



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 643 OF 2010

SALIM MANJI:.....
PLAINTIFF

VERSUS

INSTA PRODUCTS (EPZ) LTD.:1ST DEFENDANT/APPLICANT

DAVID HOPCRAFT:.....:2ND DEFENDANT/APPLICANT

R U L I N G

1. The application before the court is a Notice of Motion dated 2nd September 2014. It is filed under Section 3A and 80 of the Civil Procedure Act Chapter 21 of the Laws of Kenya and Order 50 Rules 6 and Order 22 Rule 22 of the Civil Procedure Rules, and all other enabling provisions of the law.
2. The application seeks the following orders:-
 1. *The time within which the 2nd Defendant/Applicant was required to deposit into a joint interest earning account USD 152,000/- be extended.*
 2. *Upon such extension, the said amount be required to be deposited in a joint interest earning account opened in the names of the Plaintiff and the Applicant (2nd Defendant) within 24 hours of being ordered to do so.*
 3. *The Orders granted by this Honourable Court on 13th May 2013 be reviewed.*
 4. *The Applicant's defence filed on 13th April 2012 be reinstated and the matter be directed to go for determination on merit.*
 5. *In the alternative to prayer 4 above the Applicant be granted leave to file his defence and counter claim in terms of the annexed draft within 7 days of paying the deposit of USD 15 2,000/- as ordered.*
 6. *There be a stay of execution of the Judgement granted in favour of the Plaintiff upon the 2nd Defendant pending hearing and determination prayer 3 and 4 of this application.*
 7. *Costs of this application be provided for.*
3. The application is premised on the grounds stated therein and is supported by affidavit of **2nd Defendant, Mr. David Hopcraft** dated **2nd September 2014**.
4. The brief facts of the application are that by a Ruling of this court on 15th March 2012 this court set aside an interlocutory judgement entered against the 2nd Defendant on condition that the 2nd

