



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**HIGH COURT MISC APP. NO 82 OF 2019**

CYRUS WAIHENYA MURANGO.....1<sup>ST</sup> APPLICANT

WACHIRA NDIRANGU.....2<sup>ND</sup> APPLICANT

**-VERSUS-**

THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

MUHOTETU FARMERS COMPANY LTD (IN LIQUIDATION).....2<sup>ND</sup> RESPONDENT

**RULING**

1. The matter pending before court is the Application dated 21<sup>st</sup> October, 2020 filed by Cyrus Waihenya Murango and Wachira Ndirangu, Applicants herein seeking for the following orders:

***i. Spent***

***ii. That the honorable court be pleased to enlarge the time of 21 days within which the Applicant is to present the certified court proceedings, judgement and orders made in Nyahururu CMCC 119/2013 and Nyahururu CMCC 116/2013 per the Ruling delivered on 1<sup>st</sup> October 2020.***

***iii. That costs be provided for.***

2. Which application is based on the grounds:

***i. That the time within which the Applicant were to present certified proceedings, judgement and order to 1<sup>st</sup> and 2<sup>nd</sup> Respondent on 22<sup>nd</sup> October 2020.***

***ii. That the Applicants have been unable to obtain certified proceedings, judgement and orders in the said so as cases to comply with the said order.***

***iii. That failure to obtain the certified proceedings and order is based on the fact that the files Nyahururu CMCC 119/2013 and Nyahururu CMCC 160/2013 cannot be traced at the Civil Registry lower court Nyahururu.***

3. That it is only mete and just that orders sought herein be granted for the interest of justice.

4. The application was supported by the affidavit of Muhoho Gichimu, counsel for the Applicants of even date.

5. On the other hand, the application was opposed by the affidavit of Beatrice Osicho dated 17<sup>th</sup> May, 2021.

6. The cause of action herein traces back to the application dated 8<sup>th</sup> October 2019 where the Applicants sought to be granted leave to institute a suit against the Respondents/dependants herein under **Section 432 (2) of the Insolvency Act, 2015**.

7. Consequently, Hon Justice RPV Wendoh J delivered a Ruling on 1<sup>st</sup> October 2020 where she gave orders as follows:

***“That the Applicants do present certified court proceedings, judgement and orders made in Nyahururu CMCC 119/2013 and 160/2013 to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent for consideration of their claims. That should be done within 21days from today’s date.***

***If the parties do not agree, the court hereby grants leave to the Applicants to file suit within 45 days of the Respondents decision denying the Applicants claim Since the Applicants were the indolent party, they will bear the costs of the suit.”***

8. Subsequently, the Applicants being unable to comply with the aforementioned timelines file the present application.

#### **APPLICANTS’ SUBMISSIONS**

9. The Applicants submitted that for this court to grant extension if time it must consider length, the reason for delay, the chances of success and degree of prejudice. Reliance was placed on ***Order 40 rule 6 of the Civil Procedure Rules, HC Misc Civil Application Joseph Shmaderer v Serah Njeri Ngene [2021] eKLR, Jaber Muhosen Ali & Another v Priscillah Boit & Another & Aviation Cargo Support Limited v St Mark Freight Services Limited [2014] eKLR.***

10. It was stated that the Ruling in which the court gave timelines was delivered on 1<sup>st</sup> October 2020. The Ruling granted the Applicant 21 days to present the certified court proceedings, judgement and order in Nyahururu CMCC 119/2013 and CMCC 160/2013 and that as per the Ruling the time of lapse was to be 22<sup>nd</sup> October 2020. They asserted that the application herein was brought even before the lapse of 21 days’ time.

11. The Applicants averred that they had foreseen that they would not be able to obtain the documents sought as the relevant court files could not be traced in the registry. Further, in the supplementary affidavit, the Applicants deponed that they now have the documents sought.

12. The Applicants argued that the application having being filed before the lapse of time, there cannot be said to be inordinate delay. They submitted that the contents of the judgment only came to their notice on 9<sup>th</sup> October 2020, 11 days before the expiry of time and as such the Applicant cannot be said to have delayed in bringing the application.

13. In response to the Respondents claim that the Applicants have not shown efforts in obtaining the documents, the Applicants submitted that it is the court files from which the proceedings were to be obtained that could not be traced from the registry. The Applicants urged the court to take judicial notice that where a court file is said to be missing the registry would only state as much as they cannot respond to a letter without a file.

#### **RESPONDENTS’ SUBMISSIONS**

14. The Respondents submitted that it has been over 11 months after the delivery of the Ruling dated 1<sup>st</sup> October 2020 and the Applicants have still not complied with the orders made by the honorable court. They reiterated that the court should not grant ordered in vain and court orders are not for cosmetic purposes. They are serious decisions that are meant and ought to be complied with strictly.

15. The Respondents stated that it is unwise and unnecessary for the Applicants to come knocking on a door whose keys are in their possession because the court in the first instance exercised its discretion and gave orders in favour of the Applicants who have now willfully disregarded them and are now back to seeking more orders.

16. It was averred that granting the orders sought will be prejudicial to the ongoing liquidation of the 2<sup>nd</sup> Respondent as it has held the liquidation process in abeyance- awaiting the conclusion of this matter by compliance of the Applicants. Further, it delays the liquidation process as law provides that liquidation of the 2<sup>nd</sup> Respondent ought to be completed in a period of one year.

