



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MISCELLANEOUS APPLICATION NO. 15 OF 2015

PATRICK MAINA MWANGI.....DECREE HOLDER/RESPONDENT

VERSUS

WAWERU PETER.....JUDGMENT DEBTOR/APPLICANT

RULING

By a Notice of Motion dated 31st August 2015 brought under the provisions of Sections 1A and 1B,3A,78,75,79G of the Civil Procedure Rules; Order 42 Rules 6(1),(7), Order 50 Rule 5(1) and (2) Order 51 of the Civil Procedure Rules 2010, the applicant Judgment Debtor Waweru Peter filed an application seeking from this court orders:

1. Spent
2. That the court be pleased to grant a stay of execution of the orders issued in Githunguri Civil Case No. 28 of 2012 pending hearing and determination of this application.
3. That an order be and is hereby issued for the enlargement of time to enable the application file and serve the appeal as had been directed by the Honourable court on 18th day of June 2015.
4. That an order be and is hereby issued for the enlargement of time to enable the applicant deposit the sum of kshs 416,435 in an interest bearing account in the joint names of the advocates on record.
5. That the court be pleased to grant a further stay of execution of the orders issued in Githunguri Civil Case NO. 28 of 2012 pending hearing and determination of the appeal against the ruling made by Honourable Wangechi Ngumi on 6th January 2015.
6. That costs of the application be provided for.

The said application is predicated on the grounds that.

- a. Judgment in default of appearance and defence had been entered against the defendant.
- b. The decree holder/respondent has extracted the decree and commenced execution against the properties of the judgment debtor.

- c. The applicant's former advocate filed an application dated 8th January 2015 seeking an order for stay of execution of orders issued in Githunguri Civil Suit No. 28 of 2012 of 6th January 2012 pending hearing and determination of appeal against the said order.
- d. A ruling was issued by this court on 18th June 2015 granting stay of execution and that the applicant was further granted leave to file and serve an appeal within 45 days of the ruling and further deposit the sum of kshs 416,435. In an interest bearing account in the joint names of the advocates on record.
- e. That the applicant's former advocate failed to inform the applicant about the progress of the matter and consequently the ruling made by the court.
- f. The applicant having been frustrated by his former advocates, instructed the current advocates Kibatia & Company to take over the conduct of the matter, who immediately perused the relevant court file and established the position of the matter.
- g. That as a result of lack of communication from the applicants former advocate, the applicant did not comply as per the court's Ruling issues on 18th June 2015.
- h. The applicant is ready and willing to deposit the sum of kshs 416,435 as ordered by the court.
- i. That is the orders sought in the application are not granted as a matter of urgency the applicant will suffer irreparable damage and loss.

The application by the applicant is further supported by the supporting affidavit of the applicant Waweru Peter sworn on 31st August, whose depositions mirror the grounds reproduced herein above. In addition, the applicant blames his former advocates for failing to furnish him with information/orders of the court right from the lower court when initially he had been ordered to pay thrown away costs of kshs 15,000/- as a condition for setting aside the judgment and allowing him to file defence out of time hence making him fail to comply with court orders within the stipulated time.

That even after changing advocates for purposes of getting better services, the immediate former advocates also failed to notify him of the Ruling of Honourable Mabeya J made on 18th June 2015 to enable him comply yet he has all along been willing to comply with court orders in order for him to be heard.

The respondent/decree holder Patrick Maina Mwangi opposed the application. He filed a replying affidavit sworn on 9th September 2015 deposing that the applicant was given sufficient time to deposit the money in a joint account but he intentionally refused to do so. the respondent denied that the applicant was not aware of the court ruling of 1st June 2015, having instructed his former advocate to negotiate the case amicably outside court.

The respondent accuses the applicant of persistently failing to obey court orders including one dated 7th July 2014 in the lower court for payment of thrown away costs and filing of defence within 7 days.

