



No. 193

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 125 OF 2010

1. RICHARD BUDDY OKEMWA
2. ELIJAH OKEMWA ASIAGO..... PLAINTIFFS

VERSUS

THE KENYA POWER AND LIGHTING CO. LTD..... DEFENDANT

RULING

1. On 10th May, 2013 this court entered ex parte judgment in favour of the plaintiff against the defendant in the sum of kshs. 587,327.00 together with costs. On 29th November 2013, the said judgment was set aside on application by the defendant on conditions. The conditions were that the defendant would deposit the said sum of kshs. 587,327.00 in an interest earning bank account in the joint names of the advocates for the plaintiff and the defendant within 30 days from the date of that order and shall also pay to the plaintiff thrown away costs in the sum of Ksh. 10,000.00 within the same period. The defendant was not satisfied with the part of the conditions aforesaid that were imposed by the court more particularly the limb that required the decretal amount to be deposited in a joint account of the advocates for the parties. On 18th December 2013, the defendant applied to the court for the review of the said condition so that the decretal amount may be deposited in court instead of being deposited in a joint account of the advocates for the parties. The defendant in the meantime did not comply with the said conditions. The defendant's application for review was heard and dismissed by the court on 19th February 2014. The court found that the application for review had no merit. Since the time within which the decretal amount was to be deposited in court had lapsed as of the date of the court's ruling of 19th February 2014, the defendant moved the court through an application dated 20th February, 2014 seeking the extension of time within which to comply with the court order of 29th November 2013 aforesaid. The defendant also sought a stay of execution of the judgment that had been entered against the defendant which was reinstated automatically when the time within which the defendant was to meet the conditions under which the same was set aside lapsed. The defendant sought a further order that the auctioneers who had issued a proclamation against its movable assets do file their bill of costs for assessment by the court. This is the application before me for ruling.
2. The defendant's application dated 20th February, 2014 was brought on the grounds that the defendant is ready and willing to comply with the orders of the court that were made on 29th November 2013 and that the defendant's failure to comply with the said orders earlier was occasioned its desire to have the said orders reviewed which was unsuccessful. The defendant contended that the application was brought without unreasonable delay soon as the defendant's application for review was dismissed by the court on 19th February 2014. As a demonstration of

its readiness to comply with the order of the court aforesaid, the defendant's advocates on record have annexed to the defendant's affidavit in support of the application herein a copy of a cheque in the sum of kshs. 588,000/= already drawn in favour of the plaintiffs' and the defendant's advocates on record and a separate cheque in the sum of kshs. 10,000.00 drawn in favour of the plaintiffs' advocates being thrown away costs. The defendant urged the court in the interest of justice to grant the orders sought. The defendant's application was opposed by the plaintiffs. Through a replying affidavit sworn on 24th February 2014 by the 2nd plaintiff, the plaintiffs termed the defendant's application as unmeritorious and an abuse of the process of the court. The plaintiffs contended that the defendant was given adequate time to comply with the conditions that were imposed by the court on 29th November 2013 and failed to do so without giving any reasonable explanation for the failure. The plaintiffs contended further that the defendant is guilty of deliberate neglect and indolence which should not be condoned by the court. According to the plaintiffs, the defendant's application herein is an attempt by the defendant to delay the plaintiffs in the enjoyment of the judgment that was entered in their favour on 10th May, 2013.

