



Mwasuna v Kilonzo (Suing as the legal Rep of the estate of Isaac Maingi Nzioka DCSD) (Civil Miscellaneous Application E179 of 2021) [2022] KEHC 12220 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12220 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL MISCELLANEOUS APPLICATION E179 OF 2021
GV ODUNGA, J
JULY 28, 2022**

BETWEEN

NICHOLAS MUTUKU MWASUNA APPLICANT

AND

PATRICIA MUENI KILONZO RESPONDENT

**SUING AS THE LEGAL REP OF THE ESTATE OF ISAAC MAINGI NZIOKA
DCSD**

RULING

1. On March 7, 2022, this court delivered a ruling in this matter in which it inter alia directed that there be a stay of execution of the judgement and decree pending the hearing and determination of the intended appeal on condition that the applicant pays half of the decretal sum to the respondent and furnishes either an insurance bond or a banker's bond from an institution of repute within 30 days from the date of this ruling and in default the prayer for stay shall be deemed to have been dismissed with costs.
2. It is clear that the Judgement Debtor / Applicant was unable to comply with the said order because by a Motion on Notice dated April 13, 2022, the Applicant herein moved this Court seeking the following orders:
 1. That the application be certified urgent and fit to be heard during vacation and the orders sought be granted exparte.
 2. That there be stay of execution of the Judgment delivered on 14/07/2021 in CMCC No. 290/2020 Machakos Law Court pending hearing and determination of this application.
 3. That the time given by the court vide the Ruling dated 7th March 2022 to release half the decretal sum and furnish an Insurance bond be extended for a further period of 7 days.
 4. That costs of this application be provided for.



3. According to the applicant, following the delivery of the said order, Applicant's insurance company released Kshs. 750, 000/- to the Respondents Advocates on April 8, 2022. However, the said insurance did not manage to prepare and execute the Insurance bond within the required time as the Director had been out of the offices. Nevertheless, the Insurance bond is now ready hence the prayer for the extension of time to furnish the same by a further 7 days in the interest of time.
4. By a further affidavit, it was deposed that during the preparation of the insurance bond in compliance with court orders, a typing error was made, indicating that the bond was in respect of CMCC No. 69 of 2018 instead of CMCC No. 290 of 2020. It was explained that this error had since been corrected and a new bond in respect to CMCC NO. 290 of 2020 issued. It was averred that the applicant was still desirous of prosecuting the appeal and therefore prays for the application to be allowed.
5. In opposing the application, the respondent averred that the applicants' application is by a party that does not obey Court Orders and is meant to frustrate him from enjoying the fruits of my judgment. According to the respondent, the applicant filed an application for leave to appeal out of time that was dismissed on 14/10/2021 for want of prosecution. The same was however, reinstated on 21/10/2021.
6. It was averred that a conditional stay was granted by this Court on 7/3/2022 and the applicant has chosen not to comply with the conditions of the stay. It was averred that no payment of half the decretal sum has been paid as ordered; that if any payment was done as alleged counsel for the Respondent was not notified; and that if any payment was done as per the purported annexure it was done (3) three days outside time and without leave of the Court and the same is of no legal consequence. It was noted that the purported annexed bond is for a totally different case hence the applicant is being mean with truth and honest to this Court.
7. To the Respondent, the conduct of the applicant herein is of a party that does not comply with Court Orders by failing to appeal within time, to failing to comply with stay Orders, hence does not deserve any further extension of time.

Determination

8. I have considered the Application, the Grounds of Opposition and the submissions made by the parties.
9. Section 95 of the *Civil Procedure Act* provides as hereunder:

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.
10. Order 50 rule 6 of the *Civil Procedure Rules* provides that:

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.



