



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 126 OF 2018

NYERI MOTOR SERVICES LTD.....APPLICANT

VERSUS

MUTUA KALUKU.....RESPONDENT

RULING

1. By a Motion brought on notice dated 27th September 2018, the Applicant herein, **Nyeri Motor Services Ltd**, seeks the following orders:

- 1) **THAT this application be certified as extremely urgent and service be dispensed with in the first instance.**
- 2) **THAT the applicant be granted leave to file the appeal out of time**
- 3) **THAT this Honourable court be pleased to stay the proceedings and order dated 30th July, 2018 and all consequential orders in Machakos Civil Suit Number 653 of 2017 pending the hearing and determination of this application.**
- 4) **THAT this Honourable court be pleased to stay the proceedings and order dated 30th July, 2018 and all consequential orders in Machakos Civil Suit Number 653 of 2017 pending the hearing and determination of the appeal herein, Civil Appeal No. 126 of 2018 .**
- 5) **THAT costs of this application be provided for.**

Applicant's Case

2. According to the applicant, it carries on the business of *inter alia* sale of Motor Vehicles and sale of motor vehicle spare parts. On or about the 21st September, 2015 the Applicant and the Respondent got into an agreement whereby the Applicant was to finance the Respondent for the purchase of motor vehicle registration number KCE 947F. As part of the said agreement motor vehicle registration number KBQ 626J was to act as collateral to secure payment of the advanced amount by the Applicant. It was further agreed that the Applicant would repay the amount advanced in equal monthly instalments and the parties were to be registered as joint owners of the Motor Vehicle registration number KBQ 626J and a Chattels Mortgage against the Motor Vehicle would be registered in favour of the Applicant.

3. It was confirmed that on the 6th October, 2015 a Chattels Mortgage was in fact registered against the said Motor Vehicle in favour of the Applicant and upon its registration the Motor Vehicle was registered in the joint names of the Applicant and the Respondent. However, after the registration of the Chattels Mortgage the Respondent erratically paid the monthly instalments and eventually entirely defaulted in making the payment on or about October 2016. Following the said default, the Applicant began looking for the motor vehicle in order to exercise its right of repossession pursuant to the Chattels Mortgage Instrument but all its efforts were futile because the Respondent hid the motor vehicle and it was only on the 1st July, 2018, close to two years after the default, that the Applicant finally managed to repossess the motor vehicle.

4. According to the Applicant, after lawfully repossessing the motor vehicle as aforesaid the Applicant was on the 11th July, 2018 served with an order given by the lower court on the 21st November, 2017 but extracted on the 4th July, 2018, which orders restrained the Applicant from repossessing the motor vehicle. Unbeknown to the Applicant the Respondent had filed this suit in court on the 18th October, 2017 and obtained temporary orders restraining the Applicant from repossessing the motor vehicle which orders were confirmed on the 21st November, 2017. However, the said orders of 21st November, 2017 and the pleadings in this matter were never served upon the Applicant at any point in time before it repossessed the motor vehicle and therefore it was not aware of the said orders prior to repossessing the motor

vehicle on the 1st July, 2018.

5. Based on legal advice, the applicant believed that by the time the order was being served on the 11th July, 2018 the same could not be complied with because the event it sought to stop (repossessing the motor vehicle) had already taken place and the order had already been overtaken by events. Notwithstanding the foregoing, on the 17th July, 2018 the Respondent rushed to court vide an application dated 17th July, 2018 which sought *inter alia* for release of the motor vehicle and for committal to civil jail of the directors of the Applicant for allegedly disobeying court orders which application was served on the Applicant on the 20th July, 2018 and the same was slated for *inter-partes* hearing on the 30th July, 2018. In the meantime, the Applicant instructed its advocates on record who came on record on the 30th July, 2018.

6. Based on information received from its counsel, the applicant averred that its advocates sent their clerk to the court on the 30th July, 2018 to file and serve the Notice of Appointment of Advocates and to also get an advocate to hold their brief and seek time to enable the Applicant file its response but despite pleas of the advocate holding their brief the lower went ahead and gave the substantive order for release of the Motor Vehicle without affording an opportunity to the Applicant to file its response to the application by the Respondent.

