



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

MISC CIVIL APPL NO 18 OF 2017

BONIFACE NYUTU MBOGO.....APPLICANT

VERSUS

JAMES KARIUKI GACHARA.....RESPONDENT

RULING

The **Notice of Motion** dated 19/9/2017 is expressed to be brought under **Section 3A,79G, 25 Civil Procedure Act and Order 42 (6)(1) of the Civil Procedure Rules**.

Applicant was the defendant in the lower court and he seeks the following orders:-

- 2. That the court be pleased to grant leave to the applicant to file an appeal out of time against the ruling delivered on 7/2/2017.**
- 3. That the draft memorandum of appeal attached to the application be deemed as duly filed upon payment of requisite fees**
- 4.spent**
- 5. That pending the hearing and determination of this application and the appeal, this court be pleased to grant stay of execution of the decree, stay of all proceedings, notice to show cause, warrant of arrest and all other consequential orders in the Nyahururu Chief Magistrate's Court Civil Case No 71 of 2015 between James Kariuki (plaintiff/respondent) and Boniface Nyutu Mbogo (the appellant/applicant).**

The application is predicated on grounds found in the body of the application, supporting and supplementary affidavits sworn by Boniface Nyutu Mbogo on 19/9/2017 and 31/10/2017 respectively.

The applicant was the defendant in the Chief Magistrate's Court; a default judgment was entered against him and he applied to set it aside and the court directed 3/11/2016 that the ruling would be on notice within 2 weeks; that the applicant was not served with notice for delivery of the ruling within the two weeks nor was he notified of when the ruling was read; that he learnt on 9/5/2017 that the ruling had been delivered on 7/2/2017 in absence of the parties; that the advocate kept everything about the file till 9/5/2017 when he learnt that his application had been dismissed and was due for mention on 7/6/2017 for purposes of change of mode of execution; that he decided to file an appeal which they agreed upon with his counsel on 29/8/2017 but was served with Notice to Show Cause; that on 30/8/2017, his counsel sought indulgence from the court to enable them settle accounts; that his objection to the Notice to show Cause was dismissed because he was unwell and he was committed to serve 20 days civil jail and because of his absence a warrant of arrest was issued.

The applicant therefore argues that his rights to fair hearing *under Article 50 of the certificate* were contravened; that he was unfairly denied his right to be heard and the court did not do substantive justice Under **Section 1A and 1B of the Civil Procedure Act** and the court failed to consider that his defence had triable issues.

The application was opposed and the respondent filed a replying affidavit dated 23/10/2017 in which he deponed that the application is fatally defective, incompetent and an abuse of the court process; that there was inordinate delay in filing this application; that the applicant was aware of the date for ruling yet opted not to attend court; that the application lacks any merit because the appellant failed to file a defence; that the applicant had admitted owing the respondent debts vide the letters annexed as "JCK 1" and this application is a delaying tactic and the respondents stands to suffer greatly if the orders sought are granted.

In a rejoinder in the supplementary affidavit, the applicant denied that there was inordinate delay in filing the application or that it is a

delaying tactic to avoid payment of debt..

Mr. Siglai counsel for the applicant also filed submissions. Counsel relied on the decision of *Ceneast Airlines Limited Versus Kenya Shell Limited, Civil Appeal No. 174 of 1999* where the court stated the main concern of the court in such an application, which is to do justice for the parties and not fetter the court's discretion by imposing conditions on itself. Counsel urged the court to do substantive justice to the parties. He also relied on *Misc. application 78 of 2015 Edward Kamau and Another versus Hannah Mukui Gichuki & another* where the court held that right of appeal is a constitutional right which is the cornerstone of the rule of law.

Mr. Waichungo Counsel for the respondent added the parties were notified of the dates for ruling as the Executive Officer wrote a note to counsel on 3/2/2017 informing them of the date for ruling on 7/2/2017 and the parties did not attend. Counsel is of the view that delay of the notices is inordinate and the applicant only moved this court after the proposals of payment were declined and the application was then filed after execution commenced which is an afterthought and a delaying tactic. Counsel also urged that the application for stay of execution is premature because an appeal has yet to be filed.

