



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 69 OF 2017**

**CIC GENERAL INSURANCE COMPANY LIMITED.....APPLICANT**

**VERSUS**

**ONESMUS MWANZIA NGOLE.....RESPONDENT**

**RULING**

1. This is an application by the Applicant to reinstate interim orders of stay of execution issued on 30<sup>th</sup> October, 2017 and to extend time within which to comply with the orders thereto. The court had granted orders of stay of execution which the applicant was yet to comply with result that the interim orders have since lapsed. The applicant was unable to comply with the said interim orders hence the present application. The applicant avers that the respondent has expressed an intention to proceed with execution vide letter dated 13<sup>th</sup> December, 2017. The applicant contends that if the execution proceeds in the lower court, the appeal will be rendered nugatory.

2. The Applicant avers in the supporting affidavit, that the order of stay that was granted by this honorable court lapsed after the period that was granted by the court and there is intention by the respondent to commence execution of the judgment of the lower court. The Applicant has annexed a copy of a cheque issued in the names of both advocates to the parties as well as a letter hence showing that execution is imminent.

3. The Application is opposed vide a replying affidavit deposed by the respondent and dated 20<sup>th</sup> December, 2017. The Respondent finds this application to be bad in law, incompetent, an abuse of the court process, unmeritorious, an afterthought and ill advised. First, they point out that the Applicant has brought the cheque out of time. Secondly, they find no reason for this court to exercise its discretion in favour of the applicant. Third, the Respondent points out that there is no reason why the applicant did not comply within time stipulated in the order for stay.

4. The Applicant seeks orders for reinstatement of orders for stay of execution of the judgment rendered between the parties in the lower Court. The appeal is from a ruling and judgment delivered in **Machakos CMCC NO 774 of 2016** delivered on 11.5.2017. The Application is supported by an Affidavit by the Legal Officer of the Applicant.

5. The Application was canvassed by way of written submissions. I have considered the said submissions as well as the authorities cited.

6. The issue for determination are whether the Applicant is entitled to reinstatement of the interim orders.

7. Section 3A, 95 of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules are the operative parts in answering the question whether the prayer to extend interim orders is merited. The sections grant the courts unfettered discretion to enlarge time where a limited time has been fixed for doing any act or taking proceedings under these rules or by summary notice or by order of the court.

8. In **Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, the court stated thus:-

“..... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion:-Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and

**Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

9. In light of the above reasoning, I find that the application is rightly before the court and having found so, I will now consider the Application on its substance. Our case law has now provided guidelines on what will be considered “just terms” for purposes of permitting a party whose time is limited to extend such orders. The most important consideration is for the Court to advert its mind to the fact that the power to extend time is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

10. Some of these factors were suggested by the Supreme Court in **Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**. They include the following:

- a. **Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court;**
- b. **Whether there would be any prejudice suffered by the respondent, if extension is granted;**
- c. **Whether the application has been brought without undue delay; and**

**Whether in certain cases, like election petitions, public interest should be a consideration for extending time.**

11. I will now consider the Applicants’ application for extension of time against these factors.

12. The Respondent complains that the Applicant has brought the cheque out of time and thus they find no reason for this court to exercise its discretion in favour of the applicant. The Respondent points out that there is no reason why the applicant did not comply within time. I do not think there is any such principle that says that if you have succeeded in getting a stay order you are precluded from having it extended if it has lapsed as long as you have demonstrated the same to court.

13. I have seen the cheque that is annexed. The respondent admits its existence albeit its lateness and looking at all the factors in totality, I am unable to agree with the Respondent that the court cannot exercise discretion in favour of the appellant. In any event, since the money is on the table, I see no reason why anyone would refuse ready money. The respondent should be at the forefront in facilitating and/or allowing the applicant comply with the order to deposit the money now on hand

14. I believe that the Applicant has acted prudently in getting the order extended formally and has demonstrated willingness to comply. Further, I am unable to see any substantial adverse effects granting this order will have on the Respondent other than giving them ready money.

15. In the result, it is the finding of this court that the Appellant’s application dated 14<sup>th</sup> December 2017 has merit. The same is allowed in the following terms:

***a) The orders issued on 30/10/2017 staying execution of the ruling and judgement dated 11<sup>th</sup> May 2017 in Machakos Cmcc No.774 of 2016 are hereby reinstated and be in force pending the determination of the Appeal upon the Applicant depositing the decretal sums in a joint interest earning account in the names of the Advocates for the parties within fourteen (14) days of this ruling failing which the stay shall lapse.***

***b) The costs of the application shall abide in the Appeal.***

Orders accordingly.

Signed, Dated and Delivered at **Machakos** this **19<sup>th</sup>** day of **June, 2019**.

**D.K. KEMEI**

**JUDGE**