7. It was the applicant's position that it was condemned unheard contrary to rules of natural justice. In the applicant's view, it is highly prejudicial to the Applicant that such a substantive order can be given without affording the Applicant an opportunity to be heard. The applicant further contended that the Respondent abused the process of this court by obtaining the order of 21st November, 2017 and then holding on to it and only serving it upon the Applicant when the motor vehicle is repossessed. The applicant however averred that the clerk they sent to court and the advocate who held their brief never informed them that the court had given the order directing the Applicant to release the motor vehicle and that the Applicant and its advocates on record only became aware of the order when the same was served upon the Applicant on Friday the 10th August, 2018.

8. Immediately upon such service, the Applicant immediately instructed its advocates on record to file an application to set aside the Orders issued on the 30th July, 2018 and the advocates promptly filed the same on Monday the 13th August, 2018 which application was fixed for inter-partes hearing on the 27th August, 2018, on which date the Applicant's advocate on record made a case before the learned Magistrate to stay execution of the orders of the 13th July, 2018 pending the hearing and determination of the Applicant's application to set aside the said orders. The said advocates went as far praying that the learned judge (sic) should at the very least give a conservatory order directing the Applicant not to dispose the motor vehicle. However, the learned magistrate maintained that the order of release of the motor should stay put and indicated that the Applicant could be compensated by way of damages.

9. It was disclosed by the applicant that Motor Vehicle registration number KBQ 626J was involved in an accident on or about the 25th February, 2016 and following the accident a judgment was entered in Milimani CMCC 3474 of 2016 against the parties herein jointly and severally on the 9th March, 2018 by **Hon. D.W. Mburu**. Following the said judgement the Appellant's/Applicant's property was attached and this forced the Appellant/Applicant to pay a total of Kenya Shillings Three Hundred and Twenty Seven Thousand Four Hundred and Ninety Six (Kshs. 327,496) to settle the decretal amount together with auctioneer's fees in order to avert its property being auctioned, despite the fact that the general rule is that a financier's interest is only for the repayment of the loan and it cannot be held liable for an accident involving a motor vehicle that is being used solely for the interest of the borrower.

10. According to the applicant, it instructed its advocates on record to embark on negotiations with the Respondent with a view to an amicable settlement of this matter and pursuant thereto, the said negotiations progressed on well and which culminated in the said Respondent's former advocates filing a Notice of Withdrawal of the suit. The applicant therefore was this firm belief of the Appellant/Applicant that the negotiations between the parties would bear fruits that lead to its failure to file the appeal on time because at the time the Appellant/Applicant believed that the matter could be settled amicably out of court.

11. In the Applicant's view, it has a very good defence to the application for release of the motor vehicle in view of the fact that it was never served with the order prior to repossessing the motor vehicle and further because the motor vehicle is subject of execution proceedings in Nairobi CMCC (MILIMANI) 3474 of 2016. Bearing in mind the amount of time it took the Applicant to trace and repossess the motor vehicle the Applicant was justifiably apprehensive that if the motor vehicle is released to the Respondent it might never fully recover the amounts advanced to the Respondent and thereby suffer substantial and irreparable harm.

12. To the Applicant, it had brought this application without any delay and unless the same is allowed, the Applicants' appeal would be rendered nugatory.

13. It was submitted on behalf of the Applicant that the proviso to section 79G of the **Civil Procedure Act** presupposes that an appeal has already been filed and the court is then mandated to admit the said appeal if the applicant satisfies the court that there is a good and sufficient cause for not filing the appeal in time. In this respect the applicant relied on **Gerald M'limbine vs. Joseph Kangangi [2009] eKLR**, and **Apa Insurance Limited vs. Michael Kinyanjui Muturi [2016] eKLR** and submitted that the effect of the above interpretation by the learned Judge is that a party wishing to obtain leave to file an appeal out of time must file the appeal and as provided in the proviso of section 79G, then must seek leave to admit that appeal out of time.

14. It was therefore submitted that the Preliminary objection raised by the Respondent was vexatious, frivolous and devoid of merit and the same ought to be dismissed by Court.

