



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NOS. 25 AND 26 OF 2020

KENYAN ALLIANCE INSURANCE COMPANY.....APPELLANT

VERSUS

JULIUS KIILU MUSAKI & OTHERS.....RESPONDENTS

RULING

1. On 17th November, 2020, this Court issued a ruling in the two appeals, being Civil Appeals No. 25 and 26 of 2020, which are the subject of this ruling in which the Court granted a stay of execution pending the two appeals on condition that the Applicant deposits the decretal sum in a joint interest earning account in Kenya Commercial Bank, Machakos, in the names of the advocates for the parties herein within 30 days from the date of the ruling. The Court further directed that since the proceedings are ready, the records of appeal be filed and served within the said period. In default of compliance with the foregoing, the applications were to be deemed to having been dismissed.
2. The subject of this ruling are two respective applications dated 17th February, 2021 by which the Applicant seeks that this Court extends the time given in the Ruling delivered on 17th November 2020 to allow the Appellant deposit the decretal amount in a joint interest earning account and also issue such further orders or directions that it may deem fit to grant in the interest of justice.
3. According to the Applicant, though the ruling on the Application dated 3rd March 2020 was due for delivery on 10th November, 2020, due to the fact that the Court was not sitting on that day, the ruling was not so delivered and they were informed by the Deputy Registrar that the same would be delivered on notice. However, they did not get the said notice and it was only when execution was commenced on 16th February, 2020 (sic) that they discovered through their advocates vide the Kenya Law Reports website that the ruling had been delivered on 17th November 2020. The instant application was thereby made timeously on 17th February, 2021.
4. According to the Applicants, they are ready and willing to comply with the court's ruling delivered on 17th November 2020 as regards the security for due performance as ordered by the court. In support of the application the Applicants relied on the decision of the Supreme Court in Civil Application No. 3 of 2016 - **County Executive of Kisumu -Vs- County Government of Kisumu & Others**, and submitted that the delay in complying with the Court's Order vide the ruling delivered on 17th November 2020 was not deliberate and that the Respondents will not suffer any prejudice if this application is allowed and time within which the Appellant should deposit the decretal sum in a joint interest earning account is extended.
5. In opposing the Application, the Respondents filed grounds of opposition.
6. Apart from the said grounds, the Respondents noted that though on 30th June 2021 this Court ordered that the Applicants do file and serve their submissions within 14 days and the Respondents do file and serve within 14 days after service, the Applicants never did so and only filed their submissions on 19th July 2021 (19 days later). It was also noted that they also served the Respondents counsel with submissions at 17.12pm the same day 19th July 2021 (19 days later) yet the court had granted them only 14 days to do so.
7. It was the Respondent's position that court orders are there to be obeyed and not to be disobeyed at will bearing in mind that the Applicant herein is seeking an extension of time to obey previous court orders given on 17th November 2020 after previously not doing so before. Since this is the second time the Applicants have disobeyed the court orders, the Court was urged to expunge from records the Applicant's said submissions for having been filed out of time without the leave of the Court.
8. That said, it was submitted, based on a number of authorities, that the Applicants disrespected the orders of 17th November 2020 by not bothering to obey the same for a whole (3) three months till the Respondents decided to execute. It is only then that the Appellant/Applicant woke up from its slumber and decided to rush to court to frustrate the process of execution. According to the Respondents, this clearly is inordinate delay and shows that if it were not for plaintiffs' execution, then the Applicants would never have bothered to come to court with

the current application.

9. According to the Respondents, this Court having granted the Applicants the orders it is seeking on 17th November 2020 and it cannot now come back to the same court to seek the same orders again. It was therefore contended that this application is *res judicata*, an abuse of the court process and therefore a nonstarter.

10. It was therefore sought that the application be dismissed with costs.

Determination

11. I have considered the issues raised in this application.

12. The first issue is whether the Court ought to expunge the Applicants' submissions. It is true that the Applicant failed to comply with the directions issued by this Court regarding the filing and service of the submissions. However, even if the submissions were to be expunged, it would not necessarily follow that the Court would thereby automatically dismiss the application since submissions are just a means by which the Court is addressed on the application unless the Court directs that the manner of prosecuting the application is by way of written submissions.

13. While the Courts frown upon the failure by parties to comply with directions and depending on the magnitude of non-compliance and the prejudice cause thereby, as was held the Court of Appeal in **Trust Bank Limited vs. Amalo Company Limited Civil Appeal No. 215 of 2000 [2002] 2 KLR 627 [2003] 1 EA 350**, in which the Court cited its decision in **Central Bank of Kenya vs. Uhuru Highway Development Ltd. & Others Civil Appeal No. 75 of 1998**:

“The principle which guides the Court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit and errors should not necessarily deter a litigant from the pursuits of his right...The court is obliged to look at the documents on record even though filed out of time unless for a reason other than mere lateness, it considers it undesirable to do so.”

14. The law is therefore clear that the Court ought not to ignore documents on record even if irregularly filed unless the filing thereof has prejudiced the other party in material respect.

15. Order 50 rule 6 of the *Civil Procedure Rules* provides that:

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.

16. In this case the time for lodging the appeal was fixed by this court's order. Accordingly, this court has the discretion to grant the orders sought herein. It was however contended that this Court having granted a conditional stay, the present application is *res judicata* as it seeks the same orders. With due respect, what is being sought in the present application, though would have the effect of staying execution if granted, is not the same in substance to the earlier application. What the Applicants seek is that the time that was given for compliance be extended. In my view since the said provision states that enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, even where the earlier application is deemed as dismissed for non-compliance, nothing bars the court from entertaining an application for extension of time under the said rule whose effect if allowed would result in the revival of the deemed dismissed application.

17. It is clear therefore that the decision whether or not to extend for complying with a decision of the court is an exercise of discretion and just like any other exercise of discretion. However, this being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the applicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633**, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles.

18. The main ground for seeking extension of time is that the applicants were unaware of the date of the delivery of the ruling as the ruling was not delivered on the date it was earlier scheduled and thereafter no notice was given to them. This contention has not been controverted by the Respondents and there is no basis upon which the contention can be disputed.

19. In **Chemwolo and Another vs. Kubende [1986] KLR 492; [1986-1989] EA 74**, it was held that:

“Unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs since the Courts exist for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

20. In this case there is no allegation that the applicant’s conduct amounted to fraud or intention to overreach. In the premises I find the Applicants’ explanation for the delay is excusable.

21. With respect to costs, I did not hear the Respondents contend if the application is allowed she will suffer such prejudice that cannot be compensated by an award of costs. Costs, it has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See **Waljee’s (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.**

22. Accordingly, time is hereby enlarged to the applicant to comply with the stay order issued on 17th November, 2020 with a further period of 15 days from the date hereof and in default, the application shall stand dismissed.

23. As the Applicants failed to comply with the directions of this Court regarding the filing of submissions, the costs of the Application are awarded to the Respondents in any event.

24. For avoidance of doubt, as directed on 30th June, 2021, this ruling applies to both appeals.

25. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 12TH DAY OF OCTOBER, 2021

G V ODUNGA

JUDGE

DELIVERED IN THE PRESENCE OF:

MISS KARIUKI FOR THE APPELLANT/APPLICANT

CA SUSAN