Further, the respondent deposes that there is no evidence or professional negligence on the part of the applicant's former advocates otherwise the applicant would have sued his said former advocate for damages and that the application is only intended to delay him from enjoying the fruits of his judgment. It is further deposed that there is inordinate delay in bringing this application by the applicant and that the allegation that he did not know of the ruling is false since he instructed his former advocate to file an appeal on 8th June 2015 hence he had not come to court with clean hands and therefore he does not deserve the discretionary orders of the court.

The application was certified to be heard during the vacation.

Parties appeared before me on 14th September 2015 and canvassed the application orally.

Miss Kimachia counsel for the applicant submitted in support of the application, relying on the grounds and the client(applicant's) supporting affidavit, adopting all the said grounds and depositions, together with the annexures to the affidavit urging this court to grant the applicant enlargement of time within which he should comply with the orders of Honourable Mabeya J made on 18th July 2015. She implored the court to consider that her client has all along been willing to comply with court orders but his former advocates have been frustrating him by failing to notify him of what the court has ruled and the timelines to enable him comply. She referred the court to the bank slip to show that he had already released the decretal sum to his current advocates in readiness for the opening of a joint account with the respondent's advocates as security for the due performance of decree in the lower court. Counsel for the applicant urged the court not to punish him for mistakes committed by his former counsel. He relied on the Court of Appeal decision in **John Kasimu Kilatya V Chairman Machakos Land Disputes Tribunal & Another Civil Application 2012 of 2014 and Bamaja V Zaver (2002) 2 EA 329.**

In opposition to the application, Mr Orange counsel for the respondent relied on his client's replying affidavit and submitted that the applicant had the propensity of disregarding court orders hence he did not warrant the discretion of this court and that he was therefore abusing court process by sacking his advocates on record every time he defaults to comply with court orders. Further, Mr Orange submitted that the 45 days granted by Honourable Mabeya J on 18th June 2015 was sufficient time for the applicant to comply with court orders and that had he not been aware of the orders of the lower court and this court, he could not have instructed his former advocates to negotiate for a settlement or even file an appeal as shown by copy of index HCCA 116 of 2015 signed by Njau Ngigi & Co Advocates.

Mr Orange maintained that the applicant was a dishonest person to the court and that the allegation of misconduct by his former advocates was bare since there was no evidence of any complaint lodged with Law Society of Kenya or Advocates Complaints Commission for professional negligence. He urged the court to dismiss the applicant's application with costs. Nonetheless, Mr Orange was of the view that should this court exercise its discretion in favour of the applicant then he should be given the shortest time possible of between 2-3 days to comply with the orders of 18th June 2015.

In a brief rejoinder, Ms Kimachia submitted that there was no evidence of the appellant having filed Appeal No. 116/2015 as the index annexed has no court stamp hence this court should disregard that annexure.

I have carefully considered the application by the applicant, the grounds thereof supporting affidavit and annexures. I have also considered the replying affidavit, annexures and both parties' counsels' able rival submissions for and against the application.

The only issue for determination is whether the applicant's application for enlargement of time and stay of execution has merit.

The applicable law is Sections 63(e), as of the Civil Procedure Act, section 95 of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and Order 50 rule 6 of the Civil Procedure Rules. Under Section 63(e) of the Civil Procedure Act, In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed, make such other interlocutory orders as may appear to the court to be just and convenient. On the other hand, Order 50 Rule 6 of the Civil Procedure Rule provides that:

“ Where a limited time has been fixed for doing any act of 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 true appointed or allowed. Provided that the costs of any application to extent such time and of any order made thereon shall be borne by the parties making such

application, unless the court orders otherwise.”

Furthermore, Section 95 of the Civil Procedure Act is clear that:

“ where any period is fixed or granted by the court for the doing of any act prescribed or allowed by the act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

From the above provisions of the law, it is trite that the power to enlarge time for doing any act which time is by the court and has expired is available to the court and is discretionary.

The provisions of the law above are crafted in a manner that recognizes that there had been an earlier period of time which had been fixed or extension or extensions of time which had been granted but expired.

