REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL CASE NO. 88 OF 2006

CHARLES MURIUNGI (Trading as C. M. Steel Erectors) and

GENERAL BUILDING CONTRACTORS.....PLAINTIFF/RESPONDENT

VERSUS

MERCY WANJIRU GACHONGO.....1ST DEFENDANT/APPLICANT

PISGAH LIMITED.....2ND DEFENDANT/APPLICANT

ENGINEER EZIO DUBIM.....3RD DEFENDANT/RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Ms. Kibunja for the Plaintiff/Respondent

Ms. Gicharu Kimani for the 1st and 2nd Defendant/Applicant

RULING

Mercy Wanjiru Gachongo, the applicant moved this court by way of notice of motion dated 7.8.2019 in terms of Section 80 and 3A of the Civil Procedure Act, Order 45 and Order 50 Rule 6 of the Civil Procedure Rules, Section 10 (4) of the High Court Administration and Organization Act 2015 and Rule 17 seeking the following orders:

> ***1. That the Ruling and orders made by this court on 18.6.2019 be reviewed and or varied and the applicant be granted extension of time to comply with the said orders.***
>
> ***2. That costs of this application be provided for.***

It is supported by an affidavit of the applicant which together with annexures she deposes as follows:

> ***a. That the taxing master issued a Rulings on taxation of party to party costs dated 15.3.2018 without which to the applicant and Pisgah Limited.***
>
> ***b. That the applicant and Pisgah Limited, the 2nd defendant and also applicant to this motion were made aware of the Ruling on September 2018.***
>
> ***c. That upon hearing of the Ruling and aggrieved with the certificate of costs she wrote a letter seeking reasons for the decision for purposes of filing a reference.***
>
> ***d. That the Deputy Registrar is yet to provide the 1st and 2nd applicants' Advocate with reasons for the taxation.***
>
> ***e. That the applicant was allowed to file a reference on 18.6.2019 on condition that deposit Kshs.200,000/= be paid to the respondent.***

The respondent on his part filed grounds of opposition couched in the following language:

a). That the application was filed in court on 14th August 2019 and was served on the respondents on 30th September 2019 a delay of 1 ½ months. This is a tactic to ambush the respondent and generally delay the respondent from enjoying the fruits of his Judgment and the attendant decree on a matter that is more than 13 years.

b). That the application is incompetent and without merit in that the applicants have not furnished the court with any new matter or evidence to enable the court review its orders of 18th June 2019.

c). That the applicants have not complied with the express order of the court (Order No. 3) to pay the sum of Kshs.200,000/= within 7 days from the 18th June 2019.

d). That the court order was explicit that non-compliance with Order No. 3 within 7 days from the 18th June 2019 will render the applicants right to a reference be extinguished.

e). That as matter stand, the applicants right to a reference is extinguished and the order now sought are not available.

f). That the instant application is similar to the application filed on the 5th day of October 2018 and whose Ruling is the subject of the instant application and it is therefore res judicata.

g). That in any event the Judgment/debtor holds a money decree which has not been challenged and from her antecedents and her inability to deposit Kshs.200,000/= as ordered the application herein is purely intended as a delaying tactic.

h). That the application is frivolous, vexatious and otherwise an abuse of the process of the court and is meant to delay the Judgment debtor the fruits of his Judgment.

I have considered the motion, the depositions in the affidavit and also grounds of opposition as ventilated by the applicants and respondents to the claim. In determining the crux of the notice of motion the question arose as to whether the applicant has satisfied the criteria to review the Ruling of 18.6.2019.

Analysis and determination

In the instant application I have been asked to review my own orders dated 18.6.2019 which had been obtained by the same applicant out of an interpartes hearing for leave to file a reference out of time.

It is trite that on such matters the court is clothed with unfettered discretion under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules to review its own orders and Judgments. Whereas under Order 50 (1) of the Civil Procedure Rules the court has the power and discretion to extend time if an applicant demonstrates sufficient cause. In this regard the citation of the key provisions of the Law would be appropriate. Section 80 of Civil Procedure Act provides as follows:

"A person who considers himself aggrieved

a). by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b). by a decree or order from which no appeal is allowed by this Act, may apply for a review of Judgment to the court which passed decree or made the order, and the court may make such order thereon as it thinks fit."