15. According to the applicant, there are four conditions that an applicant seeking leave to file an appeal out of time must satisfy to wit the length of delay, the reason for the delay, the chances of appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. According to it, since the order being appealed herein was given on the 30th July, 2018 and the memorandum of appeal herein filed on the 27th September, 2018, the Appellant/Applicant ought to have filed its appeal on or about the 30th August, 2018. It was therefore submitted that the Appellant/Applicant was only late in filing the appeal for a period of 27 days which is not

inordinately long as to warrant dismissal of the application. It was further submitted that the appellant herein had a good and sufficient reason for not filing the appeal on time since it only became aware of the order on 10th August, 2018, when the said Order said was served upon it. The reason for this is that the Advocate who held brief for the Appellant's/Applicant's advocates on record on the 30th July, 2018 when the impugned order was given did not disclose to the Appellant's/Applicant's advocates that the order for release of the motor vehicle had been given. Immediately upon becoming aware of the order the Appellant/Applicant instructed its advocates to file an application to set aside the said order. The application was promptly filed on the 13th August, 2018. Thereafter, the Appellant/Applicant instructed its advocates to attempt out of court negotiations with the Respondent's advocates which negotiations and the erstwhile advocates of the Respondent filed a Notice of withdrawal. However, the Respondent herein made a turn around and declined to withdraw the suit to facilitate out of court settlement of the suit.

16. It was therefore the applicant's case that it is these attempts at out of court negotiations and the consequent agreement to file the suit out of time which led the Appellant/Applicant to believe that this matter would be settled out of court and hence led to the delay in the Appellant/Applicant filing an appeal in time. In the Applicant's view, the foregoing constitute good and sufficient reasons for the Appellant's/Applicant's failure to file the appeal in time and hence the appeal ought to be admitted out of time.

17. On the chances of the appeal succeeding, it was submitted that the appeal herein is merited and the same stands a very high chance of succeeding as the order being appealed against, was given by learned magistrate without affording the Appellant/Applicant a chance to be heard on the application for release of the motor vehicle which was against the dictates of natural justice. In this respect the Applicant relied on the decision of the Court of Appeal in **J M K vs. M W M & Another [2015] eKLR** and **Mbaki & Others V. Macharia & Another (2005) 2 EA 206**, at page 210.

18. It was further submitted that the repossession of the motor vehicle by the Appellant/Applicant was within the confines of the law because it is not in doubt that the Respondent never served upon the Appellant/Applicant the confirmed Orders of 21st November, 2017 which stopped the repossession. The Respondent only served the ex parte orders given on the 18th October, 2017, which orders under Order 40 Rule (4)(2) of the **Civil Procedure Rules** lapsed after the expiry of 14 days. To the Applicant, the failure by the Respondent to file the confirmed orders of the 21st November, 2017 meant that the Appellant/Applicant was not aware of the existence of any orders stopping repossession by the time it repossessed the motor vehicle.

19. It was the Applicant's case that it had demonstrated that its appeal should be admitted out of time. However, in the event that the Court finds that the Appellant has not demonstrated good and sufficient cause for filing the appeal out of time, the court was urged to exercise its discretion/powers under Section 3A of the **Civil Procedure Act** and admit this appeal out of time. In this respect reliance was placed on **Justina Adongo Ofwa & Another vs. Mary Aoko Ofwa [2017] eKLR**, in which the Court despite finding that the applicant had not given good and sufficient cause for the delay still went ahead and allowed the appeal filed out of time.

20. In the Applicant's submission, having shown that it has a very good appeal against the impugned order, it is a deserving litigant and this court should not shut out the Appellant/Applicant.