17. The Respondents asserted that there are principles of equity that warn against indolence and delay by parties therefore the Applicant was bound by the law and equity to pursue his claim both in liquidation and in compliance with orders sought without undue delay. Where the same was not done, the court ought to refuse its aid to stale demands. Reliance was placed on ***Mwangi S. Kimenyi v Attorney General & Another [2014] eKLR.***

18. Furthermore, the Respondents contended that the Applicants ha not tendered in evidence to demonstrate that they were actively pursuing the registry to obtain the proceedings. Reliance was placed on ***Hamendra Mansukhalal Shah v Alnoor Kara & Another [2000] eKLR.***

19. The Respondents urged the court to be guided by the overriding objective of speedy resolution of disputes as envisaged under ***Section 1A and 1B of the Civil Procedure Act.***

20. It was the Respondents’ argument that there can be no enlargement of time as the order relied upon does not exist as it has since lapsed/is expired and/or spent due to inaction and non-adherence of terms by the Applicants. Reliance was placed on ***Macfoy vs United Africa Ltd [1961]3 ALL E.R. 1169 at page 1172.***

21. Further, they stated that enlargement of time is an equitable remedy that is only available to a deserving party and the court at the first instance already exercised its discretion and enlarged time for the Applicants to comply with the liquidation requirement. The Applicants’ inordinate delay and willful neglect to furnish the liquidator with the documents requested is the reason why their claim has not been addressed. Reliance was placed on ***Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 Others [2016] eKLR & Karachi Walla Nairobi Ltd vs Sanji Van Mukherjee [2015] eKLR.***

22. In conclusion, the Respondents reiterated that the application herein is devoid of merit and an abuse of court process, time and resources and should be dismissed in its entirety with costs to the Respondents.

### **ANALYSIS AND DETERMINATION**

23. Having considered the application, the affidavits on record, list of authorities, submissions by counsel and the law, the main issue for determination is whether the court should grant the enlargement of time orders as sought by the Applicants.

24. **Order 50 Rule 6 of the Civil Procedure Rules** provides that:

***“Power to enlarge time [Order 50, rule 6.] Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”***

25. The principles to be followed as regards to the extension of time were laid out by the Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others (2014) eKLR** 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 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 Respondent of the extension is granted.***

***(6) Whether the application has been brought without undue delay; and***

***(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”***

26. In **Sammy Sawe Korir v Cabinet Secretary (Ministry of Defence) Ex-parte Attorney General [2016] eKLR**, Githua J stated as follows:

***“In this case, the Applicant has sought enlargement of the statutory limitation period for his intended action on grounds that he was unable to file suit within time due to partial physical disability occasioned by the injuries he sustained which required him to be hospitalized for a long time. He also claimed that he had been pursuing negotiations for an out of court settlement which had collapsed. In my considered view, these are not the conditions or reasons that are contemplated under Section 27 of the Act on the basis of which a court can extend time within which a suit can be filed. Time can only be extended if the Applicant proved that he was ignorant of material facts constituting the cause of action. The Applicant in this case did not claim that he was ignorant of the material facts constituting his alleged cause of action against the 1<sup>st</sup> Respondent either before or after the limitation period expired.”***

27. The Applicant submitted that they were unable to obtain certified proceedings, judgement and orders in the said so as cases to comply the court orders. The Applicants averred that they had foreseen that they would not be able to obtain the documents sought as the relevant court files could not be traced in the registry. However, they did not proffer any evidence to support their allegations that the file was indeed missing hence why they did not present certified court proceedings, judgement and orders made in **Nyahururu CMCC 119/2013 and 160/2013** to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent for consideration of their claims within the allocated timeline.

28. Notably, the Applicants filed the application herein at the expiration of the timeline set by the court as per the Ruling dated 1<sup>st</sup> October 2021. From the supporting affidavit dated 21<sup>st</sup> June 2021, the Applicants through their Counsel deposed that when the aforementioned matter came up for mention to fix directions however counsel was unable to join the virtual meeting despite all his attempts to which he attached evidence of his conversations with a court assistant to prove the same.

29. The Applicants have a duty to offer a plausible explanation why they did not present certified court proceedings, judgement and orders made in **Nyahururu CMCC 119/2013 and 160/2013** to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent for consideration of their claims with the timelines set by the court. Is the explanation offered by the Applicant satisfactory? It is my considered view that the Applicants' explanation as to the delay being that the court files were missing may be considered as extenuating factors. In addition, it is my view that there is a stage when litigation should come to an end and the court must exercise its discretion as to extension of time fairly and judicially. This court is mandated with the fundamental task of ensuring that substantive justice is served to all parties and that each party gets a right to be had as enshrined in the constitution particularly in **Article 159**.

30. Taking into totality all the circumstances in this case, it is my considered view that the Respondents will not suffer any prejudice if the orders sought are granted. Further, it is in the interest of the parties that the issues in contention be determined with finality. However, I have taken keen note of the Applicants conduct during the proceedings herein and proceed to warn the Applicants that they will no longer enjoy

the court's discretionary favour should they not adhere to court orders. Court orders are not mere suggestions; they are to be strictly adhered to. According to the supplementary affidavit dated 24<sup>th</sup> august 2021 the Applicants averred that they have since obtained the documents required as per the Ruling dated 1<sup>st</sup> October 2021.

31. Guided by the foregoing, I am of the view that justice would be served in allowing the application and make orders as follows:

***i. That the Applicants do present certified court proceedings, judgement and orders made in Nyahururu CMCC 119/2013 and 116/2013 to the 1st and 2nd Respondent for consideration of their claims within seven 7 days from the dates herein.***

***ii. The Applicants will bear the costs of the application.***

***Dated and Signed at NYAHURURU this 17<sup>th</sup> day of February, 2022.***

.....

**CHARLES KARIUKI**

**JUDGE**