



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CIVIL APPEAL NO. 120 OF 2017**

**AIRTEL NETWORK (K) LIMITED.....APPELLANT**

**-VERSUS-**

**PRAKASH RADIA.....RESPONDENT**

**RULING**

1. The application before me is a Notice of Motion that was amended on 17<sup>th</sup> January, 2020. It has been brought under the provisions of Articles 50 and 159 (2)(d) of the Constitution of Kenya, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 50 Rule 6 of the Civil Procedure Rules, 2010 and all the other enabling provisions of the law. The appellant seeks the following orders

i. That the appeal be reinstated;

ii. That the orders for stay of execution granted on 4<sup>th</sup> November, 2019 be reinstated and the time within which the appellant was required to comply with the conditions for grant of the orders be extended to a date to be set by the Court;

iii. That the Executive Officer, Mombasa Law Courts be ordered to supply the appellant's Advocates with the handwritten proceedings in Mombasa Chief Magistrate's Court Civil Suit No. 1544 of 2015; Prakash Radia versus Airtel Networks (K) Limited so as to facilitate typing of the same; and

iv. The costs of this application be provided for.

2. The application is brought on the grounds on the face of it and is supported by an affidavit sworn on 17<sup>th</sup> January, 2020 by Winifred Gitao, the appellant's Advocate.

3. On 13<sup>th</sup> February, 2020, the respondent, Prakash Radia, filed a replying affidavit sworn in opposition to the application herein. The application was canvassed by way of written submissions. The law firm of Hamilton Harrison & Mathews Advocates filed written submissions on 30<sup>th</sup> April, 2020 for the appellant. The respondent's submissions were filed on 15<sup>th</sup> December, 2020 by the law firm of Obara & Obara Advocates.

4. Mr. Mugambi, learned Counsel for the appellant submitted that Section 95 of the Civil Procedure Act provides for enlargement of time even though the period already fixed may have expired, which general power is carried forward by the procedural provisions of Order 50 Rule 6 of the Civil Procedure Rules, 2010. He relied on the case of **East African Portland Cement Company Limited v Superior Homes Limited** [2017] eKLR, where the Court of Appeal held that Courts have jurisdiction to set aside, vary or review a consent decree.

5. He further submitted that the delay to comply with the consent orders was occasioned by an inadvertent oversight of the appellant in availing the funds to its Advocates. He indicated that the oversight was an unintentional mistake. He cited the case of **Contractors Ltd vs Margaret Oparanya** [2004] eKLR, where the Court while determining a similar application held that it had powers to interfere with any order whether by consent or otherwise for the sole purpose of meeting the ends of justice or to prevent abuse of the process of the Court. He also stated that the said Court also held that jurisdiction to vary the consent depended on whether the delay to comply was intentional or not; and if the delay was found to be unintentional, then the Court should consider whether the delay was inordinate.

6. It was submitted by Mr. Mugambi that the appellant regretted the unfortunate oversight on its part, which was an unintentional mistake. He also submitted that there had been no inordinate delay in approaching this Court with the present application. He stated that the default clause of the orders took effect on 3<sup>rd</sup> December, 2019 and that the appellant approached this Court on 6<sup>th</sup> January, 2020. He indicated that the period between 21<sup>st</sup> December, 2019 and 6<sup>th</sup> January, 2020 did not count by virtue of Order 50 Rule 4 of the Civil Procedure Rules,

hence the appellant approached this Court within 17 days of the Court order. He stated that the said delay could not be said to be so inordinate to the extent of locking out the appellant from having the appeal heard on merit.

7. The appellant's Counsel submitted that the delay should not be placed entirely on the appellant since the proceedings had not been provided to it as ordered by the Court. He submitted that where it was shown that there was no fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought to be determined on merit rather than on technicalities of procedure. This Court was urged to allow the application and make an appropriate order on costs in the interest of justice.

8. Mr. Mkan, learned Counsel for the respondent submitted that there was no application for review before this Court. As to whether there is a genuine reason to have the orders that have taken effect to be set aside, he submitted that the purported memorandum of appeal was filed without leave of Court hence it does not amount to any appeal with high chances of success. He further submitted that the line number 0733612401 was the respondent's business line and the appellant's action of taking the said telephone line away had made the respondent to lose more (sic) business and it had continued to lose the same as a result of the appellant's deliberate actions. He stated that issuance of stay of execution to the appellant would make the respondent to continue suffering.

9. The respondent's Counsel submitted that this Court has a duty to do justice in accordance with the law and to prevent abuse of the process of the Court. He urged this Court to rely on the ordinary principle of law that a successful party is entitled to the fruits of his judgment. He relied on the case of **Machira t/a Machira & Co. Advocates E.A Standard No. 2** [2002] eKLR 63 to bolster the said submission. Mr. Mkan contended that it was not enough for the appellant to merely state that substantial loss would result but specific details and particulars must be adduced to convince this Court to exercise its discretion.