Being a matter of discretion of the court, granting enlargement of time will depend on the circumstances of each case which vary from case to case. It therefore follows that previous enlargement per se does not limit the power of the court to enlarge time except that, only previous enlargements will be considered by the court in determining whether the applicant has abused the process of the court and should not, therefore, benefit from any discretion of the court. See **Fidelity Commercial Bank Ltd V Azim Jiwa Rajwani (2014) e KLR.**

The respondent’s counsel, Mr Orege submitted that the applicant has the propensity of disobeying court orders and sacking his advocates on record and hiring new ones while feigning frustrations from his former advocates through failure to furnish him with information following rulings by the court thereby making it difficult for the applicant to comply with court orders:

Mr Orege contended that the applicant was laced with unclean hands as he had failed to obey orders of the subordinate court which required him to pay thrown away costs of kshs 15,000/- to the respondent and file a defence within 7 days and it was after he had defaulted to comply that he sacked his advocate on record and sought enlargement of time which was rejected by the court hence this matter of the intended appeal. In his view, the applicant was abusing the court process. In addition, that the applicant had delayed in bringing this application after being given sufficient 45 days hence he should not benefit from the discretion of the court.

In exercising the discretionary power to grant or refuse to grant enlargement of time, the court has to be guided by some factors including.

- i. Whether there has been indolence on the part of the applicant or default which has not been explained;*
- ii. Whether the applicant is guilty of abuse of court process.*
- iii. Whether the enlargement will prejudice the defendant.*
- iv. Whether the denial of further period to comply will occasion prejudice to the applicant given the circumstances of the case.*
- v. Whether the enlargement is necessary for the effectual complete adjudication of the issues in controversy;*
- vi. Whether it is just to enlarge time in the **circumstances of the case.***

Once the court is persuaded that it is in the interest of justice to enlarge time, it will exercise its unfettered discretion in favour of the applicant and impose terms and conditions on which it will allow enlargement of time, which requirement, besides an award of costs to the respondent as

espoused in the proviso to Order 50 Rule 6, serves the legitimate expectation on the part of the respondent that he is not being unfairly prejudiced by such enlargement.

The applicant was on 18th June 2015 granted 45 days to file and serve a Memorandum of Appeal and deposit the whole decretal sums into a joint interest earning account to be opened and operated by both parties' advocates. The forty five days lapsed on 2nd August 2015 by which time there was no compliance. This application was filed on 31st August 2015, about one month after the original period granted by the court had lapsed.

The issue therefore is whether the applicant was indolent or had slept on his rights. According to the applicant, his advocate on record did not notify him of the order and the timelines for compliance despite concerted efforts to know the position and outcome of the application heard by Honourable Mabeya J, and that upon being frustrated, he instructed the current advocates on record who perused the court file and advised him accordingly, by which time, compliance period had lapsed. He urged the court not to visit on him the mistakes of his counsel relying on the Court of Appeal decision of **John Kasimu Kilatya V The Chairman Machakos Land Disputes Tribunal & Others (supra)** where the court citing with approval the case of **Ramanya V Zaver(2002) 2 EA 329** held that :

“The mistakes, faults or dilatory conduct of counsel should not be visited on the litigant.”

On the other hand, the respondent's counsel urged the court to find the applicant dishonest as he had instructed his former advocates to file an appeal from the Githunguri ruling vide HCCA 116 of 2015 yet he had turned round and filed those proceedings an indication that he was hell bent to delay justice and deny the respondent the fruits of this lawfully obtained judgment. Further, counsel for the respondent submitted that if the applicant was wronged by his former advocates there was no single complaint against them to the Law Society of Kenya or Advocates Complaints Commission for professional negligence, an indication that he was attempting to steal a match on the respondents. In the John Kasimu Kilatya case, the Court of Appeal (Warsame JA) was categorical that:-

“ It is not every mistake or error of an advocate that would be excused; only those acts and omissions which meet the threshold of a proper and reasonable explanation would benefit from the discretion of the court.”

