



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

MISCELLANEOUS CIVIL APPL. NO. 302 OF 2019

FRANCIS MULINGE KIIO.....PLAINTIFF/RESPONDENT

VERSUS

KAM SACCO LIMITED.....APPLICANT/INTENDED APPELLANT

JOHN NDETI.....APPLICANT/INTENDED APPELLANT

RULING

1. This is an application by the Applicants dated 10.8.2020 seeking two main prayers, Firstly enlargement of time by 30 days within which to comply with the court orders issued on 6.2.2020 and secondly variation of the order to deposit the decretal sums to the effect that the remaining sum of Kshs 604,550/- be deposited in court and not a joint interest earning account.

2. The orders that the applicants seek to be enlarged and varied were issued in this court. The Application is supported by an affidavit sworn by Isabella Nyambura, the claims officer at the firm that insured the vehicle KBX 422 Z and defended the claim in this matter. The grounds are that this court had granted orders of stay of execution and that the applicant had partially complied by filing a memorandum of appeal and was yet to comply with the order to deposit the decretal sum. It was averred that the applicant was unable to comply with the orders in the absence of documentation from the respondents that they requested for and were not furnished with hence filed this application due to the lapse of the order. The Applicants annexed copies of documentation indicating the process they have taken towards the performance of the orders they seek extended. The Applicants depose that the delay in compliance was occasioned in the process of opening a joint account.

3. The applicants further deposed that they are ready and willing to deposit security and if the orders sought are not granted, then they shall suffer substantial loss and further that they have an arguable appeal that shall be rendered nugatory.

4. The Application is opposed by the Respondent's advocate vide grounds of opposition dated 26.8.2020. Counsel is of the view that the application is frivolous, vexatious, incompetent, bad in law, incurably defective, abuse of the court process, an afterthought, brought after inordinate delay and *res judicata*. It was pointed out that the application is being brought seven months after the court issued its orders and further that there was no evidence that an appeal was filed within 14 days as dictated by the court order.

5. The Application was canvassed by way of written submissions. Counsel for the applicants placed reliance on the case of **Okiya Omtatah Okioti v Commissioner General, Kenya Revenue Authority & 2 Others (2017) eKLR** that invoked the inherent jurisdiction of the court to vary its own orders. It was submitted that the applicant's advocates could not approach the court for orders to extend time due to the cessation of movement into and out of Nairobi. It was submitted that most courts were closed and the time to comply had lapsed. The court was urged to allow the application.

6. In response, counsel for the respondent submitted that the instant application is *res judicata* the orders that were issued on 6.2.2020. Reliance was placed on the case of **Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR**.

7. The issue for determination is whether the application for review, variation and or extension of orders issued on 6.2.2020 has merit.

8. Section 3A, 95 of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules are the operative parts in answering the question whether the prayer to extend the mentioned court orders is merited. The sections grant the courts unfettered discretion to enlarge time where a limited time has been fixed for doing any act or taking proceedings under these rules or by summary notice or by order of the court.

9. In **Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, the court stated thus:-

“..... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising 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 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; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if 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.”

10. It is undisputed that the Applicant was granted orders by this court on 6.2.2020 and that the said orders had since lapsed and have not been complied with.

11. The Respondent’s response is that the Application is frivolous, vexatious, incompetent, bad in law, incurably defective, abuse of the court process, an afterthought and brought after inordinate delay. In view of the failure to comply with orders issued on 6.2.2020, I agree with the respondent that the application is vexatious and frivolous as well as an abuse of process.

12. The court has been urged to exercise its inherent powers and it suffices to cite **Halsbury’s Laws of England, 4th ed. (London: LexisNexis UK, 1973 —), vol. 37, at para. 14** where it is stated:

“In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

13. The inherent jurisdiction of the court most readily deals with issues concerning the court’s own processes. It is used to fill gaps where the legislature has not provided an answer and it is discretionary. Having looked at the applicant’s affidavit I am satisfied that the appellants have not come to court with clean hands as there are hints of dishonesty on the part of the applicants since it is only until 18.2.2020 that they requested for documentation to open accounts and this was about 12 days from the date of this court’s orders and 2 days to the expiry of the same. I have seen a reminder dated 18.2.2020 as well as a letter dated 25.2.2020 forwarding the documents. The applicants have not explained what they were doing from 25.2.2020 to 10.8.2020 when the instant application was lodged that seeks in essence to reverse the process that had already began. This court rendered itself in the case of **Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR** that *“Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See Ratman vs. Cumarasamy [1964] 3 All ER 933; Savill vs. Southend Health Authority [1995] 1 WLR 1254 at 1259.”* The applicants did receive the respondent’s letter dated 25.2.2020 forwarding the duly signed documents to the applicants. No reasons have been given by the applicant as to why it has not fast-tracked the process until 10.8.2020 when the present application was filed. The inordinate delay notwithstanding, this court has a reservoir from which it draws its discretionary powers when the need arises. The applicant’s request for more time to comply with the earlier orders of this court will be allowed. However, the same will be tempered somewhat so as not to prejudice the respondent who in my view has not contributed to the delay. To this end I will grant prayer 3 of the application but deny an order for stay of execution of the decree as sought in prayer 2.

14. Next I will address the issue of variation of the court order and have noted that the applicants appear to be using the court process to circumvent the court orders issued on 6.2.2020 that they were under obligation to obey and have failed to obey. In the case **Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR**, the Learned Justices of the Court of Appeal stated:

“We think that we have the jurisdiction to stop it in its tracks in order to attain or further the “O2” principle. We would act unjustly if we were to allow it another chance in this Court to defeat the cause of justice by failing to obey an important order of the superior court.”

15. It is noted that the applicants have not shown whether they had drawn a cheque for the decretal amount and forwarded it to the respondent who would thereafter proceed to deposit into the joint account once opened. Again, there is inordinate delay by the applicants in moving the court from February 2020 until August 2020 which has not been explained. I find that the applicant has not given a plausible explanation. In any case the applicant should not be allowed to choose the mode of deposit of the decretal sum. It should proceed to comply with the earlier orders by depositing the money into an interest earning account in the joint names of the advocates. There is good wisdom in depositing the amounts in an interest earning account instead of into an account that attracts no interests. Consequently, I decline to grant prayer 4 of the application.

16. Accordingly, and for the reason set out above, the Applicants application succeeds only to the extent in terms of prayer 3 thereof and is directed to ensure compliance within Thirty (30) days from the date hereof failing which the stay shall lapse while the rest of the prayers are ordered dismissed. The costs hereof to abide in the appeal.

Orders accordingly.

Dated and delivered at Machakos this 5th day of November, 2020.

D. K. Kemei

Judge