REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO 39 OF 2014

Auto Selection (K) Ltd.....1ST Appellant/Applicant

Lysbeth Bsatira Mbae.....2nd Appellant/Applicant

Jusper Gitonga Kiubuthi.....3rd Appellant/Applicant

versus

John Namasaka Famba.....Respondent

RULING

This ruling is in respect of two applications namely; a notice of motion dated 25th November 2016, filed by the appellants herein (hereinafter referred to as the *first application*) and a notice of motion dated 30th October 2015 filed by the Respondents in this appeal (herein after referred to as the *second application*). Counsels for both parties proposed that both applications be argued together and determination at the same time. This is so because a determination of one either way is bound to determine the outcome of the other.

The *second application* is expressed under the provisions of Order **51** Rule **1** of the Civil Procedure Rules, 2010, Sections **1A** & **3A** of Civil Procedure Act and all other enabling provisions of the law. The substantive prayer sought in the said application in that this honourable court be pleased to order the release of the decretal sum of **Ksh. 2,736,061/=** together with all the accrued interests held in a joint interest earning account **No. 1002142593**, NIC Bank in the names of **Kairu & Mcourt** Advocates and **Mang'erere J. & Co** Advocates.

The said application is premised on the following grounds, namely; **(a)** That the stay of execution granted on 24th April 2014 has since lapsed and **(b)** There is no prejudice likely to be occasioned to the appellant herein if the orders sought herein are granted.

The said application is supported by the affidavit of **Bosire Kennedy Mark**, advocate who avers *inter alia* as follows:-

i. *That on 24th April 2015 this court granted the appellants a conditional stay which they have not complied with.*
ii. *That the decretal amount of **Ksh. 2,736,061/=** was deposited in a joint interest earning account in the joint names of the parties advocates.*
iii. *That no appeal or review was filed against the said ruling and the said stay was for 6 months which has since lapsed.*
iv. *That the appellants have not been keen to prosecute the appeal as ordered by this court.*

The *first application* is expressed under Order **50** Rule **6**, Order **51** Rule **1** of the Civil Procedure Rules, 2010, Sections **1A, 1B, 3, 3A** and **95** of the Civil Procedure Act. The applicant in the said application seeks orders extending the stay of execution issued in this court on 24th April 2015 in respect of CMCC No 55 of 2013.

The grounds in support of the said application are that:-

> ***(a)*** *a stay of execution was granted on 24th April 2015 on condition that the appellants set down the appeal herein for hearing within six (6) months from the said date;*
>
> ***(b)*** *that the appellants were unable to set the appeal down for hearing due to no fault on their part;*
>
> ***(c)*** *that failure to set the appeal down for hearing was occasioned by failure by the lower court to provide the appellants with typed copies of proceedings, judgement and decree;*
>
> ***(d)*** *that the appellants advocates applied for the typed proceedings, judgement and decree and paid a deposit of Ksh. 2,000/= ;*
>
> ***(e)*** *that their clerk has consistently been pursuing the said proceedings;*
>
> ***(f)*** *that this court has discretion to grant the orders sought;*
>
> ***(g)*** *that the respondents will not be prejudiced as they will ventilate his case a the hearing of the appeal;*
>
> ***(h)*** *that the appellants are keen on prosecuting the appeal.*

At the hearing of the two applications, Mr. **Gori** for the Respondents in this appeal who are the applicants in the *first application* adopted the affidavit in support of the said application and pointed out that the orders of stay have since lapsed, and that the appellants only woke up after being served with the Respondents application, that since the orders have already lapsed, they cannot be extended and that they have not demonstrated the steps taken to prosecute the appeal. He also pointed out that the Respondents had not paid their costs as per the previous court order.

Mr. Karanja for the applicants in the second application relied on the reasons expressed in the said application and insisted that they have written several letters to the court to no avail, and that they were not able to file the appeal within **6** months and blamed the court registry for the delay. Counsel also submitted that their appeal has merits and that no prejudice will be suffered by the Respondents. Counsel also argued that the Respondents have not demonstrated ability to refund the money if it is released to them.

At the outset, it is important to point out that he orders in question were granted on 24th April 2015. The appellants were ordered to take appropriate steps to fix the appeal for hearing within six months from the date of the said order. The appellants insist that indeed they took such steps as are necessary and in particular they state that they applied for certified proceedings, judgment and decree without which the appeal cannot be admitted for hearing. They also paid a deposit of Ksh. 2,000/= for the proceedings. In support of this contention, the appellants have annexed a letter addressed to the Executive Officer and a court receipt. A close examination of the said letter marked exhibit **JK1** shows that the said letter was received at the court registry on 10th September 2014 and the court receipt is dated the same day. The proceedings were applied for 6 months before the order in question was granted. There is nothing to show that the appellants pursued the proceedings after the order in question was granted. The other letter addressed to the court asking for the proceedings is dated 18th November 2015. The affidavit of service filed by the Respondents on 16th November 2015 shows that the Appellants were served with the Respondents application on 3rd November 2015 raising questions whether the Appellants were prompted

by the said application to write the said letter.

