



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CIVIL APPEAL NO. 22 OF 2016

(Being an appeal from a Judgment of the CM'S Court Naivasha Civil Case No.399 of 2012)

PATRICK KALAVA KULAMBA.....1ST APPELLANT/APPLICANT

TRISTAN K. LIMITED.....2ND APPELLANT/APPLICANT

VERSUS

PHILIP KAMOSU and RODA NDANU PHILIP

(Suing as the Legal Representative of the Estate of

JACKLINE NDINDA PHILIP (Deceased).....RESPONDENTS

R U L I N G

1. On 20th December 2016, this court delivered a ruling in respect of an application brought by the Appellants for stay pending appeal and filed on 14th April 2016. The resultant orders as captured at paragraph 34 of the ruling were that:

“In the circumstances of this case, I would grant an interim injunction restraining the Respondents from recovering the sums awarded to them, in respect of the lower court suit, pending the hearing of the appeal. This order is made on condition that the entire decretal sum is to be deposited into an interest earning account in the joint names of the parties’ respective advocates within 21 days of today’s date. The costs of application will abide the outcome of the appeal.”

2. The Applicants did not attend the ruling which had earlier been set for 7/12/2016 but adjourned to 20/12/2016. On the latter date, only the Respondent attended. Ditto for 20th December 2016.

3. Over 3 months later, on 5th April 2017 the Applicants approached the court under certificate of urgency with the Motion now before me. The Motion is expressed to be brought under Sections 1A, 1B, 3A and 95 of the Civil Procedure Act and Order 42 Rule 6 and 50 Rules 6, 51 of the Civil Procedure Rules.

4. The key prayers are number 3 and 4 which seek:-

“3. THAT this Honourable court be pleased to enlarge and/or extend time for purposes of compliance with the provision of security by the Appellants ordered by the honourable court on the 20th December 2016 (deposit of the entire decretal sum into a joint interest earning account).

4. THAT the honourable court be pleased to reinstate of the order for stay of execution of the judgment and decree herein issued on the 20th December, 2016.”

5. The key grounds raised in support of the application is that the Applicants’ advocates were unaware of the ruling delivered on 20/12/2016 in light of its adjournment on 7/12/2016. And that on 20th March 2017 their inquiries revealed the condition of the stay ordered in their favour, but as time had lapsed they sought unsuccessfully, to persuade the Respondents to facilitate compliance through opening of a joint account. They assert that delay was inadvertent.

6. The Respondents through **Philip Kamosu** swore an affidavit in opposition to the Motion. Therein the Respondents take issue with the Applicants tardiness and multiplicity of applications. They cite the Applicants non-attendance on 20/9/2016 when the initial ruling date of 7/12/2016 was given and on the said ruling date itself.

7. The Applicants, they assert, were also absent on 20/12/2012 being the date when the ruling was eventually read. That it was almost two months after the orders of the court lapsed that the Applicants approached the Respondents. The deponent states that the Applicants have not shown good cause why time should be extended in their favour in order to comply with the order of 20/12/2016.

8. The parties’ arguments took cue from their filed depositions. The Applicants urged the court to exercise its discretion in the Applicants’ favour. They relied on two decisions, namely **Kenya Power & Lighting Company Limited -Vs- Winfred Ndunge Katiwa & Another [2016] eKLR** and **Geminia Insurance Company Limited -Vs- Susan Nduta Mwangi & 2 Others [2009] eKLR**. They emphasized willingness to deposit the decretal sum as order and asserted that the Respondents will not suffer prejudice.

9. For their part the Respondents relied on the case of **Timber Treatment International Limited -Vs- Bonko Investment Limited [2015] eKLR** to oppose the Applicants’ alleged multiplicity of applications as inconsistent with the overriding objective in Section 1A of Civil Procedure Act. They point out that the Applicants have failed to explain their failure to attend court when the Respondents attended dutifully.

10. In their view the delay by the Applicants has not be explained. That delay further prejudices the Respondents efforts to enjoy the fruits of their judgment. The Respondent submitted that the cases cited by the Applicants have no relevance to the instant Motion.

