



**National Industrial Credit Bank Limited & another v Njeri & another (Civil Appeal 46 of 2018) [2023] KEHC 17481 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17481 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 46 OF 2018**

**A MSHILA, J  
MAY 12, 2023**

**BETWEEN**

**NATIONAL INDUSTRIAL CREDIT BANK LIMITED ..... 1<sup>ST</sup> APPELLANT  
JOYLAND AUCTIONEERS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PAUL MBURU NJERI ..... 1<sup>ST</sup> RESPONDENT  
KINOTI SIMON BUNDI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before this court for determination dated August 2, 2021 is brought under article 50(1), 159 (1)(d), order 51(1) section 3A of the *Civil Procedure Act* and all other enabling provisions of the Law. The applicant seeks the following orders:
  - a. The court grants leave to the firm of Mugo & Associates to come on record for the applicant and the notice of change dated June 18, 2021 be deemed as properly filed.
  - b. The court does extend time for another ninety (90) days within which the substantive suit being Thika CMCC No 1133 of 2017 should be heard and determined.
  - c. The costs do abide with the results of the said substantive suit.
2. The application is premised on the grounds that the ninety (90) days period within which the substantive suit was to be heard have lapsed. The substantive file was returned to Thika through the letter dated February 17, 2020. The reason for the delay is the long-time taken for the trial court to be returned to Thika Law Courts, the outbreak of Covid- 19 pandemic and the failure to trace the trial court file in Thika Law Courts.



3. The application is supported by the annexed affidavit of Musa Mugo sworn on August 2, 2021 the advocate intending to come on record for the applicant. He reiterates the grounds of the application, he further deponds that unless the orders are granted the applicant will be shut out of the sit of justice, the delay in setting the matter down for hearing was caused by circumstances beyond the applicant's advocate's control. No prejudice will be occasioned to the respondent if the orders are granted.
4. Opposing the application, the respondents filed grounds of opposition together with a replying affidavit sworn by Jackson Nyaga, Advocate in conduct of the matter on November 15, 2022, he deponds the application is made in bad faith, it is unmerited, no reasonable explanation has been advanced as to why the applicant did not move the court within the prescribed time. No efforts have been shown that the applicant employed in tracing the file. The issue of corona virus is not plausible as the same hit a year after the orders were granted. The court should not aid an indolent. He is not opposed to Mugo & Associates Advocates coming on record for the applicant.
5. At the hearing of the application Mr Nyabuto counsel for the respondent opposed the application, he said the orders of February 13, 2019 lapsed on May 13, 2019. The applicants have failed to show the efforts employed to have the file transferred to Thika, the applicant has been indolent and thus equity should not aid an indolent. He urges the court to dismiss the application.
6. Mr Mugo for the applicant submitted that the court was at fault and the letter dated February 17, 2020 proved efforts of the applicant. the fault of the court should not be revisited on the applicant and urged the court to allow the application.

#### **Issues for Determination**

7. Having keenly considered the application, the grounds of opposition and the replying affidavit the issues for determination are framed as follows;
  - i. Whether counsel should be allowed to come on record for the applicant.
  - ii. Whether this court should extend time within which the applicant is to comply with the orders of February 13, 2019.

#### **Analysis**

8. Before dealing with the issues in the current application hereunder is a brief history of the matter.

#### **Background**

9. The respondents herein (applicants in the instant application) filed a suit against the appellants in the trial court by a plaint dated November 29, 2017 filed alongside the notice of motion seeking *inter alia* an injunction order to restrain the appellants from re-possessing, attaching, selling, advertising for sale and or interfering with the respondent's possession of motor vehicle Kxx xx6.
10. According to the respondents on or about November 2, 2015 they took a loan facility for Kshs 4,467,564/= from the 1<sup>st</sup> appellant for the purchase of motor vehicle Kxx xxxG Mitsubishi FH 215 for transport business. The monthly repayment was Kshs 125, 956/= for 60 months. In mid-2017 the respondent were unable to service the loan due to the political situation and fell into arrears of Kshs 252,178/=.
11. The 1<sup>st</sup> appellant sent the 2<sup>nd</sup> appellant to repose the motor vehicle without notice.



12. The appellants refuted the claim that the respondents were serving the loan promptly and thus the respondents were in breach of the agreement.
13. The trial court allowed the application for injunction by the respondents, aggrieved the appellants appealed to this court. By the judgment of the court on February 13, 2019 delivered by Justice Meoli, on behalf of Justice Mutende found there was no evidence of payments of funds by the alleged purchaser Ann Mercy Wanjiru or evidence of transfer of motor vehicle to the individual, the issues herein need to be canvassed through a full hearing, allowed the appeal set aside the orders of trial magistrate and made the following directions:
  - a. That pending hearing and determination of the suit filed in the lower court, status quo as at November 28, 2017 shall be maintained.
  - b. The file shall be placed before the Chief Magistrate's Court for hearing and determination of the substantive suit within ninety (90) days
  - c. Each party to bear their own costs.

**Whether counsel should be allowed to come on record for the Applicant.**

14. On this issue of the advocate coming on record as the same was not opposed by the respondents and this prayer is therefore allowed. A litigant has a right to representation and this court will not deny any litigant its constitutional right.
15. The applicant is hereby granted leave to come on record as having conduct of the matter on behalf of the applicant.

**Whether this court should extend time within which the applicant is to comply with the orders of 13th February 2019,**

16. Extension of time is provided for under section 95 of the *Civil Procedure Act* and order 50 rule 6 of the *Civil Procedure Rules* which reads as follows:

Section 95. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this 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.

Power to enlarge time [order 50, rule 6.]

Where a limited time has been fixed for doing any act or 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 time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

17. From the record, the orders issued herein lapsed on June 13, 2019; it is trite law that the extension of time is not a right but a discretionary remedy that may be given by the court, a party who seeks extension of time needs to ably demonstrate that he/she is deserving of the same to enable the court exercise its discretion in their favour.



18. The applicant submits the delay to set the matter down for hearing was occasioned by the Covid- 19 outbreak which affected the normal court operations. The trial court file was returned to Thika by a letter dated February 17, 2020. A fact which the respondent refutes, counsel contends that the covid outbreak was in 2020 and not 2019 thus the applicant had a whole year to set the suit down for hearing.
19. Counsel submits the trial court file was traced on June 8, 2021 when they set the suit down for hearing the trial court advised the applicants to seek orders of extension of time.
20. The issue of Covid- 19 hit the country in March 2020 which saw the scaling down of the court operations, however the court returned to normalcy in the year 2020. It is not until August 2, 2021 that the applicant brought the current application. This court's considered view is that the reason given of Covid-19 is not sufficient to demonstrate the reason for the delay in moving the court to exercise its discretion and extend time.
21. This court is guided by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR which laid down the principles the court may consider in exercise of this discretion which are as follows:
  1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
22. Based on the facts of the current application this court is not satisfied with the explanation given and the applicants are found to have been indolent in bringing the current application.

### **Findings and Determination**

23. In the light of the foregoing this court makes the following findings and determinations;
  - i. The application is partially successful
  - ii. The applicant's counsel is hereby granted leave to come on record as having conduct of the matter on behalf of the applicants.
  - iii. This court finds that the applicants failed to adduce sufficient reasons to allow this court to exercise its discretion and extend time; this prayer is found to be devoid of merit and the same is dismissed with costs to the respondents

Orders accordingly.



**DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 12TH DAY OF  
MAY, 2023**

**HON. A. MSHILA**

**JUDGE**

