

REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Misc Appli 329 of 2007

ERDEMANN COMPANY (K) LTDAPPLICANT

V E R S U S

FERDINAND KOMBORESPONDENT

R U L I N G

By an order entered herein on 28th September, 2007 the court (Osiemo, J) allowed the Applicant's application by notice of motion dated 29th May, 2007 upon the condition that it deposits the decretal sum in court. The court enlarged the time within which to appeal against the decree of the lower court passed on 29th March, 2007 by 14 days from the date of the order. The Applicant thus ought to have filed its appeal on or before 12th October, 2007.

No period was set within which to deposit the decretal sum in court. But on 27th November, 2007 the court (Visram, J) granted the Applicant a temporary stay of execution for two months upon the condition that it deposits the decretal sum in court within four days. It did so on 28th November, 2007. One of the grounds of the application of 29th May, 2007 was that the Applicant was not aware of the judgment of the lower court as it was not served with notice of delivery thereof.

As it happened, the Applicant did not file its appeal as stipulated in the order of 28th September, 2007. It has now come back to court by notice of motion dated 26th November, 2007 seeking the main order that the time within which to file memorandum of appeal be extended by 14 days from the date of such order. The application is brought under rule 5 of Order 49 of the Civil Procedure Rules (the Rules). Under that rule, where a limited time has been fixed for doing any act or taking any proceedings under the 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. The power is entirely discretionary. However, the court's discretion must be exercised judicially.

The main ground for the present application appearing on the face thereof is that the Applicant's previous advocates did not inform it of the order of 28th September, 2007 and that it became aware of it only on 21st November, 2007 when auctioneers came calling. The Respondent has opposed the application principally upon the ground that it is only an after-thought calculated to delay the course of justice.

I have read the affidavit sworn in support of the application and that sworn in reply. I have also given due consideration to the submissions of the learned counsels appearing, including the cases cited. As already observed, the initial application was premised upon the main ground that the Applicant was not aware of the passing of the decree of the lower court. One would expect therefore that the Applicant's

directors or other senior officers would be keen to know the outcome of the application for extension of time to file appeal. There is no evidence at all in the supporting affidavit sworn by a director of the Applicant that he or any other director or officer of the Applicant tried at all to find out the outcome of the application before the auctioneers came. Had they keenly followed up the application with their then advocates they would have found out in good time the order of 28th September, 2007 and could thus have instructed their advocates timeously to lodge the appeal. This was the second time that the officers of the Applicant were showing a particular lack of interest in their company's case. The company must thus suffer the attendant consequences of this dilatoriness. Why should the Respondent be kept any longer from his money decree in these circumstances?

I respectfully agree with the Respondent's learned counsel that the habit of litigants blaming their erstwhile legal advisers and expecting, upon the plea that it was all the fault of the former advocates, to get indulgence from the court, can no longer work in all situations. In the present case it would be unjust to keep the Respondent from his money any longer.

Having considered all matters placed before the court I do not find any merit in this application. It is hereby dismissed with costs to the Respondent. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 29TH DAY OF FEBRUARY, 2008