



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 133 OF 2014**

**CHARLES GITHINJI MUIGWA.....APPELLANT/APPLICANT**

**-VERSUS-**

**CHARLES KARANJA KIIRU.....RESPONDENT**

**RULING**

1. Before the court for determination is a **Notice of Motion** application dated **19<sup>th</sup> March, 2021** taken out by the Appellant/Applicant seeking for the following orders;

*a) Spent;*

*b) Spent;*

*c) That this Honourable Court be pleased to extend the period for depositing Kshs.1,000,000/= by the Plaintiff in a joint interest earning account as ordered by court on 14<sup>th</sup> February, 2021 by 90 days;*

*d) That costs of this application be in the cause.*

2. The application is expressed to be brought under **Order 50 Rule 6** of the **Civil Procedure Rules** and premised on among other grounds that; the Applicant has not been able to raise Kshs.1,000,000/= within the period indicated by the court because the Plaintiff is unemployed and only surviving on goodwill and support of friends. That to show he is desirous in prosecuting the matter, the Plaintiff has already raised Kshs.300,000/= and undertakes to raise the balance of Kshs.700,000/= in the next 90 days. He states that his inability to deposit the whole amount as directed by the court to have been contributed to by the suppressing economy. The application is supported by the affidavit of the Plaintiff, **Charles Githinji** sworn on **19<sup>th</sup> March, 2021** wherein he has reiterated the ground on face of the application.

3. The application is opposed by the Respondent on basis of his **Replying Affidavit** sworn on **22<sup>nd</sup> March, 2021**. He is of the view that it would be pointless to grant the extension of time as sought for the reason that the Judgment having been delivered on **4<sup>th</sup> February, 2021**, the Applicant was granted forty five (45) days to comply and they lapsed on the **22<sup>nd</sup> March, 2021**. Consequently, Order (i) setting aside the Judgment of the trial court lapsed with the 45 days and for any extension of time, the Plaintiff has to first seek leave for the extension of order (i).

4. The Respondent further laments that the Applicant has nothing to show that he has raised the amount of Kshs.300,000/= as purported and the Applicant having stated that he only relies on goodwill from friends has offered nothing to show that the said friends will raise the sum of Kshs.700,000/= within the 90 days being sought for. The applicant also decries the delay in this matter, the lower court Judgment having been delivered on **19<sup>th</sup> November, 2013** and without any hopes for the Applicant realizing the amounts awarded in the Decree.

5. The application was canvassed by way of written submissions with the Appellant/Applicant filing his submissions on **7<sup>th</sup> May, 2021** and likewise, the Respondent filed his on **7<sup>th</sup> May, 2021**.

6. For the Plaintiff, it is submitted that while computing the 45 days as from **4<sup>th</sup> February, 2021** when the Judgment was delivered, the time lapsed on **22<sup>nd</sup> March, 2021** which was way after the instant application was filed on **19<sup>th</sup> March, 2021**. Therefore, it cannot be said that the orders lapsed with the lapse of the 45 days as intimated by the Respondent given that the applicant had moved court before the lapse of such time. That even assuming that the time had lapsed as purported by the Respondent, the same is curable under **Section 95** of the **Civil Procedure Act**.

7. Lastly, the Applicant submitted that **Order 50 Rule 6** of the **Civil Procedure Rules, 2010** affords the court the discretion to enlarge time where a limited time has been fixed for doing any act. Those submissions were also buttressed by reliance on the case of **Compliant International Security Ltd & Another –vs- Nicodemus Mulwa Muli [2019]eKLR**.

8. On the part of the Respondent, it is submitted that the at the lapse of the 45 days, the order setting aside the trial court's Judgment lapsed and there ought to be a specific prayer for extension of the order to set aside the trial courts Judgment. That position was fortified in reliance on the case of **Aftab Ahmed & Another –vs- Salim Dhanji & 2 Others [2007] eKLR**.

9. It is the Respondent's case that the discretion of the court should not be exercised in a vacuum but on basis of material evidence. In this case, although the Applicant avers that it has raised Kshs.300,000/= there is nothing in evidence to show that there have been an attempt to deposit the said sum in a joint account as directed by the court. And in any event, the period of ninety (90) days sought from the filing of the application is already spent and there is no indication as to whether the Applicant has raised the balance of Kshs.700,000/= he seeks to raise. Lastly, the Applicant has urged the court to take into consideration that a successful party is entitled to fruits of its judgment and not to be delayed on unclear circumstances. This line of argument was supported by the cases of **Megashell Transporters Limited –vs- Co-operative Bank Limited [2021]eKLR** and **Macharia T/A Macharia and Co. Advocates –vs- East African Standard [2002] eKLR**.

