



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 122 OF 2017**

**THE CREATIVE PRINTHOUSE LIMITED..... APPELLANT**

**VERSUS**

**DENISE OLIVIA FRANKLYN PEREIRA (SUING AS LEGAL REPRESENTATIVE**

**OF FRANKLYN Pereira [Deceased].....RESPONDENT**

**RULING**

1. Through a Notice of Motion application dated 21<sup>st</sup> August, 2020 brought under the provisions of Order 42 Rule 21, Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act (Cap 21) Laws of Kenya and all other enabling provisions of the law, the applicant seeks the following orders:-

i. Spent

ii. That this Honourable court be pleased to set aside and or vary the orders made on the 5<sup>th</sup> March, 2020 dismissing the appellant's appeal and the said appeal be readmitted and heard on merits;

iii. That the draft annexed submissions of the appellant be deemed as duly filed upon the payment of the requisite court fees; and

iv. That the cost of this application be provided for.

2. The application is anchored on the facts in support of it and the supporting affidavits of Edward Njenga Muchai, Advocate and Cherlyl Isabella Desouza, the Managing Director of the appellant company. Both affidavits were sworn on 21<sup>st</sup> August, 2020.

3. On 3<sup>rd</sup> September, 2020 the respondent's Advocate filed grounds of opposition and a replying affidavit which was sworn on the same date by the respondent, Denise Olivia Franklyn Pereira.

4. In written submissions filed on 13<sup>th</sup> October, 2020 the applicant's Counsel submitted that the applicant's substantive appeal was dismissed on 5<sup>th</sup> March, 2020 on the basis of non-appearance of the applicant on the said date which had been set for hearing of the appeal. It was stated that the appeal was initially scheduled for hearing on 25<sup>th</sup> February, 2020 and a Counsel by the name of Irene Oguna attended court and held brief for the applicant's Advocate, Mr. Njenga Muchai. That the said Advocate informed him that the appeal was re-scheduled for hearing on 6<sup>th</sup> March, 2020 but it turned out that the appeal had actually been set for hearing on 5<sup>th</sup> March, 2020. The applicant's Counsel relied on the annexures attached to his affidavit which are extracts from his personal and office diaries to show the entries which were made thereon, after he was informed that the appeal would be heard on 6<sup>th</sup> March, 2020.

5. He submitted that prior to 5<sup>th</sup> March, 2020 the applicant had never failed to be represented in court and that the court record attests to the said fact. He pointed out that the said issue was not contested by the respondent's Counsel.

6. Mr. Njenga Muchai relied on the case of **Utalii Transport Company Limited and 3 Others v NIC Bank and Another** [2014] eKLR, on the law governing dismissal of suits.

7. He also submitted that when he became aware that the suit had been dismissed on 5<sup>th</sup> March, 2020 he immediately dispatched a letter to court on the same day. He stated that failure to file the present application timeously was due to the outbreak of the current covid-19 pandemic which affected all and sundry. He further stated that the said pandemic led to closure of courts at one time and that court business

was not being conducted in the normal manner. He regarded the delay in not filing the current application before 21<sup>st</sup> August, 2020 as not being inordinate.

8. The applicant's Counsel invited this court to look at the conduct of the appellant during the entire proceedings that had taken place prior to 9<sup>th</sup> December, 2019 to demonstrate that the instant appeal was filed immediately (after the decision of the lower court was pronounced) and so was the Record of Appeal.

9. The said Counsel urged this court to exercise its discretion in the applicant's favour, more so, taking into account the fact that the respondent had not demonstrated that she would suffer prejudice that cannot be atoned for by an award of costs.

10. On the issue of the court's discretion when dealing with an application of this nature, the applicant's Counsel relied on the case of **Ivita v Kyumbu** [1984] KLR 441.

11. It was submitted that if this court was to deny the applicant an opportunity to be heard, it would run counter to the provisions of Article 50 of the Constitution of Kenya, 2010 on the right of parties to be heard. He was of the view that denying a party the right to be heard should be abhorred at all times as the same does not promote the rule of law.