10. He was of the view that the appellant was not going to incur any losses if the orders for stay of execution were not issued. He stated that the respondent was the one who was incurring losses since he needs the mobile number for his operations which are now grounded. He submitted that the orders sought by the appellant are discretionary in nature as extension of time is not a right of any party in proceedings but is an equitable remedy which is available to a deserving party who has a duty to state sufficient grounds to warrant the court to exercise its discretion. Mr. Mkan urged this court to dismiss the present application with costs.

#### **ANALYSIS AND DETERMINATION**

11. This court has considered the application, the supporting and replying affidavits and rival submissions filed by the Advocates for the parties. The issue that arises for determination is whether the application dated 17<sup>th</sup> January, 2020 is merited.

12. In its supporting affidavit, the appellant averred that its earlier application dated 19<sup>th</sup> June, 2017 was allowed on 4<sup>th</sup> November, 2019 on condition that it deposits the decretal sum in a joint account in the names of the parties' Advocates within 30 days and that the Record of Appeal be filed within 60 days. The Court also ordered that the appellant to be supplied with copies of the Trial Court's handwritten proceedings for purposes of facilitating typing of the same and in default of compliance, the appeal would stand dismissed.

13. It was further averred by the appellant that the default clause took effect since it was not able to comply with the order regarding deposit of funds within the stipulated time. The appellant explained that the delay in depositing funds was occasioned by an inadvertent oversight on its part in availing the funds to its Advocates, which was highly regretted. The appellant proffered apologies to the Court and the respondent's Counsel.

14. The appellant deposed that funds had now been availed to its Advocates and it was in a position to comply. It was stated that the appellant had been unable to file the Record of Appeal because it was yet to be supplied with copies of the lower court handwritten proceedings despite writing severally to the Trial Court asking for the same. The appellant asserted that no prejudice would be occasioned to the respondent if the orders sought were granted.

15. In the replying affidavit filed by the respondent in opposition to the application herein, he deposed that the orders issued on 4<sup>th</sup> November, 2019 were made by consent of the parties. He further stated that the Court orders are not issued in futility and that they are supposed to be complied with unless there are difficulties which can be explained.

16. The respondent averred that the orders consented to were valid up to 3<sup>rd</sup> December, 2019 and the present application was brought on the 22<sup>nd</sup> January, 2020, which was two months after the expiry of the agreed period. He also averred that no proper explanation or reason had been given to confirm the reason for such delay.

17. The respondent went on to depose in his affidavit that the appellant had not met the required conditions to have the consent orders reinstated as it was aware of the Court orders and the period within which to comply. He further deposed that the mistake referred to by the appellant was of its own making and not by its Advocate. It was also deposed that no reasons had been provided with regard to the delay to remit the said funds to its Advocates on time

18. In his affidavit, the respondent averred that he was entitled to the fruits of his judgment and any further delay shall be prejudicial to him. He also averred that the appellant could not invoke the provisions of Article 159 of the Constitution to justify its indolence.

19. It is noteworthy that the orders issued on 4<sup>th</sup> November, 2019 were granted pursuant to a consent between the parties. The appellant is therefore through the amended application dated 17<sup>th</sup> January, 2020, seeking extension of time trying to review the consent orders entered between the parties herein. The principle for setting aside, reviewing and/or varying consent orders is now well settled. In **Hiram vs Assam** [1952] 19 EACA 131 at page 134, the Court of Appeal held as follows-

**“The mode of paying the debt, then, is part of the consent judgment. That being so, the Court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in Setton on judgments and orders (7<sup>th</sup> Edition), Vol. 1 page 124, as follows:**

**“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court ..... or if the consent was given without sufficient material facts, or in general for a reason which would enable the Court set aside an agreement”. (emphasis added).**

20. The present application is grounded on the provisions of Article 50 and 159 (2)(d) of the Constitution and Order 50 Rule 5 of the Civil Procedure rules. Order 50 Rule 5 of the Civil Procedure Rules provides as follows-

**“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.”**

21. The appeal that the appellant seeks to reinstate was dismissed by virtue of the appellant failing to deposit the full decretal sum in a joint bank account in the names of the Counsel for the parties within thirty (30) days from 4<sup>th</sup> November, 2019. The appellant averred that the failure to comply was occasioned by an inadvertent oversight in availing the funds to its Advocates. It further averred that the funds had been availed to its Advocates and it is now in a position to comply.