Thus, the period from the first time the appellants applied for the proceedings and the time the orders in question were granted has not been explained. Further, the lapse of time from the date the said order was granted until the Appellants wrote the second letter to the court has not been explained. The six months lapsed on 24th October 2015 and as per the said order, the stay granted also lapsed.

The argument that the orders in question have expired and strictly speaking there is no order to extend is valid. There is no explanation why the Applicants did not bring their application before the expiry of the said orders and seek to have them extended.

I find that there was an unexplained delay in filing the present application. Unreasonable delay depends on the circumstances of each case. In *Jaber Mohsen Ali & Another vs Priscillah Boit& Another* the court held:-

> *".....What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgement could be unreasonable delay depending on the judgement of the court and any order given thereafter. In the case of* ***Christopher*** *Kendagor vs Christopher Kipkorir, the applicant had been given 14 days to vacate the suit land. He filed a application one day after the 14 days. The application was denied, the court holding that, application ought to have come before expiry of the period given to vacate the land"*

Mwera J in the case of *Godfrey Ajuang Okumu vs Nicholas Odera Opinya* held *inter alia* that *'an aggrieved party seeking a review of a decree or order on whatever basis must apply without unreasonable delay.'*

In the case of *Abdulraham Adam Hassan vs National Bank of Kenya Ltd,* an unexplained delay of **three months** was found to be unreasonable. Similarly, in the case of *Kenfreight (E.A.) Limited vs Star East Africa Company Limited* **Onyango Otieno J** (as he then was) found a delay of **three months** to be unreasonable.

In *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* it was held that:-

> *"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged ....., the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".*

Also relevant is an excerpt from *Halsburys Laws of England* wherein the learned writers observe that:-

> *"The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue."*

In the case of *Global Tours and Travels Ltd* it was held that:-

> *".....Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such*

discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, ...and whether the application has been brought timeously." (Underlining provided)

I am alive to the fact that the discretion donated to the court under section **95** of the Civil Procedure Act is unfettered, but for the discretion to be exercise in favour of the applicant, the application must be based on sound grounds or on any sufficient reason **but** in either case the application must be made within a reasonable time. In *Mbogo Gatuiku vs A.G.* **Mwera J** emphasised that *'even a delay of a day or two calls for an explanation'*. In the present case no explanation has been offered.

Musinga JA in Equity Bank vs West Link MBO Limited put it correctly when he held that *'Courts of law exist to administer justice and in so doing they must balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met.'* Thus, there is a need to balance the rights of both parties before the court.

I find that the reason given by the applicant for failing to prosecute the appeal are not excusable and that this is not a proper case for the court to exercise its discretion in favour of the applicant. In this regard, I find useful guidance in the court of appeal decision in the case *of Richard Nchapai Leiyangu vs IEBC & 2 others* where the court expressed itself as follows:-

"We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice"(Emphasis added)

What is contested is whether the appellants have demonstrated *"sufficient cause"* to warrant the exercise of the courts discretion in their favour. But what does the phrase *"Sufficient cause"* mean. The Supreme Court of India in the case of *Parimal vs Veena* observed that:-

*"**sufficient cause**" is an expression which has been used in large number of statutes. The meaning of the word "**sufficient**" is "**adequate**" or "**enough**", in as much as may be necessary to answer the purpose intended. Therefore the word "**sufficient**" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "**sufficient cause**" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "**not acting diligently**" or "**remaining inactive.**" However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"*

Sufficient cause is thus the cause for which an applicant cannot be blamed. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application Thus, an applicant must demonstrate that he was prevented from taking the steps in question by a sufficient cause.

However, in the present case, guided by the facts of the case, several authorities cited herein and the relevant provisions of the law, I humbly find that the applicant has not demonstrated that there was due diligence in pursuing the proceedings nor is there an explanation why the application was filed long after the order had lapsed.

The Appellant has cited Sections **1A, 1B, 3 & 3A** and Section **95** of the Civil Procedure Act. I have considered the above sections and in particular the *"overriding objective"* under Sections **1A &1B** of the Civil Procedure Act and also the provisions of Article **159 (2) (d)** of the Constitution of Kenya 2010. Before I examine the said provisions I find it fit to recall with approval the words of **Justice Hancox** in *Githere vs Kimungu* where he stated that:-

> *"the relation of rules of practice to the administration of justice is intended to be that of a handmaid rather than a mistress and that the Court should not be too far bound and tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case."*

Commenting on the same subject, the **Hon. Mr. Justice Robert Makaramba**, judge of the High Court Tanzania stated:-

> *"the inherited common law adversarial system with its attendant English practice and procedure has always been at the centre of public criticism for contributing to delays in the dispensation of justice together with its attendant procedural technicalities."*

Procedural laws refer to rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties. It was this strictness of having due regard to the rules of civil procedure that occasioned the loss of many legitimate claims by plaintiffs thus denying them access to justice. The overriding concept however came to cure this. **Michael Howar** defines the Overriding Objective thus:-