12. He prayed for the application herein to be allowed and for the appeal to be heard on merit and not to be disposed of by way of technicalities. He further stated that the applicant could not be held to blame for any delay as it had all along wanted to move the appeal save for the demise of the original respondent. He urged this court not to oust the applicant from the seat of justice for no fault of its own. Mr. Njenga Muchai relied on the case of **Richard Ncharpi Leiyagu v IEBC & 2 Others** Civil Appeal No. 18/2013, to buttress his submission.

13. He also relied on the authorities in **Belinda Murai and Others v Amoi Wainaina** (1978) KLR 2782 and **Philip Chemwolo and Another v Augustine Kibede** (1982 – 88) KAR 103 at 1040, in furtherance of his submissions that the mis-communication of the hearing date should not be visited on the applicant.

14. Mr. Muinde, the respondent's Counsel in written submissions filed on 5<sup>th</sup> October, 2020 stated that on 10<sup>th</sup> December, 2019 both the appellant and respondent entered into a consent which was adopted as an order of the court. It was to the effect that stay of execution was granted on condition that the appellant herein deposited Kshs. 3,000,000/= in a joint interest earning account and the appeal was then admitted. It was stated that the appellant was given 30 days from 10<sup>th</sup> December, 2019 to file and serve its written submissions on the respondent. That the respondent was given corresponding leave to file and serve her written submissions.

15. He indicated that highlighting of submissions for the appeal was scheduled for 25<sup>th</sup> February, 2020. It was further stated that on the said date, the appellant had not filed and served its written submissions and the matter was adjourned. It was indicated that on the said date, the Hon. Court proceeded to give directions that the appeal would be heard on 5<sup>th</sup> March, 2020 subject to there being compliance with the court's previous directions and orders given in respect to the security of deposit in the sum of Kshs. 3,000,000/=.

16. It was further submitted that on 5<sup>th</sup> March, 2020 the appellant did not appear before court and its appeal was dismissed with costs on account of non-attendance. Mr. Muinde relied on the case of **Kathanje Daniel & Silverspread Company Limited v Stella Gacheri Gitonga and Another** [2018] eKLR, which states that applications similar to the one filed herein must be made timeously and reasons advanced for failure to attend court and the prejudice that the other party may suffer, if any.

17. He pointed out that the applicant's Advocate and his client swore affidavits only 4 days before the filing of the application in August, 2020 but no proper explanation was given on the reason why the application was not filed soon after the applicant and her Advocate met on 11<sup>th</sup> March, 2020. He opined that the application should have been filed before April, 2020 as the courts were closed in the month of April after the outbreak of the covid-19 pandemic. He also stated that the foregoing notwithstanding, Mombasa High Court went an extra mile to hear matters of urgency, during that period and that the applicant should not use the covid-19 pandemic as an excuse for not filing its application.

18. It was contended that it was unnecessary for the applicant's Managing Director to swear an affidavit in support of the application since the applicant's Advocate was the one who knew the facts in issue. In Mr. Muinde's view, the explanation given for the delay in the filing of the present application was not valid, genuine or excusable.

19. He further indicated that the applicant had not filed its submissions since 10<sup>th</sup> December, 2019 and continued disobeying court orders and the directions which had been given, even after being granted a second opportunity to file submissions on 25<sup>th</sup> February, 2020. Counsel for the respondent stated that even if the applicant's Advocate had appeared before court on the 5<sup>th</sup> of March, 2020, the applicant had still not filed its written submissions by then.

20. On the issue of the claim that Ms Irene Oguna was the one who mis-informed the applicant's Advocate about the hearing date being on 6<sup>th</sup> March, 2020 instead of 5<sup>th</sup> March, 2020, Mr. Muinde pointed out that the said Advocate never filed an affidavit to confirm that she gave the said information to Mr. Njenga Muchai. Mr. Muinde relied on the provisions of Sections 107(1) and 109 of the Evidence Act as to the issue of the burden of proof.

21. In regard to the issue of inordinate delay in filing of submissions since the 10<sup>th</sup> December, 2019, Mr. Muinde relied on the case of **Cecilia Wanja Waweru v Jackson Wainaina Muriruri & Another** [2014] eKLR, to support this argument.

