

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.34 OF 2015

KENINDIA ASSURANCE CO. LTDAPPELLANT

VERSUS

BUSWAYS KENYA LTDRESPONDENT

RULING

[1] The application dated **21st April 2020**, made by **KENINDIA ASSURANCE CO. LTD (APPELLANT/APPLICANT)** vide a notice of motion seeks for an order for leave to appeal against the ruling and orders of this court delivered on 8th April 2020, on grounds set out in the motion as fortified by a supporting affidavit deponed by the applicant's legal officer **JOSEPH GACHIGUA**, on the 21st April 2020.

The respondent, (**BUSWAYS (K) LTD**) did not file a response to the application at any time thereby implying that they had not been served and were unaware of the application. Nonetheless, the application was made under certificate of urgency under the vacation rules and was to be placed before the duty judge via e.mail for necessary directions as indicated by the Deputy Registrar on 22nd April 2020. Nothing was heard of the application from that date. The application thus disappeared into oblivion and in its place a similar application was presented by the applicant vide a notice of motion dated **28TH APRIL 2020**, which is the actual one pending hearing and determination and not the application dated 21st April 2020, as indicated by the applicant and confirmed by the respondent at the hearing of the matter on 17th May 2021.

[2] This ruling must therefore be in respect of the later application dated 28th April 2020, rather than the former application dated 21st April 2020, which may now be treated as having been overtaken by events. The ground in support of the application are set out in the appropriate notice of motion. These are fortified by the averments contained in the supporting affidavit dated 28th April 2020 deponed by the aforementioned applicant's legal officer. The respondent opposes the application on the basis of the ground, contained in a replying affidavit dated 14th December 2020, deponed by the respondent, branch manager, **AHMED NOAH MOHAMED**.

[3] The hearing of the application proceeded by way of written submissions. In that regard, the applicant's submissions dated 7th February 2021, were filed herein by **L.G. MENEZES**, while those of the respondent dated 10th February 2021 were filed by **GICHABA & CO. ADVOCATES**. These rival submissions were given due consideration by this court in the light of the grounds in support of the application and those in opposition thereto. Basically, the issue for determination is whether the applicant has established proper, sufficient and credible grounds for this court to exercise discretion in its favour and grant it the leave to appeal against the ruling of the court made on 8th April 2020.

[4] The genesis of the ruling was the **BUSIA CM CC No.163 OF 2014** in which the applicant was the defendant and the respondent the plaintiff. The case was determined in favour of the respondent on 8th October 2015, but the applicant was dissatisfied and preferred an appeal which was dismissed for want of prosecution on 8th November 2017. An attempt by the applicant to revive the appeal proved futile such that the matter proceeded for taxation before the Deputy Registrar after which a certificate of costs was issued on 22nd May 2019. The applicant therefore filed a reference before this court vide a chamber summons dated 30th July 2019. It was the applicant's desire to have the respondent's bill of costs remitted back to the Deputy Registrar (**TAXING OFFICER**) for re-taxation.

After hearing both parties on the reference, the court rendered its ruling on the **8TH APRIL 2020**, in which it dismissed the reference for being improper and irregular before the court.

The applicant was aggrieved by the ruling and now seeks leave to appeal basically pursuant **to RULE II (3) OF THE ADVOCATES RENUMERATION RULES**.

[5] This Rule provides that any person aggrieved by the decision of the judge upon any objection referred to the judge may with leave of the judge but not otherwise appeal to the Court of Appeal. This provision precludes an automatic right of appeal to the Court of Appeal arising from a reference to a judge on taxation. Therefore, the grant of leave to appeal is basically a matter of the court's discretion which must, as a matter of course, be exercised judicially depending on the circumstances of each particular case.

[6] Herein, the impugned decision was delivered on 8th April 2020 and the present application was filed on 28th April 2020, meaning that the applicant had within reasonable time expressed an intention to appeal the decision. The question of delay would therefore be a factor in deciding whether or not leave to appeal ought to be granted. However, it cannot escape the attention of this court to the fact that this is a suit which has been in court for almost eight (8) years and should therefore be expedited without unnecessary delay. The commencement date of the suit was the 8th April 2014, in the Magistrate's court. Final judgment was on 8th October 2015, in favour of the respondent (**PLAINTIFF**). Thereafter, the appellant (**DEFENDANT**) commenced the appeal process by filing a memorandum of appeal in this court on 27th October 2015. Here again, there was no delay by the applicant in filing the appeal.

[7] However, the applicant delayed for about two (2) years in prosecuting the appeal, thereby prompting the court to issue a show case notice as to why the appeal should not be dismissed for want of prosecution. The appellant was therefore required to appear in court on 8th November 2017 but did not. The court that proceeded to dismiss the appeal for want of prosecution. The attempt by the appellant to set aside the dismissal order and/or reinstate the appeal for hearing and disposal did not succeed. The matter then proceeded before the Deputy Registrar for taxation after which a reference was filed in this court by the appellant. This resulted in the impugned decision made on 8th April 2020.

[8] For all the foregoing, it is clear that the appellant's conduct was all along bent at having the matter concluded at the highest level possible and believed that it had strong legal grounds to challenge the original judgment of the lower court and all subsequent orders and decisions arising therefrom at both the lower and High courts. In the circumstances, it cannot be said that the appellant was not and has never been diligent in having this matter concluded in one way or the other. Given its past conduct, the delay of two years in not prosecuting the appeal cannot be construed to mean that the appellant was indolent or that he acted in bad faith to deliberately delay the expeditious disposal of this matter and/or to prevent the respondent (**PLAINTIFF**) from enjoying the fruits of this judgment. It is for all these reason, that the court deems it necessary and just to exercise its discretion in favour of the appellant/applicant and allow the present application on condition that the intended appeal be filed in the Court of Appeal at Kisumu within the next fourteen (**14**) days from this date hereof. In default, the leave granted shall forthwith lapse and the respondent be at liberty to execute the necessary decree.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[READ AND SIGNED THIS 20TH DAY OF MAY 2021]