



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 123 OF 2017

MUTUKU KYULU.....APPELLANT/APPLICANT

VERSUS

GRACE KASELE KITHOKOO.....1ST RESPONDENT

NYEVU SAMUEL alias

SAMUEL MUTINDA SAMUEL.....2ND RESPONDENT

RULING

1. On 6th December, 2017, **Kemei, J** delivered a ruling in this matter in which he granted stay of execution in Machakos CMCC No. 213 of 214 – **Grace Kasele Kithokoo and Another vs. Mutuku Kyuli & Others** – pending the hearing and determination of this appeal on condition that the Appellant deposits the entire decretal sum in an interest earning account in the joint names of the Advocates for the parties within 30 days from the date of the said ruling and in default execution was to issue.

2. It would seem that the said condition was not complied with because on 31st May, 2021, the Appellant/Applicant filed an application sated 27th May, 2021 seeking that this court reinstates the orders of stay of execution pending the hearing of the appeal and extends time within which the Appellant would deposit the said sum.

3. The grounds upon which the said application was based were that the Applicant only became aware of the said ruling when he was served with a Notice to Show Cause why his properties cannot be attached on 4th March, 2021. Upon receipt of the same he sought to peruse the court file but due to COVID 19 containment measures his efforts were unfruitful. He then instructed his present advocates to take over the conduct of the matter upon which he was informed that his previous advocates, Ms L N Ngolya & Company, filed an application for stay of execution whose ruling has been alluded to above.

4. According to the applicant, he was never made aware of the said ruling as a result of which the stay lapsed. He stated that he was further informed by his said advocates that there is no record appeal and the appeal is yet to be admitted.

5. The applicant is therefore apprehensive that without the said conditional order being extended, he is at the risk of being executed against yet the failure to comply was due to an inadvertent mistake or error on the part of his advocates and that had he been made aware of the said directions, he would have complied therewith. It was his position that the non-compliance should therefore not be visited on him. According to the applicant, should the decretal sum be paid over to the Respondents, they will not be in a position to refund that same considering the fact the amount in question exceeds Kshs 900,000/-.

6. In his submissions, the Applicant cited **George Roine Titus & Another vs. John P Nanguri Civ. Appl. No. 249 of 1998** and submitted that the failure by his then advocate to inform him of the conditions set for stay is an error on the part of the said advocate. According to him this application was brought without unreasonable delay upon getting to know of the said ruling. It was further submitted that the applicant had deposited Kshs 959,960.00 as directed by the Court and that the applicant has an arguable appeal.

7. In response the Respondents through an affidavit sworn by **Grace Kasele Kithokoo** stated that there has been an inordinate delay in moving the court of close to 4 years after the said ruling was given and that the Appellant has only been woken from his slumber by the taking out of the Notice to Show Cause. It is further averred that there is unexplained delay of 2 months between the time the Applicant allegedly became aware of the said ruling and the making of the present application.

8. It was averred that the Appellant has not denied being in contact with his erstwhile advocates who are on record in this appeal and before the trial court. It was averred that the Applicant has not explained why he has never followed up the matter with his advocates since the filing

of the appeal. According to the Respondents the Appellant has not shown good faith by depositing the entire sum in court and has withheld from this court the fact that when the notice to show cause came up, he misled the trial court that he was ready to settle the said sum and needed time to give proposals for the same.

9. On behalf of the Respondents, reliance was placed on Voken Mutunga vs. Juvenalis Musyoki Kavita & Anor Machakos ELC Misc. Appl. No. 1 of 220 and it was submitted that the decision whether or not to extend time is discretionary. Based on the decision in Mbukoni Services Ltd & Anor vs. Mutinda Reuban Nzili & Anor Machakos HC Misc. Appl. No. 77 of 2021, it was submitted that this is not one of the applications where the applicant should benefit from the exercise of discretion.

10. Accordingly, the Court was urged to dismiss the application with costs.

Determination

11. I have considered the application, the affidavits, both in support of and in opposition thereto and the submissions filed.

12. 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.

13. In this case the time for complying with the conditions was fixed by this court's order. Accordingly, this court has the discretion to grant the orders sought herein. However, the decision whether or not to do so is in the court's discretion. 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 supplicant 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.

14. In this case, the ruling which set out the conditions was delivered on 6th December, 2017. The applicant had 30 days from the said date to comply therewith which would have been by the end of January, 2018 taking into account the excluded days. It is now nearly four months down the line since the said order was made. The instant application was not made until 31st May, 2021 about 3½ years after the due date. The reason for the said clearly inordinate delay is that the Applicant was not aware of the said conditions for stay. As at the time of the filing of this application the firm of L N Ngolya was still on record for the applicant since what his present advocate filed was a notice of appointment of advocates as opposed to a notice of change of advocates. No affidavit was filed by the erstwhile advocates to corroborate the applicant's contention that he was not made aware of the conditions for the grant of stay.

15. In my view, the applicants have not been diligent in following up on his appeal. There is no explanation why for more than three years he never sought to know from his advocates the fate of his application for stay leave alone the appeal itself. With respect to counsel's mistake, the defendants' position is that the plaintiff should have shown keenness in the prosecution of his suit since the suit does not belong to counsel. In Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 Kimaru, J expressed himself as follows:

"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."

16. In the case of Sheikh vs. Gupta and Others [1969] EA 140 Trevelyan, J stated as follows:

"In this matter the claim is now eight years, less four months, old and the plaintiff, so far as the court is concerned, has done nothing for more than three years to say the least. There is a prima facie negligence on the part of the lawyers or inexcusable delay on the part of the plaintiff or both, on his own say so. In deciding whether or not to dismiss a suit under rule 6 a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the

defendant will suffer no hardship, and that there has been no flagrant and culpable inactivity on the part of the plaintiff...In the instant case there has been both culpable and flagrant inactivity on the part of the plaintiff in respect of his smallish claim and he cannot bring himself within the set of circumstances as stated...It is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. It is of the greatest importance in the interest of justice that these actions should be brought to trial with reasonable expedition."

17. In the case of Et Monks & Company Ltd vs. Evans [1985] KLR 584, Kneller, J (as he then was) stated as follows:-

"Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances...If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates...It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position. A plaintiff who, for whatever reason, delays for over six years before bringing his suit for trial can expect little sympathy."

18. The Respondent averred that before the trial court, the Applicant made proposals with a view to settling the decree, an offer which has not been disclosed in these proceedings. This damning averment has not been controverted. In Stephen Ngethe Mungai vs. Salim Abeid Shaush Civil Application No. Nai. 270 of 2005, Omolo, JA held that:

"Where the applicant alleges that his former advocates kept him in the dark as to what was going on with regard to his case, yet there is evidence that negotiations were going on with respect to settlement of the decretal sum, the explanation which simply lays all the blame on the previous advocates is clearly untenable."

19. In this case, based on the material before me I find that the applicant is undeserving of the favourable exercise of this Court's discretion. In the premises I find that it would be unjust to extend the life of the stay any longer. Accordingly, this application fails and is hereby dismissed but as the parties did not comply with the court's directions to furnish soft copies, there will be no order as to costs.

20. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 6TH DAY OF DECEMBER, 2021

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Susan