11. It is clear from both the Act and the Rules that in exercising its powers to extend time the Court exercises a discretionary power. In this case, since the time for complying with the conditions was fixed by this court's order, this court has the discretion to grant the orders sought herein. It therefore follows that as long as the justice of the case requires the Court may on its own motion or upon an application by a party enlarge time fixed for doing any act or taking any proceedings under the *Civil Procedure Rules*, or by summary notice or by order of the court and it matters not whether the time appointed or allowed has expired. It is therefore not correct as contended by the Respondents that this Court can only extend the time where the application is made before the expiry of the time allowed by the Rules or the Order of the Court. That discretion in such matters covers periods before or even after the set time has expired was appreciated by O'kubasu, Mbito & Mwera, JJ in *M'maiti vs. Lusweti & another* [2008] 1 KLR 501.
12. The Respondent has however contended that the conduct of the applicant herein is of a party that does not comply with Court Orders by failing to appeal within time, to failing to comply with stay Orders, hence does not deserve any further extension of time. It is true that the Applicant herein did not file an appeal within time. That failure however was the subject of an earlier application which this Court disposed of. That default in my view cannot be the basis for denying the grant of the reliefs sought herein since to do so would amount to punishing the applicant twice over.
13. However, the decision whether or not to do so is in the court's discretion. This being an exercise of judicial discretion, like any other judicial discretion must be exercised on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. However, it is clear from both the Act and the Rules that in exercising its powers to extend time the Court exercises a discretionary power. This being an exercise of judicial discretion, like any other judicial discretion must be exercised judicially. Accordingly, it has to be exercised on fixed principles and not on private opinions, sentiment and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. In *Rev. Peter Indalo & another vs. Fanana Investments* Civil Applications No. NAI. 119 of 1994, it was held by the Court of Appeal that the applicant must place before the Court sufficient materials to enable the Court exercise its discretion in his favour. It was similarly held by in *Kimani vs. Kirimi & another* [2008] 1 KLR 515, by O'kubasu, Mbito & Mwera, JJ that:

“We have now considered the arguments by learned Counsel in this matter and while it is not in dispute that there was non-compliance with court orders, we must hasten to add that we have discretion to extend or enlarge time...That discretion wide as it is may, must be exercised judicially. It is not automatic. The Court must consider the reasons advanced for non-compliance the duration of the delay and the petitioner's conduct...Convincing and reasonable cause should be laid before the Court.”

14. In *Mwakalu vs. Timamy & another* Nairobi HCEP No. 18 of 1993 [2008] 1 KLR 464, the same bench held that:

“We were requested to exercise our discretion and enlarge time within which the plaintiff could file and serve the particulars. Granted, even with the strictness and necessity attending the compliance with our orders, on reasonable cause, we may consider to exercise our



discretion and enlarge time. But this should be in deserving cases only. The discretion too should be exercised judicially, considering whether or not in a given case it is reasonable and just to do so...In this case we have not been given circumstances that are deserving of our exercising the discretion to enlarge time within which the petitioners should file the particulars. He had all the time from the date of a request for particulars were served on him. We were told that the petitioner is in fact outside the Country engaged in research. And he will come back sometime later to furnish fuller particulars. Even the particulars so far filed are said not to be adequate. We cannot enlarge time in such a case such as this. We are not satisfied that time should be enlarged for a party who had all the time allowed to him to do what was ordered and he did not comply.”

15. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in *Feroz Begum Qureshi and another vs. Maganbhai Patel and others* [1964] EA 633, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in *Daphne Parry vs. Murray Alexander Carson* [1963] EA 546 that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles.
16. In this case, the applicant contends that following the delivery of the said order, Applicant’s insurance company released Kshs. 750, 000/- to the Respondents Advocates on 8th April, 2022. However, the said insurance did not manage to prepare and execute the Insurance bond within the required time as the Director had been out of the offices. Nevertheless, the Insurance bond is now ready hence the prayer for the extension of time to furnish the same by a further 7 days in the interest of time.
17. In my view, a party who seeks discretionary relief must always show that he is honest in his dealings and where indulgence is sought with respect to compliance with timelines it is always helpful if the applicant shows that he has complied with the order albeit belatedly or that he is ready to do so. However, as held by Torgbor, *Amin & Couldrey, JJ in Omamo vs. Oyoo & Another* [2008] 1 KLR 483, every application to enlarge time is to be considered in the circumstances peculiar to it and that no two applications are identical.
18. In such matters, Lakha, JA held in *Touring Cars (K) Ltd & Anor vs. Ashok Kumar N. Mankanji* Civil Application No. 78 of 1998 that the rule (permitting extension of time) confers the widest measure of discretion in an application for extension of time and draws no distinction whatsoever between the various classes of cases but clearly requires the Court to look at the circumstances and recognises the overriding principle that justice must be done and that prejudice or lack of it is a highly relevant matter in considering the justice; it may be an all-important one. The Learned Judge appreciated that to construe the rule with exceptional rigidity of its requirements would contrast most forcibly with the flexibility which is now a general characteristic of the rules and which ensures that justice is done.
19. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See *Waljee’s Uganda) Ltd v Ramji Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188.
20. It is therefore my view that in the wider interest of justice and as no serious prejudice is likely to be suffered by the Respondent that cannot be cured by costs, time should be enlarged to the Applicant to comply with the order in question.



21. Accordingly, I hereby extend the time prescribed by this Court to release half the decretal sum and furnish an Insurance bond be extended for a further period of 7 days from today's date.
22. The costs of this application to be borne by the Applicant.
23. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 28TH DAY OF JULY, 2022.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Masika for the Applicant

Mr Mutua for the Respondent

CA Susan