22. The respondent's Counsel asserted that the applicant slept on its rights and got a wake up call by the dismissal of its appeal. It was submitted that the applicant acted contrary to the provisions of Section 1A of the Civil Procedure Act by failing to comply with directions

given by the court. It was also submitted that the applicant had the tendency of disobeying court orders as on 19<sup>th</sup> December, 2019 both parties to the appeal recorded a consent before court which was adopted as an order of the court. That in the said consent, the applicant was required to deposit Kshs. 3,000,000/= within 60 days to be held in a joint bank account but it neither complied with the said order nor gave any reason for non-compliance. Mr. Muinde held the view that the applicant was not deserving of the orders sought.

23. On the issue of the prejudice that the respondent was likely to suffer in the event the appeal was reinstated, it was submitted by the respondent's Counsel that the case herein has been in court since the year 2014 and 6 years had gone by since the lower court matter was resolved and Franklyn Pereira who filed the suit had since passed away. It was contended that the appellant's aim was only to keep the respondent from enjoying hard earned fruits of a regular Judgment which was procedurally entered by the lower court.

## **ANALYSIS AND DETERMINATION**

### **The issues for determination are-**

**i. If the appeal which was dismissed should be reinstated for hearing; and**

**ii. If the submissions filed out of the timeline given by the court should be deemed as being properly filed.**

24. Reinstatement of an appeal/application which has been dismissed for want of prosecution attracts favourable orders if the court is satisfied that an applicant's conduct towards having the appeal/application prosecuted is not wanting, a proper explanation is advanced for not complying with the directions given by a court and where it is established that no prejudice is likely to ensue to the respondent. It also boils down to the exercise of the discretion of the court seized of the matter, after taking all relevant factors into consideration.

25. The proceedings of 25<sup>th</sup> February, 2020 do indicate that Ms Oguna held brief for Mr. Njenga Muchai who was said to have been indisposed. As a result, he had not filed written submissions for the applicant in the appeal. It is worth noting that on 10<sup>th</sup> December, 2019 Judge Otieno had given the applicant's Counsel up to 11<sup>th</sup> January, 2020 to file and serve written submissions. As at 25<sup>th</sup> February, 2020, 2½ months had passed by with no action being taken by Mr. Njenga to file the said submissions.

26. On 25<sup>th</sup> February, 2020, Judge P. J. Otieno stood over the hearing of the appeal to 5<sup>th</sup> of March, 2020. A perusal of the handwritten lower court proceedings however indicate that the Judge at first wrote the date "6" and then cancelled it and wrote 5/3/2020.

27. There is therefore a strong possibility that at first the Judge pronounced that the appeal would be heard on 6<sup>th</sup> March, 2020 and then changed the date to 5<sup>th</sup> March, 2020 immediately thereafter, in the presence of the Ms Oguna and the Advocate who held brief for the respondent's Counsel.

28. In the said circumstances, it is not far-fetched when Mr. Njenga Muchai, states that Ms Oguna informed him that the appeal was scheduled for hearing on 6<sup>th</sup> March, 2020. It depends on the date Ms Oguna heard and internalized. It is a common practice for courts to give dates which are convenient to them but which may not be convenient to the Advocates representing parties. In such instances, an Advocate who requests for a different date may be given a date which is convenient to him.

29. It is not lost to this court that the applicant has been slow in moving the appeal forward towards having it heard and determined by failing to file its written submissions within the timeline required. Mr. Muinde is right in that aspect. There is a possibility that the appeal would not have proceeded for hearing on 5<sup>th</sup> March, 2020 as the applicant's Counsel had not filed written submissions. The issues brought out in the submissions of the respondent's Counsel which go to the merits of the appeal, such as the interest payable on the money advanced cannot be considered in an application for reinstatement of an appeal.

