



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MISC CIVIL APPLICATION NO. 393 OF 2018

KENYA RED CROSS SOCIETY.....APPLICANT

VERSUS

MBONDO KATHEKE MWANIA.....RESPONDENT

RULING

1. On 23rd day of September, 2019, this court granted leave to the applicant to file the appeal out of time and directed that the Memorandum of Appeal be filed and served within 10 days from the date thereof and in default of compliance the application would stand dismissed. The Court further stayed execution of the decree issued in Kitui CMCC No. 61 of 2017 pending the hearing and determination of the intended appeal but on condition that the Appellant deposits the entire decretal sum in a joint interest earning account in the names of the advocates for the respective parties in Kenya Commercial Bank, Machakos within 30 days of the said decision and in default of compliance the stay would automatically be vacated.
2. By an application dated 22nd October, 2019 the applicant herein was once again before this court seeking substantially an order that the orders of stay of execution regarding the timeline for opening of a joint Account in the names of the parties' Advocates be extended by a further period of 30 days.
3. After hearing that application, this Court on 19th November, 2019 delivered a ruling thereon in which it expressed itself as hereunder: -

“The main ground for seeking extension of time is that the applicant obtained a copy of the ruling delivered on 23rd September, 2019 on 14th October, 2019. That was a whole 21 days after the delivery of the said ruling. According to the applicant it then wrote to the Respondent’s advocates enclosing the relevant forms to effectuate the opening of the joint account but the Respondent’s advocates did not respond. In this case the applicants have not explained the reason why it took it 21 days to obtain a copy of the ruling assuming that it was necessary to obtain the same when the ruling was delivered in the presence of its counsel. This court delivers typed ruling and files are returned to the registry the same day of delivery. Therefore, there is no reason why the applicants took 21 days before obtaining a copy of the ruling. In my view, a party who waits until the last minute or when the time is about to lapse before taking a step must take the risk that things might go wrong and he might not have sufficient time to rectify the same. More importantly however is the fact that the time limited by this court for filing the memorandum of appeal long lapsed and the applicant has neither sought nor obtained extension of time to comply with the directions of this court. Even in this application no such order is being sought. Instead the applicant contends that it was misled by the order which order was extracted by its own counsel in that there was no mention of the order extending time...In other words, a party cannot rely on an awkward situation created by itself as a ground for seeking favourable orders from the court. Therefore, assuming that the applicant had properly applied for extension of time within which to lodge the memorandum of appeal, that prayer would have failed since it is based on a situation of its own making. Without an order extending time for appeal, it follows that the prayer for extension of time to comply with the conditions of stay must also collapse since an order of stay depends on either the existence of an appeal or intended appeal. Before me there is neither an appeal nor an intended appeal since the application through which time was extended for filing a memorandum of appeal stands dismissed. It follows that this application is unmerited, it fails and it is dismissed with costs to the Respondent.”

4. It is clear that it was that decision that provoked this application dated 6th December, 2019 in which the applicant now seeks review of the order made on 19th November, 2019 and extension of the orders issued 23rd September, 2019 with a further period of 30 days. The said application is grounded on the fact that the applicant was unable to file the record of appeal as it had never been supplied with a copy of the judgement of the Chief Magistrate’s Court despite repeated requests for the same and it was not until 4th December, 2019 that the applicant’s counsel managed to obtain and peruse the said court file whereupon he established that the judgement had never been typed nor the manuscript copy made available to the applicant’s advocates. According to the applicant, it was this that was a hindrance to it formulating the memorandum of appeal and lodging the record of appeal within the time prescribed by this court.

5. I have considered the application and the supporting affidavit. In my ruling of 23rd day of September, 2019, I did not direct that a record of appeal be filed within 30 days. I only directed that the memorandum of appeal be so filed. The contention that the applicant was not able to file the record of appeal as it had not been supplied with documents does not excuse the failure to comply. If the applicant chose to file a record of appeal instead of the memorandum of appeal which is a simple document, it cannot rely on that to seek favourable orders. As I held in my earlier ruling herein, a party cannot rely on an awkward situation created by itself as a ground for seeking favourable orders from the court. The applicant ought to have known exactly what it was expected to do. One does not need the proceedings from the court appealed from to prepare and lodge its memorandum of appeal.

6. In my ruling dated 19th November, 2019 I expressly found that assuming that the applicant had properly applied for extension of time within which to lodge the memorandum of appeal, that prayer would have failed since it is based on a situation of its own making. That position has not changed as the applicant is still relying on its misunderstanding of this court's decision to seek favourable exercise of discretion after it failed to comply. In my view such a party is not deserving of favourable exercise of the court's discretionary powers. In my view the type of errors committed by the applicant in these proceedings are what **Hewett, J** in **Masefield Trading (K) Ltd. vs. Francis M Kibui Nairobi (Milimani) HCCC No. 1796 of 2000 [2001] 2 EA 431** termed as comedy of errors while **Waki, JA** in **Richard Apela & Another vs. Emmanuel Ngeso Nyaoko Civil Application No. Nai. 335 of 2004** termed them comedy of omissions in an application which he termed as hopelessly unsalvageable.

7. In the premises, I find no merit in this application which I hereby dismiss with costs to the Respondent.

8. It is so ordered.

Read, signed and delivered in open Court at Machakos this 3rd day of February, 2020

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Oyoo for the Applicant

Mr Muumbi for Mr Mulu for the Respondent

CA Geoffrey