- deposited within 60 days USD 152,000 in a joint interest earning account of both advocates. That order was not complied with in time or at all, and the 2nd Defendant's defence was struck out by this court in a Ruling delivered on 30th May 2013. As an alternative to striking out of that defence the 2nd Defendant was given 30 days within which to provide a deposit of USD 150,000 and to defend the suit. In that Ruling, and pursuant to the said condition, a stay was also granted.
5. It is now clear that the 2nd Defendant failed to comply with the said condition which required him to deposit USD 150,000 within 30 days in the joint names of the parties advocates, hence this application for the extension of the enlargement of the time. The main ground offered by the Applicant's counsel, senior counsel Paul Muite, is that the Applicant pursuant to the said court orders, gave sum of USD 152,000 to his advocate to enable them comply with the said order of the court. However, the said lawyers received the money and proceeded to file the defence without making deposit as required. It was not until his defence was struck out that the Applicant through other sources realised that he had been conned by his own lawyer and that he was now facing the danger of execution. Senior Counsel Paul Muite submitted that the sins of counsel should not be visited upon his client, and that the Applicant has looked for, and secured another USD 152,000 which the Applicant is willing to deposit herein within 24 hours in compliance of the said earlier orders of this court, and that, extension of the time limit is imperative. The counsel further submitted that the Applicant's defence filed on 13th April 2012 be revisited and the matter be directed to go for determination on its merits. Alternatively counsel submitted that leave be granted to the Applicant to file his defence and counter-claim in terms of the annexed draft within 7 days of paying the deposit of USD 152,000.
 6. The application is opposed by the Plaintiff/Respondent who filed grounds of opposition on 4th September 2014. Mrs. Wanyoike for the Respondent submitted that the application is brought under the wrong provisions of the law, and that it lacks precision on the orders sought and that the same are incapable of being granted. Mrs. Wanyoike further submitted that the application is an abuse of the court process and is only brought by the 2nd Defendant to buy more time with a view to forestalling execution and denying the Plaintiff the fruits of his Judgement, and that the Applicant comes to court with unclean hands.
 7. I have very carefully considered both the application and submission of the parties in this matter. I agree with M/s. Wanyoike that the Applicant's hands are not very clean in this matter. I also agree that the Applicant is abusing the process of this court, having failed to comply with the orders of this court on two previous occasions recorded herein. The Applicant, however, has made a strong moral point worth the consideration of this court. This is the allegation that indeed in an attempt to comply with the orders of this court dated 15th March 2012 the Applicant had entrusted his counsel with USD 152,000. The counsel instead of depositing the money as directed, instead misapplied it, and filed the 2nd Defendant's defence without making the said deposit. This is a moral point which any court would stop to consider. That is why the court directed Senior Counsel Paul Muite to bring evidence of such allegation to the attention of this court. The Senior Counsel Paul Muite was not able to do this within the 7 days the court gave him stating that the Applicant was out of the country and there were difficulties in communicating with him. In my view, if those allegations were true, then evidently a court of equity would not visit the sins of counsel on the litigant, and again, it would show that the Applicant had every intention to comply with this court's orders. As it is now, it is upon this court to decide whether or not to believe Senior Counsel Paul Muite. It must go on record that a counsel is honoured with the title Senior Counsel arising from the counsel's own history of excellence, high character probity, a courteous relationship with both his colleagues, litigants and the country's legal institutions; his ability to speak the truth, and his fidelity to the law. A court properly constituted takes cognisance of the appearance of a senior counsel and what he tells the court. This is a judicial officer from whom the court does not expect misdirection. He conducts himself, at all times, in a manner promoting the rule of law and the legal institutions which protect the law, and argues his clients cause with utmost fidelity to the legal process. One of the attributes of a Senior Counsel is that his word or opinion, on a non-contentious issue, can safely be relied on by court, even as the counsel engaged in contentious and divisive issues in the broad matters in issue before the court. The appearance of a Senior Counsel in court is, within a broad parameter, a gain or advantage to the court, and to the process of justice, even if it may not result in gain to any of the litigants before the court. A court of law will highly consider his or her opinion or statement on a non contentious

issue before the court. Indeed, as regards Senior Counsel Paul Muite, I think he has honoured those attributes. I do not think he is the kind of counsel to intentionally mislead this court. I therefore accept the submissions that he was unable to get the said evidence from his client as the client is out of the country. I also accept the submissions that the Applicant's former lawyer's sins cannot be visited upon the Applicant. As I said earlier, this moral ground is strong enough to turn the direction of this matter. In the case of **FIDELITY BANK – VS – RAJWANI CIVIL CASE NO. 717 OF 2006** a court, in almost similar circumstances, extended time to file a defence. Courts are there to serve the parties, and a court will not shy away from serving a party unless that party clearly does not deserve such service. I am not satisfied that the 2nd Defendant does not deserve the order he seeks.

8. Rather, I have also to listen to the Respondent. M/s Waonyoike submitted that should this court grant the orders, then the amount to be deposited should be enhanced and should not remain at USD 152,000. Indeed the sum of USD 152,000 was arrived at arbitrarily. The court was simply looking at what could be reasonable for the 2nd Applicant, and the court settled at only 25% of the Judgement debt. USD 152,000 is still a lot of money, and I will not enhance it. The Plaintiff/Respondent will have to contend with costs.
9. In the upshot the 2nd Defendant's application is allowed as follows:-
 1. ***The time within which the 2nd Defendant/Applicant shall comply with depositing USD 152,000 is hereby extended to expire on 24th October 2014 at 5.00 p.m. The said deposit shall be made in the joint names of the parties advocates.***
 2. ***The 2nd Defendant/Applicant is granted leave to file his defence and counter-claim in terms of the annexed draft within (10) days from the date of this Ruling.***
 3. ***Costs of this application shall be for the Plaintiff/Respondent.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF OCTOBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Wanyoike for the Plaintiff

P. Muite for the Defendants

Irene – Court Clerk