed on 6.10.2019 which was a Sunday and not a working day and the same is exempted by **Order 50 rule 3** of the Civil Procedure Rules.

5. It is deposed that the respondents' counsel had refused to open a joint interest earning account despite many requests and reminders as per demonstrated by the attached copies of their advocate's letters marked as LS 2(a-d). This refusal to cooperate has led to an increase in interest and as at 8.10.2019 the amount stood at 5,856,127.00/=. She further deposed that the applicant is a cooperate entity with the county government of Uasin Gishu being the principal shareholder and as such its funds being public funds should be guarded.

That in any event, if the prayers sought are not granted, then the appeal if successful may be rendered nugatory.

6. By a replying affidavit, the respondent insists that the applicant did not want her to enjoy the fruits of her judgment, the application was an abuse of the court process for the reason after delivery of judgment, the applicant sought stay of 30 days orally in court which was granted. After expiry of the same, a formal application for stay was made in the trial court, and the applicant said they were willing to abide by the conditions to be given by the court, and were willing to deposit less than half the decretal sum.

7. The trial court directed that the applicant pays half of the decretal sum within 30 days and the balance to be deposited in the joint interest earning account of the advocates. After expiry of the 30 days, they filed a similar application before the high court.

8. That in the High Court however, they wanted to deposit the entire amount in a joint interest earning account, when this application dated 10.9.2019 came up to hearing, the advocates recorded a consent whereby the half of the decretal sum was to be paid within 14 days and the other half deposited in an interest earning account within 60 days and in default of the foregoing terms, execution for the entire amount was to issue.

9. The applicant is faulted as having failed to adhere to the terms of the consent which was made on 23.9.2019, 14 days and expired on 6.10.2019, which being a Sunday was extended to Monday 7.10.2019. The applicant is accused of failing to make payment on 7.10.2019 instead making the payment on 8.10.2019 and is therefore not deserving of extension of the timelines, as in any event the consent was binding. That the applicant having failed to abide by the terms only one option which is to pay the other half of the decretal sum as this court has no legal authority to vary the terms of the consent.

10. The applicant submits that it has fully complied with the terms of the Consent order recorded in court on 23rd September, 2019 and the averments by the 1st Respondent are misplaced.

11. The applicant argues that time for compliance with the first limb of the order started running on 23rd September, 2019 was supposed to end on 6th October, 2019. The deadline for the compliance with the first limb of the Consent Order, 6th October, 2019 fell on a Sunday and the Appellant/Applicant being a public office, could not process the payment of the sums to the 1st Respondent necessitating the same to be effected the following day, Monday 7th October, 2019.

12. Further, that the Applicant had to seek authority from its board of directors to have the funds released which involved a detailed process of getting all the signatures of the respective signatories but nonetheless, the payments were made within time. It is pointed out that the said payment was effected on 7th October, 2019 as can be gleaned from the direct credit payment advice printed on 15th October, 2019 and the payment voucher thereof which documents were marked as 'LS 1 (a) & (b) in the affidavit in support of our motion. The applicant maintains that 6th October, 2019 which was the last day of compliance with the Consent Order was excluded in the computation of the 14 days' period and therefore the 14 days lapsed on 7th October, 2019. The Applicant herein, going by the aforesaid provisions and case law was well within time by effecting the payment on 7th October, 2019.

13. This court is referred to a similar scenario it faced in **Multiple Hauliers (E.A) Ltd & another v Peter Munyao Gedion [2018] eKLR**, where in dismissing the Respondent's Preliminary Objection noted as follows;

"It is not disputed that the last day computing 30 days from 8th March 2018 to 8th April 2018. However, 8th April 2018 as a Sunday thus that being an excluded day vide above cited provisions, the last day falls on 9th April 2018. Therefore, the Preliminary Objection fails with no orders as to costs".

14. Further, that in **In re Estate of Njue Kamunde (Deceased) [2017] eKLR** buttressed the above position in the following words

"...Now having stated the law regarding the computation of time, it is now clear that the 21 days I gave the parties herein on 11th May 2017 expired on 1st June 2017. The last day having fallen on a public holiday as observed above meant that going by the provisions of Order 50 Rule 3 Civil Procedure Rule, that 1st June 2017 was excluded in the computation of that 21-day period. The parties were required to have filed their papers by 2nd June, 2017. The record clearly shows that only the applicant was within time when she filed her documents to wit Supplementary Affidavit and written submissions on 2nd June, 2017. On the other hand, the Respondent was seven days late when she filed her papers on 9th June, 2017. The authorities cited by the Respondent are all in tandem on the question of computation of time. The cited decisions in my view are of the same view that the excluded days are only those days where either the first or the last day falls on a public holiday on non-working day".

15. The respondent in his submissions urges this court to take note that the applicant failed to adhere by the consent terms as payment was not made within 14 days, even with the exemption of the Sunday as provided by **Order 50 rule 3 of the Civil Procedure Rules**. The annexure **LS 1(a)** issued by the **Standard Chartered bank** shows instructions to the bank were received on **7.10.2019** yet the bank slip supplied to them showed payment was made on **8.10.2019**, and the respondent insists that what was material was the day money was received which was beyond the 14 days as stated in the consent.

