



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 339 OF 2018

(Coram: Odunga, J)

FRANCIS MWANZA MULWA.....APPLICANT

VERSUS

KANJI VAGJIANI.....1ST RESPONDENT

AFRICAN BANKING CORPORATION.....2ND RESPONDENT

KESHRA & SONS LIMITED.....3RD RESPONDENT

RULING

1. On 28th November, 2018, this court after hearing the application dated 11th October, 2018 granted leave to the applicant to appeal against the ruling and order of **Y. A Shikanda, SRM**, Machakos in Civil Case No. 1059 of 2010 dated 24th May, 2018 and enlarged to the applicant the time fixed by the Rules within which to file and serve his memorandum of appeal with 10 days from the date of the decision. The said decision was delivered in the presence of **Ms Ajiambo** who held brief for **Mrs Karani** for the 2nd Respondent. However, the applicant was not represented at the time of the said delivery

2. It has turned out that the said decision was never complied with and the applicant is once again before this court seeking an order that the said period be enlarged.

3. According to the applicant he inadvertently omitted to diarize the date of the delivery of the said decision hence was absent on the said date. The applicant contended that counsel for the respondent though present during its delivery did not exercise the courtesy of informing him of the fact. It was the applicant's case that the delay involved, of about 12 days, was neither deliberate nor inordinate in the circumstances hence it is in the interest of justice that the application.

4. From the record, the Respondent neither filed a reply to the application nor submissions as directed by this court.

5. 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.

6. 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 is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time 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 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.

7. In this case, the reason given for failure to comply with the order of the court was failure to diarise the date when the ruling was due for delivery. As was held in **Shital Bimal Shah & 2 Others vs. Akiba Bank Limited Civil Appeal (Application) No. 159 of 2005 [2006] 2 EA 323**:

“An error of judgement on the part of a legal adviser may help build up sufficient reason under rule 4 to induce the court to exercise its discretion to extend time for the doing of any act under the Rules of the Court. Mistakes of counsel come in all shapes and sizes but some have been rejected by the Court such as total inaction by counsel disguised as a mistake. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate.”

8. In **Meghji Velji Chhaya vs. Attorney General & 3 Others Civil Application No. Nai. 136 of 1996**, the Court of Appeal held that an omission by an advocate’s clerk to enter a hearing date in the diary is sufficient cause for reinstatement of a dismissed application. Similarly, in **Kalemera vs. Salaama Estates [1971] EA 284**, it was held that:

“In this case the failure to attend at the hearing was due to the fact that the applicant’s advocate wrongly diarised the date and immediately he became aware of the error he filed the present application. To treat such mistake as an indication of negligence would be to take an extreme view of the circumstances. I prefer to treat the circumstances as arising out of honest mistake...The test to be applied under section 101 which speaks of “the ends of justice” is wider in its terms and permits a greater discretion. Poverty of the excuse is not the sole matter which must be considered, the defence, if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally it should always be remembered that to deny the subject a hearing should be the last resort of a court.”

9. 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.”

10. 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 delay of 12 days neither inordinate nor inexcusable in the circumstances of this case. Accordingly, time is hereby enlarged to the applicant to file and serve the memorandum of appeal by the end of the day 10th April, 2019 and default this application will stand dismissed.

11. The Respondent will have the costs of this application.

12. It is so ordered.

Read, signed and delivered in open Court at Machakos this 4th day of April, 2019

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Nzilani for Mr F. M Mulwa the applicant

CA Geoffrey