The enabling Rule in regard to the provisions of Section 80 of the Act are to be found in Order 45 which reads as follows:

"That being aggrieved with the Judgment or order of the court, the exercise of discretion in the court adjudicating the issues that tend to bring the interpretation of Section 80 into perspective shall take into account the following elements: the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason apply for review."

As to the power of the court to extend time Order 50 Rule (1) of Civil Procedure Rules provides that:

"Where by these Rules or by any Judgment or order given or made, time for doing any act or taking any proceedings is limited by months and where the word "month" occurs in any document which is part of any legal procedure under these Rules, such time shall be computed by calendar months unless otherwise expressed.

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."

Whereas, Section 1A of the Civil Procedure Act intended to oxygenate the fair administration of justice in resolution of civil disputes does provide as follows:

> ***"The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."***

A careful interpretation has been undertaken by the court in developing guidelines and principles associated with Order 50 (1) (6) on the courts power and jurisdiction to extend time where particular cause of action has lapsed due to effluxion of time. In the case of **Nicholas Salat v Independent Electoral & Boundaries Commission & 7 Others [2014] KLR-SCK** the Supreme Court formulated and fashioned 7 principles to be used as a yardstick in exercising discretion to extend time.

> ***"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;***
>
> ***1. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
>
> ***2. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
>
> ***3. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;***
>
> ***4. Whether there would be any prejudice suffered by the respondents if the extension was granted;***
>
> ***5. Whether the application had been brought without undue delay; and***
>
> ***6. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.***

Whether the applicant has satisfied the criteria for the court to extend time was also earlier on discussed in the case of **Mugo and others v Wanjiru and another [1970] EA 484** where **President Duff** stated thus that:

> ***"Each application must be decided in the particular circumstances of each case but as a general rule, the applicant must satisfactorily explain the reason for the delay and should also satisfy the court as to whether or not there will be a denial of justice by the refusal of granting the application."***

The 1st issue is whether there should be condonation to extend time limit pursuant to the Ruling of this court dated 18.6.2019?

The consideration in this matter is regulated by Order 50 Rule (1) and 6 of the Civil Procedure Rules as elaborated in the **Nicholas Salat (supra) and Mugo (supra)** proof of sufficient cause, reasons for the delay and for any other reason have been considered to be key elements for the exercise of discretionary jurisdiction.

The genesis of the current application can be traced way back to the chamber summons filed in court on 5.10.2018 by the applicant seeking the following orders:

> ***1. That the honorable Court be pleased to order a stay of execution of the certificate of taxation pending the interpartes hearing of the intended reference.***
>
> ***2. That the honorable Court be pleased to grant leave to the applicants herein to file a reference of out of time.***

In accordance with the Rules the court is empowered to exercise such a discretion to advance substantive justice.

In this context stay of execution of the certificate of taxation was granted to the applicant pending the determination of the reference under Rule 11 (1) of the Advocate Remuneration Order. Further in accordance with the same rules and the principles of Law extension of time was granted the applicants to file the reference.

As a condition precedent to the above substantive orders the applicants were required to deposit Kshs.200,000/= within 7 days from the 18th June 2019. Secondly, upon compliance with the deposit order, a reference was to be filed within 14 days for hearing and determination.

It will be noted from the record that the applicants in essence did not comply with the said orders nor filing the reference from the impugn decision of the taxing master.

The position in Law as I understand is that the exercise of discretion has to be done in consonance with constitutional principles under Article 50 2 (e) to have ones trial begin and concluded without unreasonable delay and Article 159 (2) (b) which provides that ***"justice shall not be delayed.*** "The jurisdiction to extend time is therefore predicated within the context of these rights embodied in the constitution.

In respect of this application, the tests to be considered are; First, whether or not the applicants have shown good and sufficient cause for non-compliance with orders and timeliness.