21. As regards stay, it was submitted that the Appellant/Applicant had met all the requirements for grant of the stay pending appeal as the applicant had demonstrated the substantial loss it is likely to suffer if the order for stay is not granted. According to the applicant, as stated in the supporting and supplementary affidavits the motor vehicle registration number KBQ 626J, which was a passenger service vehicle, was involved in an accident and several claims have been lodged by the passengers. One such claim is Milimani CMCC No. 3474 of 2016 wherein judgment was entered against the Appellant/Applicant and the Respondent jointly and severally. Following the judgment the Appellant/Applicant was forced to pay a sum of Kenya Shillings Three Hundred and Twenty Seven Thousand Four Hundred and Ninety Six (Kshs. 327,496) to settle the decretal amount together with auctioneer's fees in order to avert its property being auctioned. It was therefore submitted that the Appellant/Applicant was justifiably apprehensive that it could be forced to settle more similar claims because the motor vehicle was carrying many passengers at the time of the accident. To the applicant, if the application is not allowed and the motor vehicle is released to the Respondent and the Appellant/Applicant is ultimately successful in its appeal, the Appellant/Applicant would suffer substantial loss of more than Two Million because the loan amount continues to attract interest, a loss which may well cripple the Appellant/Applicant. To the appellant, if it were to repossess the motor vehicle again at the conclusion of the appeal, if it is successful, the loan amount together with any further claims arising out of the accident might well exceed the value of the motor vehicle. Further the Respondent on learning that the Appellant/Applicant was looking for the motor vehicle to repossess the same hid the motor vehicle and it took the Appellant/Applicant close to two to recover the same. The Appellant/Applicant is therefore justifiably apprehensive that this time around, if the application is not allowed, it might never recover motor vehicle because some of its clients have been known to dismantle the motor vehicle and sell the parts as spare parts whilst the Appellant/Applicant is still in possession of the log book.

22. It was further submitted that the Appellant/Applicant filed this application without any delay and it was willing and ready to abide by any direction of the court with regard to the issue of security.

Respondent's Case

23. In opposition to the application the Respondent filed the following preliminary objections:

1. The said Application is frivolous, Vexatious and a total abuse of this Honourable Court's process as the same is filed on an appeal that does NOT exist.

2. The Application seeks prayers which are incapable of being granted and the same are based on an invalid appeal which appeal has been filed out of time and without the leave of this Honourable Court.

3. The said Application and the Appeal herein should be struck out as the same are unprocedurally filed.

24. The application was further opposed by a replying affidavit. According to the Respondent, both the appeal herein and the subject application are unprocedurally filed hence should be struck out with costs.

25. The Respondent disclosed that on 21/9/2015, he entered into an agreement with the appellant/applicant whereby the applicant financed me a total of Kshs. 3,500,000/- to purchase Motor Vehicle Registration Number KCE 947F from a third party and as a collateral, the Respondent gave the applicant his logbook for Motor Vehicle Registration Number KBQ 626J. After he successfully purchased Motor Vehicle registration Number KCE 947F, the same was placed in his custody as he continued to make monthly payment towards the loan advanced to him. However, sometimes in the year 2016, his said Motor Vehicle which was registered in the joint names of the applicant and himself was involved in an accident whereby it was declared written off which accident occurred barely a year after the loan facility had been advanced to him.

26. The Respondent disclosed that he had had comprehensively insured the said Motor Vehicle with Heritage Insurance Company wherein he raised a claim after the accident and a sum of Kshs. 2,925,000/- was forwarded to the applicant. By the time of the said accident, he had paid to the appellant/applicant a total of Kshs. 1,874,317.15 hence the applicant had benefitted to the tune of an amount of Kshs. 4,799,317.15 as against the sum of Kshs. 3,550,000/- which was the value of Motor Vehicle Registration Number KCE 947F which was written off and is a salvage, therefore making a difference of Kshs. 1,249,317.15.

27. Despite having been fully paid for the amount advanced, the applicant through two letters dated 24/3/2016 and 5/8/2017 respectively which were belatedly delivered to the Respondent, threatened to repossess Motor Vehicle Registration Number KBQ 626J. The Respondent thereafter on 29/9/2017 caused a demand letter to be written to the applicants informing them of his objection to the said intended repossession and immediately after receipt of the said letter, the applicant's managing director one **Tajdin Nathoo** made a phone call to the Respondent and threatened to use any means to repossess the said Motor Vehicle Registration Number KBQ 626J which prompted the filing of **Machakos CMCCC No. 653 of 2017**. Together with the suit, the Respondent filed an application seeking orders restraining the applicant from repossessing the subject Motor Vehicle and interim orders were granted by the Lower Court on 18/10/2017 and the Respondent's Advocates then on record caused the said order together with the application and the plaint to be served upon the applicant herein who acknowledged receipt of the same. It was therefore the Respondent's position that the applicant was lying by stating that they were never served with any Court documents and were never made aware of the existence of the Lower Court Suit until after they illegally repossessed the subject Motor Vehicle on 1/7/2018. To the contrary, the applicant was aware of the Court Order when the Motor Vehicle was repossessed which order had already been confirmed on 21/11/2017 and thereafter acted in total disregard of the Court Order.

