



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 207 OF 2019**

**AUTO SELECTION (K) LIMITED.....APPLICANT**

**VERSUS**

**ELIZABETH NDUKU MBISU.....1<sup>ST</sup> RESPONDENT**

**PAUL WAINAINA.....2<sup>ND</sup> RESPONDENT**

**FRANCIS KIBE MUIRURI.....3<sup>RD</sup> RESPONDENT**

**RULING**

The applicant herein has moved this court by way of the Notice of Motion dated the 1<sup>st</sup> July, 2019 in which the Applicant has sought orders for a temporary stay of execution of the orders made by this court on the 17<sup>th</sup> day of June, 2019, a review or variation of the conditions of the orders issued on the 17<sup>th</sup> June, 2019. In the alternative, the court varies the condition in the aforesaid order by allowing the Applicant to deposit a Bank Guarantee in court in place of cash and extension of time for compliance with the orders as may be varied by the Honourable Court.

The application is supported by the annexed affidavit of Fredrick Muriithi Thuku and on the grounds set out on the body of the same.

In the said affidavit, it is deponed that; the Applicant is engaged in the motor vehicle selling business by importing used motor vehicles and selling them to buyers locally in Kenya. That it was not in possession of motor vehicle registration number KAU 679D at the time of the accident as it had already sold the same to the 3<sup>rd</sup> respondent herein. A copy of the sale agreement is annexed and marked FMT-1.

The Applicant further avers that despite having a good defence, judgment was entered against it on the 18<sup>th</sup> November, 2016 due to the negligence on the part of it's advocates on record then.

That following the entry of the judgment aforesaid, it moved the court for an order for stay of execution which was granted on condition that it deposits the entire decretal sum of kshs. 4,239,233.16 in court within 30 days from 17<sup>th</sup> June 2019 failing which the stay order would lapse.

The applicant avers that it cannot manage to get the entire decretal sum and has urged the court to vary its orders made on 17<sup>th</sup> June, 2019 to have it deposit a Bank Guarantee in place of cash.

The 1<sup>st</sup> respondent has opposed the application vide grounds of opposition filed on 22<sup>nd</sup> July, 2019 in which she states;

- i. That the applicant is in breach of express orders of the court issued on 17<sup>th</sup> June, 2019.
- ii. That the application is misconceived, unsupported, unmeritorious, frivolous, vexatious and devoid of legal and factual basis and it's an abuse of the court process.
- iii. That the application has not met the legal requirements for grant of order of review and its main purpose is to buy time and defeat the lawful orders of the court made on 17<sup>th</sup> June, 2019.
- iv. The application is res-judicata and that it offends the purpose of order 42 Rule 6(1) and (2) of the Civil Procedure Rules.

v. The Applicant is in contempt of court orders given on 17<sup>th</sup> June, 2019 for failing to deposit the decretal sum or any part thereof to court.

The application proceeded by way of oral submissions and various authorities were relied on by both parties in support of their respective positions.

This is an application for review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. An applicant seeking review has to satisfy the court that:

- 1. There was discovery of new and important matter that was not within his knowledge when the orders were given,**
- 2. There is an error apparent on the face of the record.**
- 3. The application has to be brought within a reasonable time.**
- 4. For any other sufficient reason.**

The orders sought are discretionary in nature. The applicant avers that it is not able to raise the entire decretal sum as ordered by the court and that it is not running away from the orders of the court. That it does not have money to deposit but it has assets on the basis of which the court can issue an order for it to deposit a Bank Guarantee. It has argued that it has an arguable appeal which has high chances of success in that it had sold the motor vehicle to a third party at the material time when the accident occurred and therefore the vehicle was not in its possession. It has blamed its previous advocate on record for failing to attend court to argue its case.

The court has also considered the grounds of opposition and the authorities cited by the counsel for the 1<sup>st</sup> Respondent and his argument that an order for stay of execution has to consider the interest of both parties. The 1<sup>st</sup> Respondent has also submitted that a court should not allow the Applicant to deposit what it thinks is sufficient and has relied on the case of **Francis Njoroge vs Stephen Maina Kamore (2018) eKLR**. He has also relied on the argument that the inability of a party to deposit the decretal sum or any other sums ordered by the court is not a ground for review and has cited the case of **Simba Coach Limited Vs. Kiriyyu Merchants Auctioneers (2019) eKLR**.

The Respondent further submitted that the orders sought to be reviewed do not exist as the same lapsed upon the expiry of the 30 days given to the Applicant by the court to comply. He cited the case of **Simba Coach Limited Vs. Kiriyyu Merchants Auctioneers (2019) eKLR** to that effect. It was also argued that the application was filed with undue delay and that the same is res-judicata as it deals with similar issues to the ones that were dealt with in the application dated the 28<sup>th</sup> February, 2019.

In considering the orders for review, it is apparent that counsel for the applicant has relied on “any other sufficient reason” to support his application. This is borne in his submissions in rejoinder, the reason for review being that the respondent is unable to raise the total decretal sum as ordered by the court and has instead offered to deposit a Bank Guarantee as an alternative.

On delay in bringing the application, the court notes that the orders sought to be reviewed were given on 17<sup>th</sup> June, 2019 and the applicant had 30 days within which to comply. The application herein was filed on the 15<sup>th</sup> July, 2019 which was within the 30 days. It was filed under certificate of urgency but when it was placed before Githua Judge, she could not make any orders as the orders sought to be stayed were issued by this court. It is therefore my considered view that the Applicant moved the court expeditiously.

With regard to the issue of the orders having lapsed, there is on record an application dated 7<sup>th</sup> day of August, 2019 pursuant to which, interim orders were granted by Serگون J. on the 8<sup>th</sup> day of August, 2019 and they have since been extended and are still in force to date.

This court finds that the applicant has given a plausible explanation for non compliance with the court orders given on 17<sup>th</sup> June, 2019 and has satisfied the court the need to have the same reviewed. Consequently, the said orders are hereby reviewed and varied in the following terms;

- a. The order for stay of execution is hereby reinstated
- b. The applicant to deposit half of the decretal sum in a joint interest earning account in the joint names of the advocates on record.
- c. The applicant to deposit a Bank Guarantee in court as security for the balance of the decretal sum
- d. Conditions (b) and (c) to be complied with, within 30 days from the date of this ruling failing which the stay order shall lapse.

**Dated, signed and delivered at NAIROBI this 14<sup>TH</sup> day of NOVEMBER, 2019.**

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

..... for the 3<sup>rd</sup> Respondent