In that case, the advocate for the applicant had owned up to failing to file Notice of Appeal within time due to an oversight on her part and the court accepted her explanation thereby enlarging time for filing of Notice of Appeal.

In this case, I have set out what the applicant gives as an excuse for the failure to comply and for the delay thereof as being occasioned by his advocate's failure to notify him of the position to enable him comply. That was, indeed the same reason which the applicant gave in the lower court for failure to comply with conditional orders for the setting aside of *ex parte* judgment.

This court asks, is it by bad luck that all the advocates that the applicant retains have to conduct themselves the same way? This court, regrettably, has no means of establishing the veracity of those similar allegations against the applicant's former advocates. The copy of index showing that an appeal had been filed annexed by the respondent, regrettably has no court stamp to show whether indeed an appeal was filed. This court would not go on a fishing spree to gather evidence of how honest or dishonest the applicant has been in the past. It was incumbent upon the respondent who alleged dishonesty on the applicant's part to prove the allegations, to the required standard of balance of probabilities. It was not sufficient to allege in an affidavit matters which he could not with precision prove. I note that in the lower court, the applicant alleged that his advocate did not even respond to an application which sought to reinstate interlocutory judgment after the applicant had defaulted to file defence and pay thrown away costs within 7 days.

In my view that, indeed is a serious allegation against the advocate that led to the applicant losing the right to defend the claim against him, similarly, it is a serious matter to decline to inform a client of

the conditions set by the court.

The applicant impresses this court as a fighter to the bitter end. He has shown real and serious interest in contesting any orders that are made against him and it seems like until he is given a chance to defend himself he will not rest. He does not impress me as an indolent party. He may not have lodged a formal complaint against his former advocates to the Law Society of Kenya or to Advocates Complaints Commission. Nonetheless, he has complained to this court where he beseeches the court to grant him an opportunity to be heard. There is nothing on record to make me believe that the applicant must have been aware of the ruling by Honourable Justice Mabeya and that he deliberately refused or failed or neglected to comply with the same.

There is no legal requirement for parties who are represented by their advocates to be present when interlocutory applications are being heard or ruling delivered. There is also no evidence that the applicant's former advocates notified him of the ruling by Honourable Mabeya J, urging him to avail the decretal sum for depositing in a joint earning account to be held by both parties advocates.

The applicant has annexed copy of banking slip for the amount ordered by Honourable Mabeya J. He has already deposited the money with his present advocate in readiness for compliance with the orders of this court which lapsed, and in anticipation that this court grants him another chance by enlarging the time.

There is no denial that from time to time, most advocates make blunders which impact negatively on their clients' cases. But in my view, It is not every other blunder that must land an advocate before the Advocates Complainants Commission or Law Society of Kenya's disciplinary table. The level of awareness of the affected client also matters. It has not been shown that the applicant is feigning ignorance of his rights to complain against his former advocates. what I gather from his application is that he is imploring this court to exercise discretion and accord him a hearing. Punishing an advocate for every sundry of blunders does not necessarily accord justice to the client.

I am fortified by the holding in **United Arab Emirates V Abdel Ghafar & Others 1995 IR LR 243** cited with approval in **Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others (2014) e KLR** that :

“.....the grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively, or at whim or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the appeal tribunal. The result of the exercise of a discretion is not dictated by any set factor. Discretions are not packaged, programmed responses.”

2. As Sir Thomas Bingham M.R. pointed out in Costellow V Somerset CC (supra) at page 956 C, times problems arise at the intersection of two principles, both salutary, neither absolute.The first principle is that the Rules of court and the associated rules of practice, deserved in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met....” (Emphasis added).

The second principle is that:

“.....a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of cost cannot compensate.....”

