



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 76 OF 2019

KENYA PORTS AUTHORITY.....APPELLANT

VERSUS

NASSIR MOHAMED ZIMBARESPONDENT

RULING

1. Vide **Notice of Motion** application dated **20th May, 2020**, Appellant/ Applicant herein seeks the following prayers:

a) Spent.

b) That this Honourable Court be pleased to review and set-aside its orders issued on 14th of November 2019 summarily dismissing the Appeal.

c) That this Court be pleased to re-instate the Applicant/ Appellant's Memorandum of Appeal filed on 16 of April 2019 for purposes of its hearing on merit.

d) That this Honourable Court be pleased to issue an order directing the Chief Executive Officer Mombasa Law Court to supply the Applicant with the typed certified proceeding for the MSA CMC Civil Suit No.99 of 2015 – Nassir Mohamed Zimba vs Kenya Ports Authority.

e) That this Honourable Court be pleased to reinstate the order of stay of Execution of the impugned Judgment in the same terms with respect of the Bank Guarantee deposited by the Applicant with the Judiciary pending the hearing and determination of the Appeal.

f) That this Honourable Court be pleased to give directions for an early hearing date of the Appeal.

g) Costs of this Application be provided for.

2. The Application is premised on the grounds contained in the **Affidavit** of **Amos Cheruiyot** sworn on the **20th May, 2020** and other grounds are on the face of the Application.

3. **Mr. Cheruiyot**, who is Counsel for the Applicant avers that the Judgment in favour of the Respondent was rendered on the **15th March, 2019** without the Applicant being notified, or a **Notice of delivery of Judgment** was never served upon the Applicant. Nevertheless, upon learning of the delivery of the said Judgment, the Appellant on the **10th April, 2019** wrote to the Chief Executive Officer requesting for certified typed proceedings, and a copy of **Judgment** to enable it file an **Appeal**.

4. The deponent avers that on **16th April, 2019**, the Applicant filed its **Memorandum of Appeal** and a formal reminder to the Chief Executive Officer was made on **2nd July, 2019**, followed by several follow up that resulted in obtaining a copy of Judgment.

5. The deponent also avers that on **17th May, 2019**, the Applicant sought a stay of execution of this Judgment, which stay was allowed on condition that the Applicant deposits a Bank Guarantee of the decretal amount with the judiciary as security within **45 days** of the Ruling.

6. The deponent further avers that when the Appeal came up for directions on **19th September, 2019**, the Court directed the Applicant to file the record of proceedings on or before **4th November, 2019** failure to which the Appeal would stand dismissed. And on **4th November, 2019**, the Court dismissed the Appeal for failure by the Appellant in complying with its directions given on the **19th September, 2019**.

7. He argues that the issuance of certified court proceedings is a duty beyond the control of the Applicant as the same is a preserve of the Chief Executive Officer. Consequently, it is averred that the Applicant will suffer prejudice and irreparable harm despite having committed to pursue the Appeal and deposited a bank guarantee with the Court pending the Appeal.

8. The Respondent opposed the Application via its **Replying Affidavit** sworn on the **2nd June, 2020** by **Mr. Kioko Maundu**, the Respondent's advocate. He avers that on **19th September, 2019**, the Applicant was given 30 days to file and serve a Record of Appeal or otherwise the Appeal would stand dismissed. However, the Appellant's Counsel never applied for the extension of the time, and the Appellant has not demonstrated efforts it made to comply with the court's directions issued on **19th September, 2020**. Consequently, the period expired and the Appeal stood dismissed.

9. The deponent avers that after the dismissal of the Appeal, their request for the realization of the Bank Guarantee was declined prompting them to commence execution and it is the execution which prompted the instant application.

Submissions

10. In its submissions, **Ms. Dena**, Learned Counsel for the Applicant submitted that the Applicant should not be condemned unheard due to a fault not of its own making and control. She cited the Court of Appeal case of **Katsuri Limited...Vs...Nyeri Wholesalers Limited[2014]eKLR**, where the court held that the overriding objective principle mandates a court to act justly and fairly so as to do justice to one party at the expense of another.

