



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 14 OF 2015**

**PANIJ AUTOMOBILES LIMITED**

**TIMOTHY KIMANTHI NYAMU.....APPELLANTS/APPLICANTS**

**VERSUS**

**PATRICK MBOGO MBUI (*Suing as the personal representative of the estate of***

**MADRINE MAKENA MBOGO (Deceased).....RESPONDENT**

**RULING**

1. The applicants have applied for leave to appeal out of time against the judgement of the Senior Resident Magistrate (Mr Mutai) delivered on 3rd March 2015 in Embu Chief Magistrate's Court Civil Suit No. 166 of 2013. Additionally, they have also applied that Civil Appeal No. 14 of 2015 be deemed to have been filed within the prescribed time. Finally, they have applied that the costs of this application be provided for.
2. The application is anchored in the supporting affidavit of Joseph Karanja. He has deponed that the judgement intended to be appealed against was delivered against the applicants on 3<sup>rd</sup> March 2015, in which the respondent was awarded Kshs 2,700,000/- plus costs and interest. He has further deponed that the time required to appeal expired on 3<sup>rd</sup> April 2014. He has deponed that the intended appeal is meritorious, arguable and raises issues of law with overwhelming chances of success.
3. Mr. Karanja has further deponed that by consent of both parties, it was agreed in the magisterial court that the appellants pay to the respondent's advocates Kshs 800,000/- and the balance of Kshs 1,900,000/- to be deposited in a joint account. The other term of the consent order was that the memorandum of appeal dated 8<sup>th</sup> April 2015 was to be deemed to have been filed within the required time. Following the consent which was adopted as an order of the magisterial court, the applicants paid Mr. Mungai Kivuti, the respondent's counsel Kshs 800,000/-. They then forwarded to him a joint account opening forms on 20<sup>th</sup> May 2015 but he failed, neglected and/or refused to honour that consent. In the interim period, the applicants filed another application in the magisterial court to vary the consent orders in the application dated 13<sup>th</sup> April 2015 to enable the applicants to deposit a sum of Kshs 1,900,000/- in court instead of the joint account.
4. The applicant has also deponed that the respondent's counsel filed an application dated 16th April 2015 seeking to dismiss Embu Civil Appeal No. 14 of 2015 on the ground that the same had not been prosecuted, although it was deemed filed within the required time. The applicant further deponed that the respondent's counsel is estopped from changing his tune and going back on his word having acknowledged receipt of Kshs 8,00,000/- and has taken more than 8 months to prosecute his application

dated 16th April 2015. More importantly, the applicant has deponed that the respondent has not explained the delay in failing to argue his application, because the appeal he intends to have dismissed is already admitted as being properly on record.

5. Finally, the applicant has deponed that it is only fair and just that this court grants the application of the applicants.

6. In response to the applicants' application dated 15<sup>th</sup> March 2016, counsel for the respondent has raised a preliminary point to the effect that the application filed is an abuse of the process of the court. In that regard, he has stated that the application flies in contravention of the judge's order of 17<sup>th</sup> February 2016 and the subsequent directions by the Deputy Registrar on 9<sup>th</sup> March 2016. He has also stated that the application is in disregard to the rules of the court in the administration of justice, without specifying the specific rule.

7. I have considered the affidavit evidence of the applicants and the preliminary point raised by the respondent. I believe the affidavit evidence of the applicants. I find that there was a consent order filed in the magisterial court whose terms stipulated that a sum of Kshs 800,000/- be paid to the respondent's counsel. It was also a term of that consent order that the memorandum of appeal of the applicants was deemed to have been filed within the required time. Finally, it was mutually agreed that the applicants and the respondent were to open a joint account. In furtherance of that consent order, the applicants paid the respondent's counsel Kshs 800,000/-. It is very troubling that the respondent's counsel for reasons which are unknown failed to complete the forms for opening a joint account, which the applicants forwarded to him.

8. I find that the consent entered between the parties was binding upon the parties. Surprisingly, counsel for the respondent has used his failure to honour his obligations under consent to have the applicant's application dismissed. A party such as the respondent cannot rely on his failure to comply with a binding consent order to have the same consent order dismissed.

9. In view of the foregoing, I find that the respondent's preliminary objection is without merit and is hereby dismissed.

10. In the light of the foregoing, I allow the applicant's application in prayer No. 2 of their notice of motion dated 15<sup>th</sup> March 2016. It therefore follows that the applicants are to deposit into court a sum of Kshs 1,900,000/- in terms of the consent order within three months.

11. The applicants will have the costs of this application.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **21<sup>ST</sup>** day of **JUNE 2016**

In the absence of the applicants and in the presence of the respondent.

Court clerk Njue

**J.M. BWONWONGA**

**JUDGE**

**21.06.16**