

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Case 71 of 2003

THE COMMITTEE,

HOLY ROSARY GIRLS PRIMARY SCHOOL.....APPLICANT

VS

MICK WANGILA MILIMO.....RESPONDENT

RULING

In a motion dated 26th April 2005, Holy Rosary Girls Primary School, sought for leave to appeal out of time against the Judgment of the Resident Magistrate, Webuye, delivered on 17th December 2004 in Webuye R.M.C.C.C. No. 103 of 2002. The school also prayed for an order of stay of execution of the resultant decree pending the hearing and determination of the said motion and intended appeal.

On the 24th day of May 2005, Mr. Buluma for the applicant and Mr. Kutwa for the Respondent compromised the motion in which the orders prayed for were granted by consent on condition that Holy Rosary Girls Primary School would deposit the decretal sum within 21 days from the date of the consent in an interest earning account in the joint names of the advocates for the parties. The school was also to pay thrown away costs assessed in the sum of Ksh.3,000/= to the Respondent's Advocate. The parties further agreed that these orders would apply to Bungoma H.C. Misc applications nos. 100 and 101 of 2005.

It would appear the school did not meet the conditions set within the time frame agreed upon. The Respondent then proceeded to execute the decree by attaching the applicant's motor vehicle registration number KAL 225 U and this prompted the applicant to file the motion dated 23rd June 2005, the subject matter of this ruling.

Before considering the issues raised for and against the motion, I think it is appropriate to give the brief history of this dispute. To begin with I do not have the record of the subordinate court. However I can discern from the material placed before me that Mick Wangila Milimo, the Respondent herein and two others namely Robert Wanyonyi Milimo and Gladys Nasimiyu suffered injuries arising out of a road traffic accident involving a motor vehicle owned by Holy Rosary Girls Primary School on the 11th day of February 2002. They all filed separate suits claiming damages against the school before the Resident magistrate's court at Webuye. The aforesaid court delivered its Judgment on the 17th day of December 2004. The record shows that the Respondent and the others executed the decree to recover the awards. This culminated to the proclamation of motor vehicle registration number KAL 396 C, the property of the applicant. The intended attachment of the aforesaid motor vehicle was forestalled by the consent order recorded by the parties through their advocates on 24th May 2005.

The Motion before me now seeks for an order from this court to extend time to enable the applicant comply with the terms of the consent. The applicant's argument is that it became difficult for it to meet its obligations due to financial difficulties. The applicant has premised its application on sections 3 A and S. 79 G of the Civil Procedure Act and Order XLIX rule 5 of the Civil Procedure rules. The applicant also prays for an order to lift the attachment of motor vehicle registration number KAL 225 U and consequently releasing it to the school for its use.

The motion is strenuously opposed by the Respondent in a replying affidavit sworn by Godfrey Nathan Kitiwa. The applicant's counsel prayed for the aforesaid replying affidavit to be struck out on the ground that it is fatally defective in that the same does not state where it was sworn in the jurat.

In opposing the motion the Respondent averred that this court lacks jurisdiction to extend time because time was fixed by consent and can only be interfered with on the grounds normally used to interfere with a contract between the parties.

I prefer to start with the question as to whether or not this court is seised with jurisdiction to extend time. I entirely agree with the argument that this court can only interfere with a consent Judgment in such circumstances as would afford a good ground for varying or rescinding a contract between parties. However in this dispute I am being urged to extend time to enable the applicant to comply with the consent order. I think my jurisdiction is not taken away by the consent order because the orders prayed for in my view will not fundamentally change the nature of the consent order save that the period fixed is likely to be changed. This court will lack jurisdiction if it were to make an order that would radically and fundamentally change the terms of the consent. Courts of law will always guard itself against any rule which purports take away the inherent jurisdiction of the court. Such a rule should be looked at very carefully before it is constituted in such a manner. This court cannot just sit and say its hands are tied whereas it can exercise its inherent power to maintain its character as a court of justice.

In this case, the Respondent was given 21 days to deposit the decretal sum from the date of the consent order. The applicant delayed for a period of 7 days and the Respondent proceeded to execute the decree. I think the delay in my view is not inordinate. The explanation given by the applicant is genuine and the school should be given another chance to prove its worth. If time is extended, no serious miscarriage of justice shall be suffered by the Respondent. I am inclined to extend time in favour of applicant but with further conditions. The other issue raised touches on the defects noted in the replying affidavit sworn by Mr. Godfrey Nathan Kitiwa. It is argued that Mr. Kitiwa, as the advocate for the Respondent, has deponed on contested matters hence his affidavit should be struck out. I have perused the aforesaid affidavit. It is evident that the deponent has deponed on matters which are within his knowledge and non-contentious in anyway. I see no merit in this ground. Mr. Were has also complained that the affidavit is fatally defective in that it does not disclose where it was sworn contrary to section 5 of the oaths and statutory declarations Act. Mr. Kutwa is of the view that the defect is excusable because the place of swearing was shown by the stamp of the commissioner for oaths. The truth of the matter is that the affidavit of Godfrey Nathan Kitiwa does not show at the jurat where it was sworn. This is contrary to the provisions of Section 5 of the Oaths and Statutory Declarations Act. The same is not excusable or curable under Order XVIII of the Civil Procedure Rules. It contravenes the parent Act hence it is fatally defective. The end result is that the affidavit is ordered struck out.

Having struck out the replying affidavit the motion is treated as though it was unopposed. The final orders in this dispute is that the applicant is granted an extension of 7 days from the date hereof to comply with the terms of the consent order recorded on 24th May 2005. The attached motor vehicle registration No. KAL 225 U should be released to the applicant forthwith. Auctioneers' costs should be taxed and ordered that payment of the same should await the outcome of the intended appeal. The applicant should however deposit with this court the logbooks in respect of Motor vehicles registration numbers KAL 396 C and KAL 225 U within 7 days from the date hereof. Since the application is treated as unopposed costs shall be in the cause. The orders in this matter shall apply to Bungoma H.C. Misc. Applications Nos. 100 and 101 of 2005.

DATED AND DELIVERED THIS 1st DAY OF July 2005

J.K. SERGON

JUDGE