28. The Respondent averred that after the said illegal repossession of his Motor Vehicle, he filed an application dated 17/7/2018 seeking release of the Motor Vehicle and further to have the applicant cited for contempt.

29. It was the Respondent's case that the applicant has delayed in filing the Court papers herein and no explanation as to the cause of delay has been given. Accordingly, applicant was then ordered to release his Motor Vehicle by the Lower Court on 30/7/2018 which Orders were never complied with despite having appeared before the Lower Court on several days thereafter to confirm compliance of the same.

30. To the Respondent, the subject Motor Vehicle is for commercial use within Machakos County and also the source of his livelihood and as a result of the repossession he has greatly suffered losses. The Respondent however denied that it had taken the applicant the two years to trace the said Motor Vehicle and asserted that the said Motor Vehicle's original logbook is in the custody of the applicant hence the applicant will suffer no prejudice if the Motor Vehicle is released to him. He however denied that he had been served with any proclamation or suit papers in **Nairobi CMCCC (Milimani) 3474 of 2016** as alleged by the applicant and contended that if that is the case, then the same should be directed to the Insurance Company to settle the matter.

31. The Respondent was apprehensive that the applicant might hand over the Motor vehicle to the purported auctioneers or sell the same thus expose him to suffer irreparably.

32. It was submitted on behalf of the Respondent that the purported appeal herein to have been filed within time, the applicant ought to have filed the same within 30 days from the date of the order being appealed against which is dated 30/7/2018. The appeal herein was filed on 27/9/2018 almost two months after the subject order was made. It was therefore submitted that the application herein is based on an invalid appeal which appeal has been filed out of time and without the leave of this Honourable Court. In this respect the Respondent relied on the decision of the Supreme Court in **County Executive of Kisumu -vs- County Government of Kisumu & 8 Others (2017) eKLR**. The Respondent however appreciated that while the proviso of section 79G of the **Civil Procedure Act** gives this Honourable Court discretion to admit an appeal filed out of time, the appellant has to satisfy the Court that he had a good and sufficient cause for not filing the appeal in time. In this case it was submitted that the appellant/applicant herein despite seeking to have a remedy for the illegality he has failed to demonstrate to this Honourable Court why the appeal was never filed in time. Further, no explanation has been adduced by the applicant who was represented by the Advocates when the same orders appealed against were given. Also the orders were served upon the applicant by the Respondent on 10/8/2018 which fact has been admitted in paragraph 26 of the Affidavit in Support of the application. It was therefore submitted that the appeal herein and the application have been irregularly filed.

33. As regards the prayer for stay it was submitted that no sufficient grounds have been adduced before this Honourable Court. According to the Respondent, the main reason for seeking the stay orders is that the Lower Court failed to stay the Orders given on 30/7/2018 and did not consider that the applicant had not been served with any order restraining him from repossessing the Motor Vehicle in issue and on an allegation that the suit papers had also not been served until 12/7/2018. However, this was totally incorrect and was meant to mislead this Honourable Court in to granting undeserved orders in view of the annexure confirming that the applicant was duly notified of the Court Orders and proceedings thereto.

34. In the Respondent's view, no prejudice will be suffered by the applicant if the Lower Court matter proceeds to its logical conclusion and no reason whatsoever has been given to have the proceedings stayed. In his view, both the appeal which challenges an order of the Court can proceed concurrently with the Lower Court matter.

35. The Respondent further submitted that parties are bound by their pleadings and that although the application is brought under Order 42, Rule 6 of the **Civil Procedure Rules, 2010** which provides for stay of execution in case of an appeal, the applicant has not sought for stay of execution of the orders of 30/7/2018. However, assuming that the applicant is seeking the orders of stay of execution of the Lower Court Orders of 30/7/2018 whereupon the Court ordered the release of the Motor Vehicle in issue, then the stay cannot be granted unless:

i. The Court is satisfied that substantial loss may result to the applicant unless the order is made.

ii. Application has been made without unreasonable delay.

iii. Such security as the Court Orders for the due performance of such decree has been given by the applicant.