What constitutes sufficient cause the Court of Appeal of Tanzania rendered its decision in the case of **The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others:**

> ***"It is difficult to attempt to define the meaning of words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice when no negligence or inaction or want of bona fides is imputed to the appellant."***

In the matter at hand whether an extension of time to comply should be granted to the applicant from the annexed affidavit and averments in terms of the above principles sufficient and good cause has not been demonstrated to render judicial discretion under Order 50 (1) (6) of the CPR. In the first application the applicant was desirous of prosecuting a reference from the impugned Ruling of the Deputy Registrar. This is what made the applicant seek extension of time in the first place. To our dismay the applicant intended reference has not been filed despite having been granted extension of time. The submission for review clearly shows that the applicant is not aggrieved with any part of the decision delivered on 18.6.2019 save for a second set of application to extend time. If an applicant who has lodged an application to file a reference out of time and in the exercise of the court's discretion is granted leave to institute such an action within a reasonable time but fails to do so can she be said to be a diligent litigant. On this point, the affidavit from the applicant has neither attempted to show any sufficient cause or reason why she failed to lodge the reference or comply with the conditional order on deposit.

It is quite clear from the ruling that the applicant had accumulative computation of time of 21 days to specifically deposit Kshs.200,000/= and correspondingly file the reference together with the issues challenging the certificate of costs. The applicant has the burden of proof to show that she exercised due diligence to get the application for enlargement of time with the orders of this court. I take judicial notice that the regime of time being complained of expired even before the High Court vacation calendar commenced and statutorily the applicant had a right to file the necessary motion to extend time to comply with the aforesaid orders during the vacation.

I am of the view that applicant has not shown good and sufficient cause why she did not take the necessary steps within time to file an application to extend time. The non-compliance with the order of the court in a Judgment or Ruling cannot be considered to be a mere irregularity which can be ignored under the doctrine of substantive justice. I consider time to be a vital ingredient for the fair administration of justice whose final outcome is delivery of substantive justice in bringing litigation to a finality.

The Supreme Court of Uganda in **Kasirye Byamunga & Co. Advocates v Uganda Development Bank CA No. 2 of 1997** held in regard to Article 126 (2) (e) of the Ugandan Constitution with similar provisions under Article 159 (2) (c), of Kenyan constitution stated that:

> ***"The constitution enjoins courts to administer substantive justice without undue technicalities. This Article is not a magic wand in the hands of a defaulting litigant."***

One cannot possibly disagree from the record and affidavit evidence that the applicant is guilty of inordinate delay and equally deserves no remedy from this court.

Normally, the court would invoke the overriding objective under Section 1 A of the Civil Procedure Act and in the doctrine of the interest of justice step in to salvage a dispute likely to abate due to effluxion of time. However, to my dismay, the applicant has provided no evidence to this court on this specific aspect of the application to condone the delay and grant the orders for extension of time.

Whether this court can exercise jurisdiction to extend time pursuant to the oxygen principle in Section 1A as read with Section 1B of the Civil Procedure Act, is a burden of proof vested with the applicant to do so to the satisfaction of the court so as to obtain Judgment.

I take the similar view with that is found in the persuasive decision from England in the case of **Commissioner of Constitutions and Excise East wood care Homes (Likeston) Ltd & others [1997 -1998] all England official Transcripts** delivered on 18.1.2000 by **Lightman J** as follows:

> ***"The position, however, It seems to me has been fundamentally changed, in this regard, as it has in many areas, by the new rules laid down in the CPR which are a new procedural code. The overriding objective of the new rules is now set out in PTI – namely, to enable the court to deal with cases justly, and there are set out thereafter a series of factors which are to be borne in mind in constraining the rules, and exercising any power given by the rules, it seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The power today is that each application must be viewed by reference to the criterion of justice and in applying that criterion. There are a number of other factors, some specified in the rules and some not, which must be taken into account: in particular, regard must be given, firstly, to the length of the delay, secondly, the explanation of the delays, thirdly, the prejudice occasioned by delay to the other party, fourthly, the merits of the appeal. Fifthly, the effect of the delay on public administration, Sixthly, the importance of compliance with time limits bearing in mind that they are there to be observed."***
>
> ***Seventhly, in particular when prejudice is alleged the resources of the parties."***

Indeed, these principles of jurisprudential regime on overriding objective and extension of time as applied in the recent case by the Supreme Court in **Nicholas Salat (supra)** sets the necessary guide in exercise of discretion so as to meet the ends of justice. In adopting this view although the applicant moved this court in terms of Section 80 of the Civil Procedure Act, the intent was to seek extension of time through the back door based on the breach of the terms of the Ruling of this court dated 18.6.2019 to file a reference within stipulated time of 14 days. From the record that action has not been put in motion hence the necessity of the instant application.