### **Analysis and Determination**

10. I have considered the grounds set out in the application and the affidavits in support and rebuttal thereof, the written submissions filed on behalf of the parties as well as the cited authorities and statute law relied on. It is apparent from the **Motion dated 19<sup>th</sup> March, 2021**, that the Appellant/Applicant is seeking for an order to extend the period given to him to deposit the sum of Kshs.1,000,000/= within forty five (45) days from the date of Judgment. The main argument that has been proffered by the Appellant is that he is currently unemployed and has had to rely on friends and relatives to raise the subject amount. That owing to that financial constraint, he needs a further ninety (90) days to raise the entire amount and comply with the condition that he deposits the entire sum of Kshs.1,000,000/= in a joint account. On the other hand, the Respondent has maintained that it would be unnecessary to grant such an order since the orders of the court sought to be complied with have already lapsed and need not to be reinstated.

11. As reflected from the court record, it is not in dispute that the Judgment was delivered on **4<sup>th</sup> February, 2021** and the Appellant was directed to deposit, within 45 days thereof, the sum of Kshs.1,000,000/= in a joint interest earning account as a condition to the setting aside the Judgment by the trial court. Both parties are also agreeable that the 45 days lapsed on **22<sup>nd</sup> March, 2021** but what is in dispute is whether the order setting aside the trial court Judgment lapsed with the 45 days.

12. The Respondent has relied on the **Aftab Ahmed & Another –vs- Salim Dhanji Case (supra)** where the court considered that an application for extension for time to comply was untenable when the set period to comply had already lapsed without extension of the subject orders.

13. I have taken time to read through the **Aftab Ahmed case** relied upon by the respondent and established that the same is not *para materia* with the present case for the reason that the applicant therein although granted 21 days to comply with the orders issued, he had moved the court after the envisaged period of 21 days had already lapsed and that in my view, is the reason why the court held that the subject orders had to be reinstated before the time to comply could be extended.

14. In the present case, it is evidently clear that the application at hand was filed on **19<sup>th</sup> March, 2021** which is within the forty-five (45) days directed by the court. In my view, the limitation clock stop ticking once the Applicant filed the application under consideration was filed and could only gain its momentum upon further directions by the court on the application. That having been said, this court does not agree with the Respondent that the orders setting aside the trial court's judgment lapsed on the 45<sup>th</sup> day of this court's Judgment. Those orders are to be considered as being in a state of pause pending a merit based consideration of the Application for extension of the time to comply by the court's order and upon hearing each party's case.

15. As for whether the application at hand is merited, **Order 50 Rule 6** of the **Civil Procedure Rules** is the point of reference and provides as follow;

***“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.”***

16. It follows that an order for extension of time to comply with conditions imposed by the court is discretionary and should be exercised judicially but not on whims and caprice.

17. In this case the Applicant sought for extension for the time to comply within the set period of 45 days and it cannot be said that he demonstrated any delay whatsoever or in any way displaying the conduct of person not interested in complying with the directions of the court. He has explained the reason for not being able to deposit the Kshs.1,000,000/= as directed to be the financial constraints he has faced since he is currently unemployed. He is however certain that he would comply with those orders if given 90 days to do so.

18. In such a scenario, the court has to take into account the pro and cons of granting or not granting the orders sought as well as the prejudice either party would suffer in each particular case. In this case, I do not see any prejudice that would be occasioned on the

Respondent that cannot be addressed by an award of damages, if the Applicant is allowed the time he seeks to comply with the directions of the court issued in the Judgment delivered on **4<sup>th</sup> February, 2021**.

19. However, it should be noted that the Applicant was seeking for 90 days as from **19<sup>th</sup> March, 2021** when the application was filed. Assuming that the orders were granted on the date of filing the application, the 90 days would have lapsed on **20<sup>th</sup> July, 2021** or soon thereafter. It is therefore safe to assume that as at now the Applicant has already raised the Kshs.1,000,000/= as he intended, if he is bona fide.

20. In the end, and while taking into account the interests of both parties, the following orders do issue;

*a) An order do and is hereby issued extending the period for depositing Kshs.1,000,000/= by the Appellant/ Applicant in a joint interests earning account as ordered in the Judgment delivered on 4<sup>th</sup> February, 2021 by 30 days from the date hereof.*

*b) Failure to comply with order (a) above the order setting aside the lower court judgment shall be vacated and the Respondent will be at liberty to proceed with execution.*

*c) The Applicant will have no other chance to seek further extension of time in the event of failure to comply with order (a) above.*

*d) Each party shall bear its own costs.*

It is hereby so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Kongere counsel for Respondent

No appearance for and by Applicant

Court Assistant - Winnie