Counsel relied on several cases including:-

1. *Beth Mugure Githinji versus James Muchiri Gathungu & others CM 237 of 2014*
2. *Ndegwa Kamau t/a Eden view garage Vrs Fredrick Isika Kalumbo Ca 51/2013*
3. *Machira t/a Machira and Co advocate Versus Mwangi & Another (2002 (Klr 39*

I have given due consideration to the application, submissions of the respective parties and the case law that was relied upon by counsel.

As to whether this court can grant an order extending time for filing an appeal; the applicable law is *Section 79G of the Civil Procedure Appeal* which provides as follows:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time”.

It is clear from the above provision that extension of time to appeal is an exercise of the court's discretion upon being satisfied that the applicant has good ground for the delay.

In the Supreme court decision in *Nicholas Kiptoo Arap Korir Salat IEBC & 7 others SC Appli 16/2014* the court laid down some principles on the exercise of the court's discretion to extend time when it said;

1. **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;**
2. **The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
3. **As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case basis;**
4. **Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;**
5. **Whether there will be any prejudice to be suffered by the respondents if the extension is granted;**
6. **The application should have been brought without undue delay; and**
7. **In certain cases, like election petitions, public interest should be a consideration for extending time.**

Again in the decision of *Beth Mugure Githinji Supra* the court said,

“ It is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal. The court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case *Ms. Portreitz Maternity versus James Karanga kavia, Civil Appeal No 63 of 1997* where the court stated

“That right of appeal must be balanced against an equal weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favor. There has

to be value and clear reasons, upon which discretion can be favourably exercised. There have been numerous judicial pronouncements on this precise points.

Upon perusing the court file, I do confirm that indeed the court directed on 9/11/2016 that the impugned ruling would be delivered on notice.

It was subsequently delivered on 7/2/2017 in absence of the parties. It is the respondents contention that notice was issued. I have seen on record, a letter dated 3/2/2017, addressed to both Counsel, to Mr. Siglai and Mr. Waichungo and written by the Executive Officer on behalf of the magistrate. Indicating that the ruling would be read on 7/2/2017. However, as to whether the notice was served, this court cannot tell because there was no affidavit of service. The next date that the defence counsel took steps in the matter is on 5/5/2017. There is no evidence that the two respondents counsel, if he knew of the ruling, ever informed the applicants counsel till May, 2017. It therefore confirms the applicants contention that he came to know of the ruling in May, 2017

Whether there was inordinate delay in bringing this application; having known of the court's ruling in May 2017, thus application was not filed till 19/9/2017 by which time execution had commenced and after the trial court had made an order committing the applicant to civil jail for 30 days. The applicant's explanation for the delay in moving the court is that he had not given his counsel instructions because of lack of funds to pay the advocate. The applicants explanation for the delay is reasonable in the circumstances and I will find that the delay in filing the application was not inordinate.

The last consideration is whether the applicants' defence raised any triable issues to warrant the grant of leave to appeal. It was the respondent's contention that the appellant had admitted that debt as the letters annexed with the replying affidavit. I have seen the letters but they are not an admission to the debt but they are written after execution commenced and seek time to settle the decretal sum. I have looked at the draft defence dated 27/11/2016, and which was annexed to the application dated 27/11/2017 seeking to set aside the default judgment. In my view, the defence did raise triable issues for example, which contract bound the parties; how much money was paid to the applicant; who breached the contract; in the event of breach how much money should be refunded to the seller. The court of appeal considered what a triable issue was in the case of Ceneast Airlines Supra when it said'

“ The main concern of the court is to do justice for the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as it is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J. put it ,” A triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

Since there were triable issues disclosed, the trial court should have done substantive justice by allowing the applicant an opportunity to be heard and ventilate his case to its conclusion.

For the foregoing reasons and doing my best to balance the interest of the applicant and respondent, I am of the view that the applicant is entitled to have his day in court and I grant him leave to file an appeal out of time 30 days. The execution process is already in progress and if I do not grant a stay of the execution, then the order will be of no consequence. To do justice to the parties, I will grant a temporary stay of execution for 30 days pending filing of appeal. The applicant do file and serve his appeal within 30 days from today's date in default the order will lapse.

It is the applicant who failed to file a defence in time and will therefore pay the respondent's thrown away costs and any other consequential costs. It is so ordered.

Dated, Signed and Delivered at NYAHURURU this 19th day of April, 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Siglai - For the applicant

Ms. Wangari- Holding brief for Mr. Waichungo

Soi - Court assistant