The court is faced with a scenario where none of the conditions in the Ruling have been complied with and no justifiable excuse has been fronted to mitigate the blatant disobedience of a court order. There was adequate opportunity for the applicant to remedy the right and

enlarging time within a reasonable period before expiry of 21 days. Further, I do not think for a moment that the absence to provide reasons by a taxing master should be a bar for the applicant to file a reference. I must hasten to add that the failure to give reasons by the taxing master may as well be one of the grounds upon which a reference can be entertained by the appellate Court.

I am in no way supporting the applicant contention either in her earlier application of June 2018 and the instant motion that failure to be supplied with reasons must be good and sufficient cause to exercise discretion in her favor. Such a line of submissions runs against the constitutional canons on expeditious and speedy trials. On this ground alone the application is denied.

Whether the applicant can succeed under Section 80 of the Civil Procedure Act?

The court's power and jurisdiction as earlier mentioned is to review its own decision is provided for in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. The embodiment of these provisions in exercising discretion to review a Judgment or order of the court is premised on discovery of new and important matter after the exercise of due diligence which was not within the knowledge of the applicant. It was on these principles the applicant under pinned the application for extension of time. The very question featured in the case of **National Bank of Kenya Ltd v Ndungu Njau [1996] KLR 496** the court held that:

> ***"An order cannot be reviewed because it is shown that the Judge decided the matter on a foundation of in correct procedure, and or that the decision revealed misapprehension of the filed, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other Judge coordinate jurisdiction and even the Judge whose order is sought to be reviewed have subsequently arrived at a different decision on the same.***
>
> ***A review may be granted whenever the court considers that it is necessary to correct an apparent error, or omission on the date of the court. The error or omission must be self-evidence and should not require an elaborate agreement to be established. It will not be a sufficient ground for review that another Judge would have taken a different view of the matter. Nor can it be agreed for review that the court proceeded on an incorrect exposition of the Law and reactivated an erroneous conclusion of law, misconstrued statutory or other provisions of law cannot be a ground for review."***

It is trite that a Court has the power to review its own decision provided the applicant brings himself within the threshold of the above principles. In the case of **Nyamogo & Nyamogo Advocates v Moses Kipkolon Kago CA No. 332 of 2000** The Court of Appeal stated as follows on this issue:

> ***"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case."***

In the instant case, the fact of the matter is that the applicants were dissatisfied with the decision of the taxing master on the party to party bill of costs. Having considered the application, affidavit in support and the genesis of the claim, I am of the conceded view that the applicant has not availed new evidence or discovery of material evidence which was not available at the time the decision was made by this court to warrant a revisit and reopening of the proceedings on the same set of facts. It is not a question for an applicant to invoke the provisions of a statute without providing cogent evidence on its infringement being pointed out to the court to vitiate the order or the decision.

The controversy in this application is about non-compliance with the orders of the court issued in her favor to exercise their right of appeal. Notwithstanding, the orders of the court to an extension of time and stay of execution no positive step has been taken to have the reference determined on the merits. The position of the applicant is entirely precarious that she should not be given more time when she has not shown that because of extenuating circumstances which contributed to her conduct to delay the action. This court would have been more sympathetic if there was good and sufficient cause that she lost the opportunity to conduct her case diligently due to mistake, negligence, oversight, error on part of counsel or for any other justifiable excuse. See the case of **(Banco Arabe Espanol vs Bank of Uganda SCCA No. 8 of 1998).**

Further, even if am wrong in this analysis in a nutshell with regard to this notice of motion the doctrine of Res judicata in Section 7 of the Civil Procedure Act bars the applicant from litigating on the same issues over the same subject matter.

Be that as it may be the applicant has no case on the merits for this court to exercise discretion to grant orders as prayed for in the notice of motion dated 7th August 2019. Accordingly, its therefore for dismissal with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF OCTOBER 2019.

.....

R. NYAKUNDI

JUDGE

In the presence of:-

Mr. Kimani for the 1st & 2nd Applicants

Ms. Kibunja for the Respondent