11. The court’s power to extend time for doing an act even when the time originally fixed has expired is set out in Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules. The latter provides:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

12. While the court’s discretion is unfettered, an Applicant is obligated to place material upon which the court should exercise its discretion. Such material establishes the factual basis for the invocation of the court’s discretion in the matter. This is one of the principles which the Supreme Court outlined as relevant for the consideration of an application to extend time, in the of **Nicholas Kiptoo Korir arap Salat –Vs- Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**.

13. Although the court, was dealing in that case with an application to extend time for the filing of an

appeal out of time, the principles enunciated have general application in regard to other applications to extend time. The court stated *interalia* that:

“[T]he under-lying principles a court should consider in exercise of such discretion:-

- 1. Extension of time is not a right of party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to 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 suffered by the respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay and;**
- 7. Whether in certain cases, like election petitions public interest should be a consideration for extending time.”**

14. In this case, the Applicants appear to blame the court and Respondent alternately, for its failure to attend the ruling delivered on 20/12/2016. While it is true that the said ruling had been initially set for 7/12/2016, the Applicants did not attend on that date either. Indeed the last attendance by the Applicant was 27/7/2016 when the parties agreed to file submissions in respect of the Applicants Motion giving rise to the ruling of 20/12/2016.

15. On the 20/9/2016 when the matter was fixed for mention to confirm filing of submissions, the Applicants were absent even though they had filed submissions. Since filing their submissions on 12th August 2016, the Applicants seemingly forgot the entire matter. They cannot blame the court or the Respondents for their absences. It was not the duty of the court or the Respondent to follow them up. Although the Applicants claim they only learned of the ruling of 20th December 2016, on 20/3/2017, it was not until 5/4/2017 that the present application was filed.

16. Paragraph 11, 12, and 13 of the Applicants’ affidavit suggest that on 7th July 2016 they received information that the ruling would be on notice and that having waited “unusually long” they inquired on 20/3/2017 only to discover that the ruling had long been delivered. It is not clear to the court how the Applicants could have received information on the ruling of a motion on 7/7/2016 when submissions were not received until 20/9/2016. Secondly they have not explained their absence in court on 20/9/2016 the date set for receiving submissions and giving a ruling date.

17. As counsel for the Respondents has pointed out, there is no affidavit sworn by counsel for the Applicants to explain the various absences and delays on their part. It is relevant to the instant motion that the motion giving rise to the ruling of 20th December 2016 had similarly been brought for the extension of time for the Applicants to file an appeal out of time.

18. This kind of tardiness makes nonsense of the overriding principle in Section 1A of the Civil Procedure Act. To their credit however, the Applicants timeously deposited the sum of Shs 300,000/= as ordered to do so at the *ex parte* stage. An eminent Judge once observed that blunders will always be made in litigation and that the errors of counsel should not be visited on the party.

19. The Applicants’ counsels ought to have taken responsibility for their blunders instead of laying the

blame at the door of the court and the Respondents. The Respondents are rightfully entitled to complain that the delay in this case unfairly keeps them from fruits of their judgment.

20. However, any prejudice they may suffer thereby will be compensated through costs and interest in the long run. Besides securities deposited will ensure future satisfaction on the decree. In order that the Applicants' appeal is not rendered nugatory, and despite their lackluster performance hitherto, I will grant the present application on two conditions namely that:-

a. The Applicants deposit the decretal sum as ordered on 20/12/2016 by close of the day on 3rd August 2017.

b. That the record of appeal be filed in court within 30 days of today's date ready for directions under Section 79B of the Civil Procedure Act.

21. In the event of default in respect of condition (a) above the Motion filed on 5/4/2017 will stand dismissed and the Respondents will be at liberty to proceed with execution. In the event of default regarding condition (b) above, the appeal herein will stand dismissed for want of prosecution. Costs of the instant application are awarded to the Respondents in any event.

Delivered and signed at Naivasha on this 25th day of **July, 2017**.

In the presence of:-

Mr. Wanga holding brief for Mr. Kisila for the Applicants

N/A for the Respondents

C/C – Barasa

C. MEOLI

JUDGE