



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

MISC. CIVIL APPLICATION NO. 31 OF 2020

HORIZON COACH COMPANY LIMITED.....1ST APPLICANT

BASARI COMPANY LIMITED.....2ND APPLICANT

-VERSUS-

ELIZABETH MUTAVE MULLI.....1ST RESPONDENT

NGIGE MUNYOKI.....2ND RESPONDENT

TSUSHO CAPITAL KENYA LIMITED.....3RD RESPONDENT

KYALO GREGORY.....4TH RESPONDENT

IRENE MUMBI.....5TH RESPONDENT

RULING

1. On 26th January, 2021, this Court granted leave to the applicants to file the appeal out of time and directed that the Memorandum of Appeal be filed and served within 10 days from the said date and in default, the application would stand dismissed. The court further granted a stay of execution of the decree herein on condition that the Applicant deposits half of the decretal sum in joint interest earning account(s) in the names of the advocates for the parties herein in Kenya Commercial Bank, Machakos within 30 days from the date of the said ruling and in default the application would be deemed to have been dismissed with costs and the Respondent would be at liberty to execute.
2. By a Motion on Notice dated 3rd March, 2021, the applicants herein seek an order that the time within which to comply with the conditions for stay aforesaid be extended and/or that the Applicants be granted 30 days to comply with the same.
3. According to the Applicants, the inability to comply within the timelines prescribed was occasioned by the delay in the drawing and processing of the documents which was occasioned by the downscaling of employees in the insurer's office. It was further contended that the delay was also due to the change of advocates in the matter. According to the Applicants, the Respondents will not be prejudiced if the application is allowed.
4. In opposing the application, the 1st Respondent averred that the instant application is pegged on order 22, order 42 rules 4 and 6 of the *Civil Procedure Act* and is a gross abuse of the court's process and is dead on arrival as it seeks to review the court's orders of the 26th January, 2021 as such the current Application ought to have been brought under order 45 of the Civil Procedure Act. It was further averred that the court orders of the 26th January, 2021 were clear and precise on the conditions that the Applicant was bound to satisfy in order to file the intended appeal out of time. According to the Respondent, at no point in time did the court grant orders for a bank guarantee to issue as alluded to by the Applicant.
5. According to the Respondent, the Applicant refused/ignored to comply with the court's orders of the 26th January, 2021 and is only running to court over 1 month since the lapse of stay orders and has not given any good reasons as to why it failed to comply.
6. The Respondent's view was that for the applicant to allude that failure to comply with the court orders was occasioned by delay in receiving and processing the account where the money will be deposited and change of advocates is neither here nor there and is an untruth

only meant to mislead the court, as firstly the instructing client is the same and has all along been aware of the court's orders and further the firms of Kimondo Gachoka & co. Advocates and Kairu & Mccourt are the same outfit as evidenced by the file reference numbers in the instant suit as indicated in annexures filed by the applicant, which bear the same reference numbers but purport to emanate from different law firms. Further, the physical addresses for both firms is Hazina Towers, 10th Floor, Monrovia Street, which is too much to be left to coincidence.

7. The Respondent contended that court operations resumed in the month of May last year and as such the Applicant cannot use the Covid 19 pandemic as an excuse for ignoring/refusing to comply with court orders. Further the applicant has not demonstrated what loss it stands to suffer if the current application is dismissed and the said application is a mere afterthought only meant to delay the finalization of this matter which was instituted 6 years ago.

8. In the Respondent's view, the instant Application is a gross abuse of the court's process and should be dismissed with costs to the 1st Respondent.

Determination

9. I have considered the issues raised in this application.

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. In this case the time for lodging the appeal was fixed by this court's order. Accordingly, this court has the discretion to grant the orders sought herein. It was contended that since the applicant did not comply with the timelines given by this court within which to file and serve the memorandum of appeal, it follows that both the applications for extension of time to lodge the appeal and for stay stood dismissed ten days after the ruling. That may be so. However, that does not necessarily deprive this court of the jurisdiction to extend time. In my view since the above provision states that enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, even though the earlier application is deemed as dismissed, nothing bars the court from entertaining an application for extension of time under the said rule whose effect if allowed would result in the revival of the deemed dismissed application.

12. It is clear therefore that the decision whether or not to extend for complying with a decision of the court is an exercise of discretion and just like any other exercise of discretion. However, this being an exercise of judicial discretion, like any other judicial discretion must 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. 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.

13. The main ground for seeking extension of time is that the applicants were unable to comply with the orders of the court due to the inability to process the documentations required within the prescribed time as well as the change in legal representation of the firms of advocates for the Applicant.

14. In **Chemwolo and Another vs. Kubende [1986] KLR 492; [1986-1989] EA 74**, it was held that:

"Unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs since the Courts exist for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

15. In this case there is no allegation that the applicant's conduct amounted to fraud or intention to overreach. In the premises I find the Applicants' explanation for the delay is excusable.

16. With respect to costs, I did not hear the 1st Respondent contend if the application is allowed she will suffer such prejudice that cannot be compensated by an award of costs. Costs, 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 vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188**.

17. Accordingly, time is hereby enlarged to the applicant to comply with the stay order issued on 26th January, 2021 within 21 days and in default this application will stand dismissed.

18. The Respondent will have the costs of this application.

19. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 29TH DAY OF JUNE, 2021

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mukula for Mrs Thoronjo for the Respondent

Miss Mukami for Mr Morara for the Applicant

CA Geoffrey