



Muri Mwaniki & Wamiti Advocates v Azal Limited & another (Miscellaneous Application 102 of 2016) [2023] KEELC 16840 (KLR) (13 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16840 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION 102 OF 2016**

**MD MWANGI, J
APRIL 13, 2023**

BETWEEN

MURI MWANIKI & WAMITI ADVOCATES APPLICANT

AND

AZAL LIMITED 1ST RESPONDENT

AFRICAN BANKING CORPORATION LIMITED 2ND RESPONDENT

RULING

1. What is coming up for determination is the applicant's notice of motion application dated August 15, 2022 seeking for orders that; the List and Bundle of documents dated March 10, 2022 in support of the Bill of Costs dated May 19, 2016 filed incompletely on March 10, 2022 and completely on March 29, 2022 be deemed as properly on record. That costs of the application be in the cause.
2. The application is premised on the grounds on the face of it as well as the supporting affidavit of Newton K. Kamwana, an advocate practising with the Applicant deponed on the August 15, 2022.
3. The deponent avers that the Applicant filed a Bill of Costs dated May 19, 2016 and the Deputy Registrar delivered a Ruling on September 5, 2019 to the effect that she could not proceed with the taxation of the Bill of Costs without documents in support of the same.
4. Consequently, the applicant filed a "reference" dated November 10, 2021 to the ruling but this court directed that the decision by the Deputy Registrar could not be set aside as prayed as it was not a taxation. The court then directed the applicant to file his bundle of documents in support of the Bill of costs within 14 days and the matter to be mentioned before the Deputy Registrar.
5. That in compliance with the said orders, the Applicant inadvertently filed an incomplete bundle of documents in support of the Bill on the March 10, 2022 well within the 14 days. However, they later



realized that the bundle of documents that was uploaded was incomplete and proceeded to file the complete bundle on the March 29, 2022 and duly served it upon the respondents.

6. He further states that when parties appeared before the Deputy Registrar, the respondent objected to the documents on the basis that they were filed out of time. The deputy registrar directed the applicant to reach out to the respondent to admit the documents out of time as she lacked the jurisdiction to extend the time for filing as ordered by the Judge.
7. The applicant then reached out to the respondents, as advised by the deputy registrar vide the letter dated June 15, 2022 but no response was forthcoming from the respondents. It is then that the applicant filed the instant application.
8. The 1st respondent despite being served with the application, did not oppose the application.

2nd Respondent's Replying Affidavit

9. The application is vehemently opposed by the 2nd Respondent who filed a replying affidavit deponed on the September 14, 2022 and sworn by Louis Omukhulu, its Senior Legal Officer. The deponent states that the Deputy Registrar dismissed the Applicant's Bill of Costs on the 5th September, 2019 for failure by the Applicant to file documents in support of the Bill.
10. The Applicant then filed a reference and on the 7th March, 2022, the Court directed that the Applicant should file its bundle of documents in support of the Bill within 14 days. The allegation by the Applicant that they filed a bundle of documents on the March 10, 2022 has no basis as no evidence has been adduced to confirm the allegation. Further, no evidence of service upon them has been adduced before this court.
11. The deponent states that the period of over 8 years taken by the Applicant to prosecute the bill greatly prejudices the 2nd Respondent's case as some of the facts may be lost through effluxion of time and change of employees.
12. There is no good or viable reason that has been provided by the Applicant as to why they failed to comply with the orders granting them 14 days to file and serve their list and Bundle of Documents.
13. The application is irredeemably defective, and the same ought to be struck out with costs. The delay of 8 years is inordinate and the 2nd Respondent will be prejudiced.
14. The Applicant filed a supplementary affidavit sworn by Newton Kamwana deponed on the October 27, 2022. The deponent denies the averments contained in the Replying Affidavit and restates their position in the supporting affidavit.

Court's directions

15. The court directed that the application be dispensed with by way of written submissions. Both parties complied and filed their respective submissions. The Applicant's submissions dated the October 27, 2022 whereas the 2nd respondent's submissions are dated 6th December, 2022.

Applicants Submissions

16. The applicant restates the chronology of the events aforesaid and submits that the issue for determination is whether the applicant is entitled to the orders sought. The applicant submit that the court has a wide discretion to extend time under section 95 of the *Civil Procedure Act* and order 50 rule 6 of the *Civil Procedure Rules*. They cite the Supreme Court's decision in *Nicholas Kiptoo Arap*



Korir Salat –vs- Independent Electoral and Boundaries Commission and 9 others (2014) eKLR on the underlying principles that a court should consider in exercising of such discretion.