22. The Court of Appeal in **East African Portland Cement Company Limited v Superior Homes Limited** [2017] eKLR held as follows-

**“While this court has discretion to extend time under the provisions of section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules if good reason is shown, the court must interrogate whether these provisions are applicable to court orders where the time for doing an act is set not by the court, but by the parties themselves in a consent order. I find in this respect that the foregoing findings as to the setting aside of a consent order by way of review must also apply to any terms as to time in a consent order. This is because there are well established grounds as to when a consent order can be reviewed, which of necessity also apply to time limits agreed to by the parties in a consent order.... It is the finding of this court that it has no discretion to extend time set in a consent order, and that for the Plaintiff to be able to set aside or vary the terms of their consent order and decree as to time, it must show a good ground.” (emphasis added).**

23. The appellant herein has averred that it inadvertently failed to avail the funds to its Advocates in time. That on its own is not a good reason for setting aside a consent order as it smacks of carelessness and indolence on the appellant’s part after it readily and willingly entered into a consent with the respondent. The appellant also deposed to the fact that its Advocates were to be supplied with copies of handwritten proceedings to enable them type the same in preparation of the Record of Appeal as per the consent orders.

24. The appellant exhibited copies of 2 letters it sent to the Court requesting to be supplied with copies of handwritten proceedings. The appellant also exhibited a copy of a bank transfer remittance advice as evidence that it had transferred the requisite funds to the law firm representing it, in compliance with the consent orders. The appellant expressed regret and apologized to the Court and to the respondent’s Advocates for the inconvenience caused.

25. It is not in dispute that the time within which the appellant should have complied with the Court orders elapsed on 3<sup>rd</sup> December, 2019. The present application was filed on 6<sup>th</sup> January, 2020 and was amended on 17<sup>th</sup> January, 2020. The amended application was filed on 27<sup>th</sup> January, 2020. Pursuant to Order 50 Rule 4 of the Civil Procedure Rules, the period between 21<sup>st</sup> December, 2019 and 13<sup>th</sup> January, 2020 does not count. The application before this Court was filed 14 days late.

26. Unreasonable delay was explained by the Court in **Jaber Mohsen Ali & another v Priscillah Boit & another** [2014] eKLR as follows:-

**“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.” (emphasis added).**

27. In an instance such as this one, courts are reminded to exercise discretion with care so as not to occasion an injustice to a party and/or delay the course of justice. In **Esther Wamaitha Njihia & 2 others v Safaricom Limited** [2014] eKLR, the Court addressed the issue of judicial discretion as hereunder-

**“The discretion is free and the main concern of the courts is to do justice to the parties before it (See Patel Versus EA Cargo Handling Services Ltd) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See Shah Versus Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be**

**compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court.”** (emphasis added).

28. In **Contractors Ltd vs Margaret Oparanya** (supra) the court when faced with an application where the applicant failed to comply with a consent order stated thus -

**“It should be noted that the consent order or judgment dated 6/10/2003, was duly recorded and approved by this court on 6/10/2003. In short, the order has become the order of the court having been domesticated upon approval. Consequently, though the order was recorded by consent, the jurisdiction of the court is not ousted but only restricted. Thus any variation has to be qualified. Section 3A of the Civil Procedure Act is where this court sources its inherent power. In other words the court can interfere with any order whether by consent or otherwise for the sole purpose to meet the ends of justice or to prevent abuse of the process of the court.”** (emphasis added).

29. The only reason that persuades this court to review the consent order issued on 4<sup>th</sup> November, 2019 and extend time within which the appellant can comply with the said orders is due to the failure by the lower court registry to supply the appellant’s Advocates with copies of the handwritten proceedings. The respondent in opposition to the motion herein failed to demonstrate any prejudice that shall be occasioned on him in the event that the consent order is reviewed.

30. This court as such allows the amended application dated 17<sup>th</sup> January, 2020 on the following terms-

1. The appeal be and is hereby reinstated;
2. The orders for stay of execution granted on 4<sup>th</sup> November, 2019 be and are hereby reinstated;
3. The applicant shall deposit the full decretal sum awarded by the Trial Court in a joint interest earning bank account in the names of the Advocates on record within 45 days from today;
4. The applicant will file and serve the Record of Appeal within 60 days from today;
5. The Executive Officer Mombasa Law Courts is hereby directed to supply the applicant’s Advocates with handwritten proceedings in Mombasa Chief Magistrate’s Court Civil Suit No. 1544 of 2015; Prakash Radia versus Airtel Networks (K) Limited so as to facilitate typing of the same;
6. In default of compliance with orders No. 2 & 3 hereinabove the appeal shall stand dismissed and consequently the order for stay of execution shall lapse and
7. The respondent shall have costs of this application.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 28<sup>TH</sup> DAY OF MAY, 2021. IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO THE COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020, THE RULING HEREIN HAS BEEN DELIVERED THROUGH TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

**Mr. Mugambi for the appellant**

**Mr. Mkan for the respondent**

**Ms Bancy Karimi – Court Assistant.**