36. It was submitted that whereas the applicant has stated that he is likely to suffer substantial loss if the Motor Vehicle is released to the Respondent because he may never recover the monies from the applicant, on his part the Respondent has clearly stated that the applicant was duly paid the whole amount and that the applicant who seeks to benefit unfairly will not suffer any loss because the logbook to the subject Motor Vehicle is in his possession. To the contrary, the Respondent is likely to suffer if the orders herein are granted. This is so because, the subject Motor Vehicle is for commercial use and the only source of livelihood for the Respondent. Secondly, having paid the applicant all the monies, and given that the applicant has both the logbook and the Motor Vehicle, he may dispose off the subject Motor Vehicle to the detriment of the Respondent. Finally, the applicant may release the Motor Vehicle to the Auctioneers in execution of the alleged Lower Court Suit in Milimani which the Respondent is not aware of.

37. It was further submitted that the application herein has been made two months after the order was made and no explanation has been made hence the delay is unreasonable. On the third limb, the applicant has not given and/or proposed to this Honourable Court on any security for the due performance of the order of the Court.

38. The Respondent therefore asserted that the application herein is incompetent and an abuse of this Honourable Court's process and prayed that the same be dismissed with costs to the Respondent.

Determination

39. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon. In this matter the two issues that fall for determination in this ruling are whether the Court should in the circumstances of this case extend the time for appealing to the Applicant herein and secondly whether stay of execution and of the proceedings appealed from ought to be granted.

40. Since the prayer for stay would depend on whether the Court extends the time for appealing, I will start with deal with the latter issue first.

41. Section 79G of the **Civil Procedure Act** provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty 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 of 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.

42. It was contended that an applicant ought not to file an appeal before time is extended to him to do so. It is however noteworthy that section 79G aforesaid employs the use of the phrase "an appeal may be admitted out of time" as opposed to "time may be extended to lodge an appeal out of time". However, even in cases where the law uses the latter phraseology, it has been held that it is prudent to regularise the default before seeking to extend time. This was the position in **Mugo & Others vs. Wanjiru & Anor [1970] EA 482** where it was held that:

"Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused."

43. In this case however the law expressly provides that an appeal may be admitted out of time. That this is so was affirmed by **Emukule, J** in **Gerald M'limbine vs. Joseph Kangangi [2009] eKLR**, in which he expressed himself as follows:

"My understanding of the proviso to Section 79G is that an applicant seeking an appeal to be admitted out of time must in effect file such an appeal and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court's process which under Section 79B says....."

44. Under the proviso to section 79G of the **Civil Procedure Act**, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so. This must be so since it was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633** that there is no difference between the words "sufficient cause" and "good

cause". It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

45. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

46. As regards the reason for the delay, it was contended that the order being appealed against herein was given on the 30th July, 2018 and the memorandum of appeal herein filed on the 27th September, 2018, the Appellant/Applicant ought to have filed its appeal on or about the 30th August, 2018. It was therefore submitted that the Appellant/Applicant was only late in filing the appeal for a period of 27 days which is not inordinately long as to warrant dismissal of the application. It was further submitted that the appellant herein had a good and sufficient reason for not filing the appeal on time since it only became aware of the order on 10th August, 2018, when the said order was served upon it. The reason for this is that the Advocate who held brief for the Appellant's/Applicant's advocates on record on the 30th July, 2018 when the impugned order was given did not disclose to the Appellant's/Applicant's advocates that the order for release of the motor vehicle had been given.

47. On the other hand, the Respondent contended that this contention was totally incorrect and was meant to mislead this Court in granting undeserved orders in view of the annexure confirming that the applicant was duly notified of the Court Orders and proceedings thereto. The document which the Respondent referred to was in fact an order dated 18th October, 2017 and issued on 19th October, 2017. On the face of the said order is a stamp of "Nyeri Motor Services Ltd" and next to it, is a signature and the date of 23rd October, 2017 and the time indicated as 8.50 am. According to the said order, the Defendant was restrained from repossessing Motor Vehicle Reg. No. KBQ 626J Mitsubishi FH215 pending *inter partes* hearing of the application on 31st October, 2017. That this order was duly served was admitted by the Applicant in the supplementary affidavit though the Applicant denied that it was served with the confirmed order given on 21st September, 2017 before the repossession of the vehicle. In its view the ex parte order was only valid for 14 days and that it was incumbent upon the applicant to serve the confirmed order notwithstanding the fact that the application was not defended. It was therefore its position that it lawfully repossessed the said vehicle because the assumption was that the ex parte orders issued lapsed fourteen days after they were issued.