17. They further submit that the applicant has explained the reason for the delay and that the delay was not inordinate: it was inadvertent. They urge the court to invoke the overriding objectives in section 1A,1B and 3A of the *Civil Procedure Act*, as well as article 159 of *the Constitution* which obliges the court to do substantive justice.

2nd Respondent's Submissions

18. The 2nd respondent restates the averments contained in its replying affidavit. It submits that no good reason has been provided by the applicant as to why they failed to file the complete bundle of documents within the time frame provided by the court. The 2nd respondent insists that 8 years had lapsed before this court granted the applicant 14 days to file and serve their bundle of documents. However, no good reason has been given for the non-compliance.
19. They further submit that article 159 of *the Constitution* is herein a panacea to all ills. One must provide good reason for their failure, which the applicant has failed to do.
20. The 2nd respondent avers that from the case of *Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral and Boundaries Commission and 9 Others* (2014) eKLR, extension of time is a creature of equity, and one can only enjoy it if he acts equitably. He who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time lapse. The applicant has not come to court with clean hands given that a period of 8 years has lapsed without filing the requisite documents.
21. The 2nd respondent submits that extension of time, would be prejudicial to the 2nd respondent due to the time taken from the time of filing of the bill of costs, maintenance of documents, change of employees working for the 2nd respondent who may have handled the file and would therefore have full knowledge of the facts of the case.
22. The applicant has failed to provide concrete grounds for their failure to comply with the order of the Judge. They are not deserving of this court's discretion to extend time and that the court lacks the power to vary the Judge's order. The application should therefore be dismissed with costs.

Issues for determination

23. I have considered the application, the response and the submissions filed by the parties to buttress their assertions. The issue for determination which arise therefrom is whether the documents as filed by the Applicant should be deemed as properly on record.

Analysis and determination

24. The Power of the court to extend time is well stipulated under the law. Section 95 of the *Civil Procedure Act*, chapter 21, Laws of Kenya, provides that;

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

25. Discernable from the provisions of section 95 is the fact that the court has a discretion, albeit, which is unfettered but which ought to be exercised judiciously and not otherwise.
26. It is not in doubt that in deciding whether or not to extend time, the court is called upon to exercise its discretion and be satisfied that there was sufficient cause that would allow it exercise the discretion.



27. The applicant seeks that the List and bundle of documents dated March 10, 2022, in support of the bill of costs initially filed on March 10, 2022 with incomplete documents and later filed on the March 29, 2022 with complete documents be deemed as properly on record. The applicant has to satisfy the court that it had good and sufficient cause for not filing the documents on time as directed by the court.
28. The Supreme Court of Kenya in the case of *County Executive of Kisumu –vs- County Government of Kisumu & others* [2017] e KLR while relying on its decision in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others* Application No. 16 of 2014 [2014] e KLR the Hon. Judges reiterated the considerations to be made in such a case to be as follows:
1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
29. Further, the court of appeal in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & others* (2013) eKLR, held as follows:
- “... it is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness.”
30. I have had an opportunity of perusing the court file including the e-filing portal. I confirm that the Applicant did file a bundle of documents on the March 10, 2022 and another bundle on the March 29, 2022. The applicant was to file the documents by March 21, 2022. The delay was therefore for a period of about 8 days.
31. Mistakes and blunders shall continue to be made from time to time, some by experienced advocates others by upstarts, but the fact that a mistake has been made, should not ipso facto, drive a Party away from the seat of Justice. In the case of *Philip Keiptoo Chemwolo & Another versus Augustine Kubende* (1986)eKLR, the Court observed as hereunder;
- “Blunders 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 determined on its merits.” I think the 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.....”

32. Based on the foregoing and guided by the provisions of article 159 of *the Constitution*, I see no prejudice that will be occasioned to the 2nd respondent and the Respondents for that matter. Any such prejudice may be compensated by an award of costs.
33. The court therefore finds and holds that in the interest of justice, the application will be allowed. The list and bundle of documents dated March 10, 2022 in support of the Bill of Costs dated May 19, 2016 filed incompletely on March 10, 2022 and completely on March 29, 2022 shall be deemed as properly on record.
34. The costs of the application are awarded to the 2nd respondent.
35. The Bill of Costs dated May 19, 2016 shall proceed for taxation before the Taxing Master.

Dated, Signed and Delivered at Nairobi this 13th day of April 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Odunga for the 2nd Respondent.

C.K. Chege for the 1st Respondent.

No appearance by the Advocate/Applicant.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

<i>elc misc app. no 102 of 2016 ruling</i>	0
--	---