11. **Mr. Maundu**, Learned Counsel for the Respondent submitted that the instant application was brought 8 months following the dismissal of the Appeal. Therefore, the Appellant is guilty of inordinate delay and has not bothered to explain what happened between **19th September, 2019** to **22nd May, 2020**. Consequently, the delay is inexcusable.

12. Further, Counsel submitted that the Appellant seeks to review and set aside non-existent orders issued on the **14th November, 2019** summarily dismissing the Appeal. Counsel argues that the court never dismissed the Appeal since it is the Appellant who dismissed the Appeal by failing to comply with the conditions granted by the court in its presence. Further, Counsel submitted that the Appellant cannot benefit from the discretion of this Court since it has not demonstrated efforts it made to secure the copies of the typed proceedings save for the Letter received in court on **12th April, 2019** and a receipt of payment of the typed proceedings has not been annexed herein either.

Determination

13. I have considered this application, affidavits in support and in opposition of the application, the submissions for both parties, as well as the authorities relied on. I have also considered the law applicable. The issue for determination is whether the application has merit.

14. **Section 80** of the **Civil Procedure Act (Cap 21), Laws of Kenya** provides as follows:-

(1) Any person who considers himself aggrieved—

a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court make such order thereon as it thinks fit”.

15. **Order 45(1)** of the **Civil Procedure Rules** states that:-

(1) Any person considering himself aggrieved—

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

2(1)An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed. [Order 45, rule 2.] To whom applications for review

16. The Respondent has submitted that the order dismissing the Appeal summarily issued on the **14th November, 2019** is non-existent and that the Appellant ought to have challenged the orders issued on **the 19th September, 2019**. On the part of the Appellant, it chose not to respond to this serious allegation via a further Affidavit. I have considered the said preliminary issue, it is noteworthy, as a matter of observation, and the Applicant handled this application casually. I say so with utmost respect, in that the impugned order was not even provided. Indeed, the application would have failed and/or struck out on that ground alone. However, this Court is inclined to uphold substantive justice pursuant to **Article 159** of the **Constitution of Kenya**.

17. In essence, what the Applicant is asking this Court to set-aside is the orders issued on the **19th September, 2019**, and exercise its discretion to extend time to allow the Applicant to file its Record of Appeal. Such exercise of discretion must be based on a good reason, which the Applicant must establish. The Court of Appeal addressed this issue in the case of **Husamuddin Gulamhussein Pothiwalla... Vs...Administrator Trustee and Executor of the Estate of Gulamhussein Ebrahim Pothiwalla & 32 Others [2007]eKLR**, where the Court held:-

“In dealing with the application before him (an application to extend the time and substitution of the Applicants in place of the deceased) what were the matters to be taken into account? As it has been stated many times by this Court for an Applicant to succeed it must be shown to the satisfaction of the court that the delay was not inordinate, the delay has been sufficiently explained, the intended Appeal is arguable and lastly that no prejudice would be caused to the Respondent if the application to extend time is allowed”.

18. There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the Applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In the case of **Andrew Kiplagat Chemaringo...vs...Paul Kipkorir Kibet [2018]eKLR**, this Court stated:-

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable”.

19. It is an undisputed fact that nearly six months have lapsed since the Appeal was dismissed. The Appellant has not given any reason nor even tried to explain what prompted the delay in filing the instant application for review. This Court also notes that save for the **Letter** dated **10th April, 2019** received in court on **12th April, 2019** the Appellant has not demonstrated by way of evidence any effort it has undertaken to secure the typed proceedings to enable it file a Record of Appeal.

20. In the circumstances, it is my finding that a delay of nearly six months without any justifiable reason is unreasonable thus bordering on indecisiveness and indolence tainted with laches on the part of the Appellant. As to the existence of any other reasonable cause, none had been demonstrated by the Appellant.

21. Having held as above, it is my finding that the application dated **20th May, 2020** herein is not merited and the same is hereby dismissed with costs awarded to the Respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 14th day of December, 2020.

D. O. CHEPKWONY

JUDGE

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 **15th March 2020**, this Ruling has been delivered to the

parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.