> *"as a principle from the civil procedure rules. The purpose of the overriding objective is for the civil litigation and dispute resolution process to be fair, fast and inexpensive. ..... The courts must consider the overriding objective when they make rulings, give directions and interpret the civil procedure rules."*

The double O's in the phrase Overriding Objectives are what coined what is today famously known as the term Oxygen Principle. In *Hunker Trading Company Limited vs Elf Oil Kenya Limited* perhaps the first case to be grounded on the new provisions the Appellate Jurisdiction Act (Sections **3A** and **3B)**, it was held that section **1A** of the Civil Procedure Act came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act. It states:-

> *"the overriding objective of this Act and rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act."*

The courts duties in performing such mandate under section **1B** of the Civil Procedure Act are:-*The just determination of the proceedings, The efficient disposal of the business of the Court, The efficient use of the available judicial and administrative resources, The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties, and The use of suitable technology.*

Article **159 (2) (b)** of the Kenya Constitution 2010 propounds that in exercising judicial authority, the courts and tribunals shall not delay justice.

Considering the above provisions which introduced the oxygen principle, the court in *Kamani vs Kenya Anti-Corruption Commission* drew comparisons to the *Wolf reforms* which introduced similar provisions in England in 1998 by way of the Civil Procedure Rules and further considered the English case of Bigizi vs Bank Leisure in which **Lord Woolf** himself talked about the concept of overriding principle objective as follows:-

> *"Under the {Civil Procedure Rules}the position is fundamentally different. As rule **1.1** makes clear the {rules} is a new procedural code with the overriding objective of enabling*

the court to deal with cases justly. The problem with the position prior to the introduction of the {rules} was that often the court had to take draconian steps such as striking out the proceedings….."

In the above cited case of *Kamanivs Kenya Anti-Corruption Commission* the court had this to say:-

*".....Sections **3A** and **3B** of cap **9** cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party ....."**(Emphasis added)***

In my view the overriding objective was brought to ensure that justice is served to both parties and further where there is a conflict of the Oxygen Rules Principles with the substantive law, the law ought to be interpreted in such a manner that will ensure the administration of justice. In this regard, I stand guided by the above quotation from the case of *Kamani vs Kenya Anti-Corruption Commission* that the amendments *cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate conduct of cases.* To me the said position represents the correct legal position. I find nothing in the **overriding objective** to suggest that a delay as in the present case which has not been sufficiently explained can be excused.

Section **3A** of the Civil Procedure Act provides that *'Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'* In the same vein, it was held in *Ratnam vs Cumarasamy* that:-

"The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material upon which the court can exercise its discretion"

In *Abdulrahaman Abdivs Safi Petroleum Products Ltd & 6 others* the court stated:-

"The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party"

I have no doubt in my mind that the Oxygen principle has come to revolutionize our civil procedure and tailor it to fit the contemporary society where access to justice and equality is the crux, but in my view the court has to consider the peculiar facts of each case and as observed in the above judgement, weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party. In this regard and having considered all the facts of this case I am persuaded that the scales of justice tilt in favour of the Respondent.

The fundamental duty of the court is to do justice between the parties. Discussing the nature and objects of the inherent powers of the court, *Sir Dinshah Mulla* in *The Code of Civil Procedure* observes that:-

*"the Code of Civil procedure is not exhaustive, the simple reason being that the legislature is incapable of contemplating all the possible circumstances, which may arise, in future litigation, and consequently, for providing the procedure for them. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act **ex debito justiciae** for doing real and substantial justice between the parties. The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act **ex debito justiciae**, and to do real and substantial justice for the administration, for which alone, it exists. However, the power, under this section, relates to matters of procedure. If ordinary rules of procedure result in injustice, and there is no other remedy, they can be broken in order to achieve the ends of justice....."*

The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.The inherent power, as observed by the Supreme Court of India in *Raj Bahadur Ras Raja vs Seth Hiralal has not been conferred on the court; it is a power*

inherent in the court by virtue of its duty to do justice between the parties before it." **Lord Cairns** in *Roger Vs Comptoir D' Escompts De Paris* stated as follows:-

> *"One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."*

Discretion vested in the court is dependent upon various circumstances, which the court has to consider. It can be exercised on application filed by a party. It could also be exercised in order to stall the dilatory tactics adopted in the process of hearing a suit, and to do real and substantial justice to the parties to the suit.

In conclusion I find that this is not a proper case for this court to exercise its discretion in favour of the appellant and I hereby dismiss the *second application* for lack of merits and allow the *first application* which I find is merited and further order as follows:-

i. *That the appellants application dated 25th November 2015 be and is hereby dismissed.*
ii. *That the sum of **Ksh. 2,736,062/=** together with all the accrued interests held in a joint interest earning account number **1002142593,** NIC Bank in the names of **Kairo & Mcourt** Advocates and **Mang'erere J & Co** Advocates be released to the firm of **Mang'erere J. & Co** Advocates.*
iii. *That the appellants do pay to the Respondents the costs of both applications, that is the application dated 30th October 2015 and application dated 25th November 2016.*

Orders accordingly

Dated at **Nyeri** this **19th** day of **February** 2016

John M. Mativo

Judge