48. It is however not in doubt that the Applicant herein was made aware of the existence of the proceedings sought to be appealed against. Instead of taking action to follow up on the same, it relied on its own assumptions to disregard the said proceedings and orders issued therein. This action on the part of the Applicant was clearly callous and it has itself to blame for the consequences arising therefrom. In my view a party ought not to be permitted to rely on its own failure to follow up on the proceedings against it as a basis for seeking favourable discretionary orders based on its own assumptions.

49. In this application, the applicant has not been forthright in its disclosure of material facts. In its application in support of the application, it never disclosed that it had been served with the ex parte order. To the contrary, its position was that:

"...the said orders of 21st November, 2017 and the pleadings in this matter were never served upon the applicant at any point in time before it repossessed the motor vehicle and therefore it was not aware of the said orders prior to possessing the motor vehicle on the 1st July, 2018."

50. It is clear that the impression that the Applicant set out to create when it applied for ex parte orders was that it was totally in the dark as regards the proceedings in CMCC No. 653 of 2017. It was only after being confronted with the ex parte order that it admitted that it was aware at least of the ex parte order but attempted to explain its failure to comply on some legal ingenuity. In **John Kiragu Mwangi vs. Ndegwa Waigwa Civil Application No. Nai. 179 of 2000**, it was held by Shah, JA in dismissing a similar application for extension of time that a delay (simple inaction) to file appeal within time, that is sought to be explained away by contrived grounds is not made *bona fide*. In my view favourable orders cannot be sought and obtained on the basis of an affidavit that is less than candid and is meant to mislead. In that event, the application would be refused since default ought not to be explained away by contrived grounds. Not much emphasis can be placed on a deposition, which shows that the deponent is not candid enough in his affidavit and having been evasive and economical on the truth. Therefore, an application seeking exercise of the court's discretion must be supported by an honest explanation and it is a serious matter to attempt to mislead the court by untruthful or half-baked affidavits since sufficient reason for the purposes of the exercise of discretion cannot be established on the basis of an obviously incorrect or twisted affidavit. See **Hon. Mzamil Omar Mzamil vs. Rafiq Mohamed Walimohamed Ansari Civil Appeal No. 44 of 1982, Shaban Hamisi Kuriwa & Another vs. Joe M Mwangi & 3 Others Civil Application No. Nai. 122 of 1996, Peter Gachege Njogu vs. Said Abdalla Azubedi Civil Application No. Nai. 370 of 2001, Koyi Waluke vs. Moses Masika Wetangula & 2 Others Civil Appeal (Application) No. 307 of 2009 and John Kiragu Mwangi vs. Ndegwa Waigwa Civil Application No. Nai. 179 of 2000.**

51. In the premises I decline to admit this appeal which was clearly filed out of time. As the applicant has failed in satisfying the conditions extension or enlargement of time to file an appeal out of time or admission of this appeal out of time, the said limb of the application must fail and without an order extending time the stay cannot be granted in vacuum and must similarly collapse.

52. What then should the Court do in those circumstances? The Court of Appeal in the case of **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** held *inter alia* that:

“...the applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will...All provisions and rules in the relevant Acts must be “O2” compliant because they exist for no other purpose. The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court’s view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.”

53. Similarly, the same Court in Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009 expressed itself thus:

“Section 3A and 3B of the Appellate Jurisdiction Act gives the Court the freedom in the circumstances of this case to ensure that the matter is handled in accordance with the relevant provisions of the Arbitration Act because it is in doing so that justice will be done to the parties. That is what matters. The overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow.”

54. It would therefore be pointless sustaining this appeal whose substratum no longer exists. It therefore follows that this appeal is incompetent and is struck out with costs to the Respondent.

55. It is so ordered.

Read, signed and delivered in open Court at Machakos this 29th day of October, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kamanda for Mrs Nyaata for the Respondent

CA Geoffrey