3. When the application came up for hearing on 25th February 2014, Mr. Bunde, advocate who appeared for the defendant relied entirely on the grounds set out on the face of the defendant's application and on the affidavit of Awuor Owiti sworn on 20th February 2014 in support to the application and urged the court to allow the application. In addition, Mr. Bunde submitted that the defendant's application was brought in good faith and that the defendant had no intention of whatsoever nature of delaying the cause of justice. In his submission in reply, Mr. Minda advocate who appeared for the plaintiffs submitted that the defendant had failed to satisfy the necessary conditions for extension of time. The plaintiffs advocate submitted that an applicant for extension of time must give reasonable explanation as to why he failed to comply with the prescribed or set time line. Counsel submitted that the defendant had failed in that regard and as such was not deserving of the exercise of this court's discretion which cannot be exercised in vacuum. The plaintiff's advocate submitted further that this is a court of law and not a court of mercy where the defendant should keep running for pardon all the time. Counsel submitted that where no good grounds have been put forward like in this case to justify the orders sought, the court should not hesitate to reject the application. The plaintiffs' advocate submitted further that the defendant's application was brought after unreasonable delay which delay was not explained by the defendant. Counsel urged the court to find that the defendant's application has no basis and to proceed to dismiss the same.
4. I have considered the defendant's application together with the replying affidavit filed by the plaintiffs in opposition thereto. I have also considered the oral submissions made before me by the advocates for both parties. The court's power to enlarge time is provided for in Order 50 rule 6 of the Civil Procedure Rules, 2010. The rule empowers the court to enlarge time upon such terms as the justice of the case may require. The exercise of the power is discretionary but unfettered. Like any other judicial discretion, the power to extend time must be exercised judiciously on well established principles. I am fully in agreement with the submission by the plaintiffs' advocate that an applicant seeking extension of time must demonstrate that he deserves the exercise of the court's discretion by among others, bringing the application without unreasonable delay and providing a reasonable explanation as to why he failed to take action within the prescribed time or the time set by the court. In the case before me, I am convinced that the defendant deserves the exercise of this court's discretion. I am satisfied by the explanation given by the defendant for its failure to comply with the order of this court given on 29th November 2013 within the time that had been set by the court. I am also satisfied that the application herein was brought without unreasonable delay.
5. It was the defendant's constitutional right to seek a review of this court's order made on 29th November 2013. As I stated in the ruling that was delivered on 19th February 2014, the defendant should have either complied with the said court order as it pursued its application for the review of the same or sought the extension of time within which to comply with the same in the event that its application for review was rejected by the court. The defendant did neither of the above as a consequence of which the ex parte judgment that was set aside by the court on 29th November, 2013 was reinstated. In the case of, **Phillip Chemwolo & Another vs. Augustine Kubede (1982-1988) KAR 1039** at page 1040 Apaloo J. A stated that:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think broad equity approach to this matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

6. As I have stated above, the defendant failed to either comply with the court order or seek the extension of time within which to do so on the assumption that its application for review would be allowed. To me, this was a blunder because the dismissal of the defendant’s application for review in the circumstances put the defendant in a situation in which the defendant lost the benefit of the order that was made on 29th November 2013 by which the court set aside the ex parte judgment that had been made against the defendant and gave the defendant the opportunity to have this case heard and determined on merit. I am of the opinion that this mistake by the defendant should not in the circumstances deny it the opportunity that had been extended to it by the court to defend this suit. It has not been demonstrated that the defendant failed to comply with the court order of 29th November 2013 with the intention of delaying the cause of justice or abusing the process of the court. I am of the view that the loss and inconvenience that would be suffered by the plaintiffs by allowing the present application can be put right by payment of costs.
7. Due to the foregoing, it is my finding that the defendant’s application dated 20th February 2014 has merit. The same is hereby allowed on the following terms:
 - a. The time within which the defendant was to comply with the orders of this court made on 29th November 2013 is extended by 21 days from the date hereof.
 - b. Pave Auctioneers shall agree with the defendant on the fees and costs payable to them for the execution levied upon the defendant on 15th December 2013 within 14 days, failure to which the said auctioneers shall file their bill of costs for taxation by the Deputy Registrar of this court.
 - c. The defendant shall pay to the plaintiffs the costs of this application assessed at Ksh. 5,000/= which payment shall be made forthwith.

Delivered, dated and signed at Kisii this 10th day of March 2014.

S. OKONG’O

JUDGE

In the presence of:-

Mr. Ochwang’i h/b for Minda for the Plaintiffs

N/A for the Defendant

Mr. Mobisa Court Clerk

S. OKONG’O

JUDGE