



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 1285 of 2014**

**SAMUEL OLUOCH HELU.....PLAINTIFF/APPLICANT**

**VERSUS**

**NATIONAL SOCIAL SECURITY FUND.....DEFENDANT/ RESPONDENT**

**RULING**

1. Coming up for determination is a Notice of Motion application dated 29<sup>th</sup> September 2021 filed by the plaintiff/ applicant seeking for the following orders:

***i. Spent***

***ii. THAT the 45 days period in which the Applicant was ordered to pay the throwaway cost be extended.***

***iii. THAT the cheques No.000124 on account of the throwaway cost in favour of Kipkenda & Co Advocates for Kshs. 15,000/- be deemed to have been paid as ordered by the court.***

***iv. THAT costs of this application be in the cause.***

2. This application is premised on the grounds outlined in the body of the application and the supporting affidavit where it is averred that on 15<sup>th</sup> July 2021 when the ruling that set aside the dismissal order and directed that throwaway costs of Kshs. 15,000 be paid to the Defendant within 45 days, counsel for the plaintiff was indisposed and in isolation on account of exposure to Corona Virus. He was therefore represented in court by Mr. Livingstone Ochieng who left the country on 1<sup>st</sup> August 2021 without bringing the said directions to his attention.

3. The advocate further averred that the mistake by Mr. Ochieng to inform him in good time was inadvertent due to the short time he had to prepare for his visa and other departure arrangements. He averred that he became aware of the directions when his client inquired to know the date of the hearing and once he learnt of the orders, he immediately forwarded a cheque of Kshs. 15,000 to advocates for the defendant who declined acceptance. It is contended that the delay to comply with the court order was regrettable and was not inordinate and no prejudice will be occasioned upon the opposite party.

4. Livingstone Ochieng, the advocate on record on 15<sup>th</sup> July 2021 on the day the ruling was delivered swore an affidavit dated 28<sup>th</sup> September 2021 from Syracuse, New York in which he affirmed that he was present in court when the ruling was delivered but inadvertently forgot to inform Mr. Alosa of the orders. He averred that Mr. Alosa was in isolation at the time. He explained that he forgot to inform counsel for the Plaintiff because after the court session on the said date, he rushed to the US Embassy for his Visa interview and left the country on 1<sup>st</sup> August 2021.

5. The Defendant has opposed the application vide the Replying affidavit dated 26<sup>th</sup> October 2021 sworn by Caroline Rakama Odera, legal officer for the Respondent/ Defendant in which she stated that the application was frivolous and incompetent since the matter stood dismissed as of 30<sup>th</sup> August 2021 for non-payment of the throwaway costs as directed by Court. As such, there was no suit in existence and the prayers sought could not be granted. She noted that the court can only extend time which has not lapsed.

6. She also stated that the explanation that Mr. Ochieng counsel on record failed to inform Mr. Alosa of what transpired in court was not enough reason arguing that equity aids the vigilant and that counsel should have followed up on what transpired in court soon after. She noted that the delay was inexcusable and an abuse of the court process since the matter had been in court for more than 7 years. She thus prayed for dismissal of the application with costs, while reminding the court that on 10<sup>th</sup> February 2020, the suit was dismissed for non-

attendance and as such there had been a prolonged delay.

7. This court has considered all the arguments raised herein including the oral submissions of the rival parties. The single issue arising for determination is ***whether the application dated 29<sup>th</sup> September 2021 is merited?***

8. The Applicant has moved this court for extension of time to pay the throwaway costs as ordered by court vide a ruling delivered and dated 15<sup>th</sup> July 2021. The applicant deponed that he was unaware of the conditions set and only learnt of the same when his client inquired of the hearing date and that is when he wrote the cheque in a quest to pay the ordered throwaway costs. The cheque annexed as evidence of the intention to pay marked SOA3 is dated 13<sup>th</sup> September 2021. The Respondent in rebuttal has stated that by the time the cheque was drawn, the stipulated time had lapsed and the suit stood dismissed.

9. This court takes cognisance that this suit was dismissed on 10<sup>th</sup> February 2020 for non-attendance by the Plaintiff after a not so brief hiatus in court spanning 6 years!. The plaintiff then applied for reinstatement of the suit vide the Notice of Motion application dated 25<sup>th</sup> February 2020. This court granted the Plaintiff the sought prayers and reinstated the suit on 15<sup>th</sup> July 2021. However, the reinstatement was conditional upon payment of throwaway costs of Kshs. 15,000. The court order reads:

***b) The plaintiff shall pay the defendant throwaway costs of Kshs. 15,000. The same shall be paid within 45 days and in default the order herein shall stand vacated and the suit shall stand dismissed.***

10. I am in agreement with the arguments of the Defendant/ Respondent that by the time the Applicants drew the cheque, the suit stood dismissed by effluxion of time as the period of compliance with the court order had lapsed.

11. The issue of seeking court orders to correct a nullity was clearly stated by the Supreme Court in the case of **Nicholas Kiptoo arap Korir Salat v the Independent Electoral & Boundaries Commission & 7 Others (2014) eKLR** as follows:

***“... By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do (Emphasis own).***

***... Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court...”***

12. The Court of Appeal in the case of **Kawaljeet Singh Rekhi v Peter Wainaina Kamau & 2 others [2016] eKLR** cited in approval the case of **Benjamin Macfoy v United Africa Co. Ltd [1961] 3 All ER, 1169**, the court stated that:

***“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...” (emphasis own)***

13. I find that by the time of filing this application seeking extension of time, the time had already lapsed. Thus the court cannot extend time of a court order in a non-existent suit. The wheels of justice need to turn. But they cannot turn if every step is unpardonably delayed. In the upshot ***The application dated 29.9.2021 is dismissed with costs to the Respondent as the suit stands dismissed.***

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Alosa for the Respondent

Court Assistant: Eddel Barasa