



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCC NO. 248 OF 2011**

**ALNA ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA METHODIST UNIVERSITY LIMITED.....DEFENDANT**

**AND**

**CASH GATE AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 27<sup>th</sup> June 2018, with the consent of counsel for the parties, the Court adopted the following consent as an order of Court:-

“By consent the parties herein agree that there be a stay of execution pending appeal on condition:-

1. THAT Kshs.1.5 million be paid to the plaintiffs advocates within 45 days of today’s date.
2. THAT Kshs.1.5 million be deposited into an interest bearing account in the names of the advocates of the Plaintiff and the advocates for the Defendant within 45 days of today’s date.
3. THAT the Defendant admits that auctioneer’s fees are payable as may be agreed between the parties or as taxed by the Court.
4. THAT the auctioneer’s fees as agreed or taxed be paid by the Defendant within 30 days of agreement or taxation]”.

2. Now before Court is the Notice of Motion dated 28<sup>th</sup> August 2018 for the following substantive prayers:-

3. THAT this Honorable Court be pleased to enlarge the time within which the Defendant/applicant is to comply with orders made herein on 27<sup>th</sup> June, 2018.

6.THAT this Honourable Court be pleased to order that Cash Gate Auctioneers do release to the Applicant Motor Vehicle Registration No. KBA 405 N.

3. On reckoning of time by excluding the first day and including the last, the deadline for paying the Plaintiff’s Counsel and depositing the money in a joint account would be 10<sup>th</sup> August 2018, a Friday. On this the Respondents Counsel is correct.

4. It is not controversial that on 8<sup>th</sup> August 2018, the Applicant sent to its advocates Bank Account Kshs.3 million to facilitate satisfaction of the conditions. On 10<sup>th</sup> August 2018 the firm of Kamau Kuria & Co. Advocates for the Applicant writes to Irungu Mwangi, Nganga TT & Co. Advocates (for the Respondents) informing them of the deposit and stating that,

“...our Dr. Kuria is attending the annual LSK conference in Malindi scheduled for the 8<sup>th</sup> – 12<sup>th</sup> of August, consequently the two transfers can only be done on Monday, 13<sup>th</sup> August 2018 after he returns from that conference. We ask for your indulgence until then”.

It is common ground that on 13<sup>th</sup> August 2018 the Applicant's Advocate transferred by RTGS, a sum of Kshs.1,500,000/= to the Respondents' Advocates.

5. In the meantime and before the 13<sup>th</sup> August 2018, the Applicant's Advocates had on 8<sup>th</sup> August 2018 signed the opening forms for the joint account. But it was not until 27<sup>th</sup> August 2018, that Standard Chartered Bank wrote to the two firms advising that the requested joint account had been opened.

6. In the intervening period, on 15<sup>th</sup> August 2018, the Respondents writes the following instructions to the auctioneer;-

Cash Gate Auctioneer

P.O. Box 203845-00100

NAIROBI

Dear Sir

RE: HIGH COURT COMMERCIAL CASE NO. 248 OF 2011: NJUGUNA NJOROGE T/A ALNA ENTERPRISES VERSUS KENYA METHODIST UNIVERSITY.

We refer to this matter and advise that the Defendant has not complied with the orders. Do proceed and attach the proclaimed goods to recover the total decretal sum together with costs.

Yours faithfully,

J.I. Mwangi

For: IRUNGU MWANGI, NGA'NGA T.T & CO. ADVOCATES.

Cc. Client

7. It is moot that the Applicant breached the timelines set out in the consent of 27<sup>th</sup> June 2018. But the Applicant blames its predicament on three factors. First, one of the documents that was needed for purposes of opening the joint account was an extract of the Court order of 27<sup>th</sup> June 2018. That, however, was not forthcoming until 2<sup>nd</sup> August 2018. Then when it did, further delay was inevitable because of the internal processes of the Bank. Although the account opening forms were submitted to the Bank on 8<sup>th</sup> August 2018, the Bank informed both Counsel that the joint account was available 19 days later on 27<sup>th</sup> August 2018. Lastly that because the principal partner in the firm of the Applicant's Advocates was held up at an annual LSK conference out of town, payment to the Respondent's Advocate could only be made on 13<sup>th</sup> August 2018. Three days after the deadline. This difficulty having been communicated to the Respondent's Advocate on the last day of the order.

8. This Court has no doubt that in the nature of things the delays and reasons for them are plausible and understandable. The Applicant's Advocates, I am certain, feels hard done by the Respondent's Advocates because they, perhaps, ought to understand that "these things do happen"! However, the truth of the matter is that the deadlines were breached and the Respondent's Advocates had made no promise to indulge the lateness.

9. A prudent way of dealing with the matter was for the Applicant's lawyer to seek extension of time from the Court once it became evident that the delays would lead to a violation of time. The Applicant's Advocates failed to do so. And it has to be said that in respect to the payment to the Respondent's Advocates, the Applicants could have done better. Unlike the opening of a joint account, payment to the Advocates did not require to be supported by a formal Court order. But look at what the Applicants did! They waited until 8<sup>th</sup> August 2018, two days before the lapse of time, to avail the money into its lawyers account for onward transmission to the Respondent's Advocates!

10. All said, the Respondent's Counsel has now been paid Kshs. 1.5 million and the deposit into the joint account is possible. The delays were short and for good reason. This Court will grant the extension sought.

11. One other issue. Upon default, the Respondent's Counsel instructed Cash Gate Auctioneers to proceed with execution. This was on 15<sup>th</sup> August 2018. The Auctioneers sought extension of the warrants earlier issued so as to complete the execution that had reached the stage of proclamation on 15<sup>th</sup> January 2018. Rule 12(4) of The Auctioneers Rule is the authority for such extension. Having acted within the law then Auctioneers fees is due for the attachment of 24<sup>th</sup> August 2018. Nevertheless, assessment of the fees must take into account that by the date of attachment Kshs. 1.5 million had been paid to the Respondent's Advocates.

12. This now is the Courts answer to the Notice of Motion of 28<sup>th</sup> August 2018:-

12.1 The time for compliance of the order of court made on 27<sup>th</sup> June 2018 is enlarged for 30 days from the date of this order.

12.2 Cash Gate Auctioneers shall forthwith release Motor vehicle KBA 405 N to the Defendant.

12.3 The Defendant shall pay the Auctioneers fees for the attachment of Motor vehicle KBA 405 N to be agreed or assessed.

12.4 Costs of the Motion shall be in the cause.

Dated, Signed and Delivered in Court at Nairobi this **8<sup>th</sup>** day of **February, 2019**.

**F. TUIYOTT**

**JUDGE**

***Present:***

Maina for Mwangi for Plaintiff

Chege for Defendant/applicant

Nixon- Court Assistant