30. I do note that the lower court case was filed on 14<sup>th</sup> May, 2014 and determined on 19<sup>th</sup> May, 2017 in favour of the respondent herein. Although the original respondent died, his legal representative Denise Olivia Franklyn Pereira would like to see an end to the litigation herein. It cannot be said as was submitted by Mr. Njenga in his written submissions that the respondent is out only to enrich herself by laying claim to that which belonged to her father, to the exclusion of her other siblings. In this court's view, the respondent is pursuing her rights as a beneficiary of her father's estate as any money due to the credit of her father at the time he died would form part of her father's estate in the event that the court finds out that her father was entitled to the amount which was awarded to him by the lower court.

31. On the issue raised by Mr. Muinde that the applicant took a long time to file the application dated 2<sup>nd</sup> August, 2020 after the appeal was dismissed on 5<sup>th</sup> March, 2020, this court's view is that the covid-19 pandemic affected the manner in which court proceedings were being conducted before. Whereas some Advocates and litigants adjusted fast to the "new normal" and the way of filing pleadings and documents online and to the hearing of cases virtually, in any given scenario, there are always late bloomers. The world over, people have adjusted at different paces to the new environment of conducting the business of the court. Covid-19 which is a worldwide pandemic has also affected people differently.

32. Failure by the appellant to deposit the sum of Kshs. 3,000,000/- in a joint interest earning bank account was a condition for the grant of an order of stay of execution. Failure to comply with the said order means that there is no stay of execution in place. The applicant's Advocate in his brief oral submissions before this court indicated that the applicant did not give him the said amount to deposit in a joint bank account.

33. On the failure by Counsel for the applicant to file written submissions on time, on 25<sup>th</sup> February, 2020 Ms Oguna explained to Judge P.J. Otieno that Mr. Njenga Muchai had been unwell and that is when the hearing of the appeal was adjourned to 5<sup>th</sup> of March, 2020.

34. The application before me rests on the exercise of the discretionary powers of this court. In **Richard Ncharpi Leiyagu v IEBC and 2 Others** (supra) the Court of Appeal held as follows on the exercise of a court's discretionary powers –

**“We agree with the noble principles which go further to establish that the court’s discretion to set aside an exparte judgment or order for that matter is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”**

35. Article 50(1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The appeal herein is at the final stages of being heard as the applicant’s Counsel has attached to his affidavit, draft submissions in support of the appeal and seeks to have the same deemed as properly filed. If this court declines to reinstate the appeal which was dismissed on 5<sup>th</sup> March, 2020 it will mean that the applicant will have been denied the right to have its appeal heard. The issue of whether the appeal was filed within the timelines required which was brought up by Mr. Muinde at the hearing of the present application is a matter to be submitted on, at the hearing of the substantive appeal.

36. The court’s discretionary powers must always be exercised judiciously and not capriciously. The Court of Appeal in the case of **Patriotic Guards Ltd. v James Kipchirchir Sambu** [2018] eKLR, stated as follows on the issue of exercise of the discretionary power of the court:-

**“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”**

37. Due the extraordinary circumstances that came up with the outbreak of the covid-19 pandemic, I am of the view that the decisions cited by Mr. Muinde in **Cecilia Waweru v Jackson Wainaina Muiruri & Another** (supra) and **Kathanje Daniel & Silverspread Company Limited v Stella Gacheri Gitonga & Another** (supra) are not applicable to the circumstances in this case. For the reasons stated in this ruling, I will give the applicant’s Counsel the benefit of the doubt as to the date which was communicated to him as the date scheduled for the hearing of the appeal. The applicant’s Managing Director stated that she was present when the date of 6<sup>th</sup> March, 2020 was communicated to Mr. Njenga Muchai, the same was not controverted.

38. I therefore make the following orders:-

- i. That the application dated 21<sup>st</sup> August, 2020 is hereby allowed and the appeal is hereby reinstated for hearing;
- ii. The applicant/appellant will file and serve its written submissions within 14 days from 18<sup>th</sup> January, 2021;
- iii. The applicant/appellant though successful in this application shall bear the costs of the application dated 21<sup>st</sup> August, 2020 for failure to file its submissions within the timelines given on 25<sup>th</sup> February, 2020.

**DELIVERED, DATED and SIGNED at MOMBASA on this 18th day of December, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

No appearance for the appellant/applicant

Mr. Muinde for the respondent

Mr. Oliver Musundi - Court Assistant.