3. The approach indicated in these two principles is modified to the stage which the relevant proceedings have reached. If for example, the procedural default is in relation to an interlocutory step in proceedings, such as a failure to serve a pleading or give discovery within the prescribed time limits, the court will, in the ordinary way and in the absence of

special circumstances, grant an extension of time. Unless the delay has caused irreparable prejudice, to the other party, justice will usually favour the action proceeding to a full trial on the merits.

The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine the case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals. An extension may be refused even though the default in observing the time limit has not caused prejudice to the party successful in the original proceedings.

4. An extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.”

The above principles espouse discretion of the court and how it should be applied in enlargement of time.

In my view, it has not been demonstrated to the satisfaction of this court that the applicant is abusing the process of the court. To my mind, the applicant has demonstrated a desire to be heard. The matter giving rise to these proceedings proceeded *ex parte*. He did not have his day in court and hence, the incessant and persistent spirit. That right to be heard and to be accorded justice is guaranteed by Article 50(1) of the Constitution. His former advocates' conduct is of course unacceptable.

However, where the justice of case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs.

In **Philip Kelpo Chemwoto & Another V Augustine Kubende (1986) KLR 492**, the Court of Appeal was categorical that:

“ Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits”..... I think the broad equity approach to this matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purposes of deciding the rights of the parties and not for the purpose of imposing discipline”.

Indeed, the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered and errors and lapses should not necessarily debar a litigant from the pursuit of his rights under the law by ousting him from the judgment seat. In this case, Justice can still be done despite the delay as the decretal sum shall be secured.

In **Mwai V Murai No. 4 (1982) KLR Madan JA** said.

“ A mistake is a mistake, it is no less a mistake because it is an unfortunate slip. It is no less pardonable because it was committed by Senior Counsel though in the case of Junior counsel, the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”

The applicant has deposed that he followed up his case with his former advocates to find out the position. He had a duty to pursue his matter so that he does not just blame his advocate.

This court finds that the failure to comply with the order has not occasioned the respondent any prejudice which cannot be compensated by an award of costs. On the other hand, the applicant, unless he is accorded an opportunity to ventilate his grievances, will be greatly prejudiced. He will be ousted from the judgment seat unheard, given the circumstances of the case. It is therefore, in my view, and which has been explained to the satisfaction of the court that the delay is not unreasonable.

It is for the above reasons that I exercise my discretion and allow the application for enlargement of the original time of 45 days from 18th June 2015 to file and serve a Memorandum of Appeal upon the respondent and for the depositing of the decretal sums in a joint interest bearing account of parties advocates by a further 21 days from the date hereof.

Having enlarged the time for complying with the orders of Honourable Mabeya J of 18th June 2015, accordingly, I reinstate the orders of stay of execution of decree in the lower court pending hearing and determination of the impending appeal.

As a precautionary measure, and in the event that the applicant comes up with a similar blame against his current advocate, this matter shall be mentioned on 8th October 2015 to confirm compliance.

In addition to the above order, and pursuant to the proviso to order 50 Rule 6, and as the delay in complying with the order of the court within the stipulated period was not occasioned or contributed to by the respondent in any way, I order that he be compensated by an award of thrown away costs of this application assessed at kshs 50,000/- to be settled within the next 21 days from the date hereof in default, the respondent shall be at liberty to execute for recovery notwithstanding the pendency of the intended appeal. This ruling is adopted as the decision of this court in HCC Misc.App 14/2015 with necessary adaptations as to parties and decretal sum.

Dated, signed and delivered in open court at Nairobi this 16th day of September 2015.

R.E. ABURILI

JUDGE

16/9/2015

Coram R.E. Aburili J

C.A. Adline

Mr. Mege holding brief for Miss Wangari for applicant.

Mr Kulecho holding brief for Orengo for the respondent

Court - Ruling read and delivered in open court as scheduled.

R.E. ABURILI

JUDGE

16/9/2015

COURT - Mention on 8th October 2015 to confirm compliance with this ruling.

R.E. ABURILI

JUDGE

16.9.2015