



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 after 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. The applicant is back before this court vide an application dated 22nd October, 2019 seeking the following orders;

- 1) That service of this application be dispensed with and this application be certified urgent and the same be heard ex parte in the first instance.**
- 2) That the orders of stay of execution issued by Honourable Justice George Odunga on 23rd September, 2019 be and are hereby extended pending the hearing and determination of this application.**
- 3) That the orders of stay of execution issued by Honourable Justice George Odunga on 23rd September, 2019 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.**
- 4) That the costs of this application be costs in the cause.**

3. According to the applicant, it only managed to obtain a copy of the ruling on 14th October, 2019 and extracted the order on 17th October, 2019. It was deposed that it has initiated the process of opening a joint account as directed and in this respect it wrote to the Respondent's advocates on 14th October, 2019 requesting for the necessary documents to enable the opening of the said joint account but the Respondents are yet to respond to the said request. It was however disclosed that the applicant had filed in account opening forms and was awaiting the documents from the Respondent's advocates to complete the process. However, the 30 days period allowed by the court was about to lapse and the applicant was reasonably apprehensive that it would not complete the process within the stipulated timelines hence the present application.

4. The application was however opposed by the Respondent. According to the Respondent, no reason has been given as to why time should be extended for opening a joint account to deposit he decretal sum and why there was a delay in the first place. It was deposed that that the applicant's application for extension of time and stay stood dismissed ten (10) days after the delivery of this court's ruling on 23rd September, 2019 and that the period granted by the court for filing and serving of the memorandum of appeal lapsed o 3rd October, 2019 and that period was neither extended nor has an application been made to do so.

5. According to the Respondent the applicant has been engaging in abuse of the court process ever since the lower court's judgement was delivered by going to sleep and only waking up to apply for extension of time with the sole aim of punishing the Respondent.

Determination

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

7. 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.

8. 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 contended that since the applicant did not comply with the timelines given by this court within which to file and serve the memorandum of appeal, it follows that both the applications for extension of time to lodge the appeal and for stay stood dismissed ten days after the ruling. That may be so. However, that does not necessarily deprive this court of the jurisdiction to extend time. In my view since the above 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 though the earlier application is deemed as dismissed, 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.

9. 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 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.

10. 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.

11. 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.

12. 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. As was held by **Bosire, JA** in **Mwakwere Chirau Ali vs. Ayub Juma Mwakesi & 2 Others Civil Appeal No. 80 of 2008:**

“Where as here a party deliberately misleads the Court with a view to circumventing the clear provisions of the law, the court ought not and should not allow him to benefit from his own doing.”

13. 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.

14. 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.

15. It follows that this application is unmerited, it fails and it is dismissed with costs to the Respondent.

16. It is so ordered.

Read, signed and delivered in open Court at Machakos this 19th November, 2019

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mbilo for Mr Mulu for the Respondent

Mr Ngome for Mr Oyoo for the Applicant

CA Geoffrey