16. It is pointed out that the second limb of the consent order was pursuant to the compliance of the 1st limb, therefore the respondent had to pay the entire amount. The respondent urges the court not to extend time for compliance on part of the applicant. That, the terms being consent order, the same can be varied only by a consent of the parties, as was held in **Gateway Insurance Company Ltd. V. Aries Auto**

Spares [2011] eklr. Further, that the applicant has failed to explain why it did not comply with the consent terms and the said application ought to be dismissed with costs.

In the supplementary submissions by respondent it is countered that the cases relied upon by the applicants were different in that the facts were different from the instant application drawing from the case of **Multiple Hauliers[E.A] Ltd v. Peter Munyao Gideon[2018]eklr**, where the issue was whether the court could enlarge time within which to file an appeal pursuant to section 79G of the civil procedure act was addressed.

17. The court is reminded that **Gateway Insurance Company(supra)** observed that a consent judgment or order has a contractual effect and could only be set aside on grounds which would justify setting aside, or if certain conditions remain to be fulfilled were not carried out.

18. The respondent insists that the issue for determination in this instant application is whether a consent order could be varied, pointing out that the applicant herein was the defendant in the trial court and judgment and has failed to disclose to the court that the trial court had ordered them to pay the respondent half of the decretal amount within 30 days and the other half be deposited in a joint interest earning account within 30 days, in default, the stay was to lapse. The applicant did not abide by the said order.

19. That the applicant still moved the court after expiry of the above stay, an application dated 10.9.2019 was filed again, seeking stay of execution, when it came for inter-parte hearing, a consent order was recorded by the advocates. The applicant failed to adhere to the strict terms and moved the court for extension of 2 days so that they could comply with the orders and stay of execution of the judgment. The applicant is accused of coming to court with unclean hands but still wants justice, yet it failed to fulfill the initial orders of the trial court.

20. **Order 50 rule 3** of the Civil Procedure Rules states as follows:

Time expiring on Sunday or day offices closed.3. Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

21. The contention is that the lapse of 14 days fell on a Sunday and therefore, the applicant was to make the deposit on a Monday, and although they allege to have instructed the bank on this day, payment was received on Tuesday, thus the court to extend time by two days. By seeking the alternative prayer, the applicant was aware of the consequence of failing to adhere to the terms of the consent.

ANALYSIS

22. The Consent order of 23rd September, 2019 provided that: "**The Appellant do pay half of the decretal sum to the 1st Respondent within fourteen (14) days from today and the other half to be deposited in a joint interest earning account in the joint names of the Advocates for the parties within 60 days and in default, execution or the entire decretal sum to issue.**"

It is not contested that the last day of paying half of the decretal sum was on 6th October, 2019 which was a Sunday. It was therefore an excluded day and the last day indeed fell on 7th October, 2019. The Provisions of **Order 50 Rule 3 of the Civil Procedure Rules, 2010** are that:

Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

Indeed, in computation of time under the provisions of the **Interpretation and General Provisions Act section 57** provides that;

In computing time for the purposes of a written law, unless the contrary intention appears-

A period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

If the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

mere an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

Where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

23. **Order 50 rule 5** gives this court power to extend time, it states as follows:

“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.”

24. The court can enlarge time upon such terms as the justice of the case may require. The applicant has however not showed why the time should be enlarged in their favor. Further, they are guilty of failing to adhere to the initial court orders.

25. On whether the appeal may be rendered nugatory the court of appeal observed as follows:

“ix. The term „nugatory? has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.

x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

(xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.

26. In addition to the above, the consent orders can only be varied by the two parties. This submission by the respondent is not in line with the case relied on, in **Gateway Insurance Company Ltd. V. Aries Auto Spares [2011]eKLR**, the Court of Appeal stated thus as regard on consents.

“Whether or not the superior court had jurisdiction to extend time in this case depends on the true construction of the consent orders considered as a whole”

27. The Court of Appeal went further to state as follows,

“therefore the enlargement of time to relieve the appellant from rigorous of such penalty clause would not be considered as altering, varying or setting aside the compromise. On the contrary, such extension would not only give effect to the intention of the parties which was to have the suit retried but would also further the ends of justice. In the context of this case, “leave to apply” would in my view include leave to apply for extension of time for filing and serving a certified copy of the deposit slip.

In any case the consent order does not specifically state that the filing and serving of the certified copy of the deposit slip was a condition precedent to the setting aside of the judgment of the subordinate court. The finding of the superior court that the conditions for the consent order was the payment of throw away costs of Kshs. 30,000 and the filing and serving of deposit slip is not supported by the terms of the consent order.

The consent order did not finally determine the dispute. Therefore, time could be validly extended. On the true construction of the consent order the court after ordering a re-trial still retained the control of the consent order and the dispute.

On the merits of the application the appellant established that the short delay of two days according to the appellant, and 6 days according to respondent was an inadvertent omission by the advocates instructed by its lawyers to file and serve the deposit slip.”

28. This court is bound by the decision of the Court of Appeal, and the applicant herein though guilty of not obeying the initial trial order, the court has to construe the whole consent to ensure that justice is dispensed. The delay was not inordinate, and has been adequately explained. I take note of the averment that an appeal has already been filed, if the applicant pays the entire half of the decretal sum, the appeal may be rendered nugatory in the event that the same succeeds and the decretal sum is reduced. My view is that in extending the time so as to deem the one day's delay as acceptable is in line with the court's authority to exercise its discretion and the consent would not be altered. Consequently, the application is allowed with no orders on costs

Delivered on-line with the consent of both counsel, and dated this 4th day of May 2020 at Eldoret.

H.A. OMONDI

JUDGE