



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 10 OF 2012**

**MOFFAT NZYUSYO MATOLO.....APPELLANT**

**VERSUS**

**JOSHUA MUTAITI SOMBA.....RESPONDENT**

**RULING**

1. On 23<sup>rd</sup> January, 2019, this court directed that the record of appeal be prepared and served within 21 days and in default the appeal would stand dismissed with costs. The matter was then listed for 20<sup>th</sup> February, 2019. On that day, the court was informed that counsel for the appellant had not been supplied with types proceedings and that the lower court was missing. Accordingly, the appellant sought for more time. However, since the order issued on 23<sup>rd</sup> January, 2019 was self-executing in the absence of an order extending time, the court confirmed that the appeal stood dismissed with costs.

2. In the present application the applicant/appellant seeks an order that the time given by the court vide the orders made on 23<sup>rd</sup> January 2019 to compile the record of appeal within 21 days be extended for a further period of 30 days.

3. In this application, it is contended by the applicant that the cause for delay in compiling the record of appeal was because they were not able to get the lower court file in time despite numerous attempts to do so. It was averred that while making the order for dismissing this appeal, though the court stated that the lower court file was now available, the file that was available together with the appeal file is not the correct file. To the Appellant while this appeal emanates from the decision made in CMCC No. 772 of 2009 the file that was available was CMCC No. 1029 of 2008 to 772 of 2009. Therefore, the lower court file that the appellant needs is CMCC No. 772 of 2009 and this file has not been available to the appellant and the file that has been forwarded to the high court is CMCC No. 1029 of 2008 which is the wrong file.

4. It was contended that the court in dismissing this appeal mistook the file CMCC No. 1029 of 2008 for 772 of 2009 which was an error apparent on the face of the record hence making an order to dismiss the appeal. The court was therefore urged to review his order based on this ground, set aside the orders to dismiss this appeal and reinstate the same. The Court was further urged to extend the time granted to compile the record of appeal in respect of CMCC no. 772 of 2009 as opposed to CMCC No. 1029 of 2008.

5. In opposing the application, the Respondent averred that the applicant has not been keen in prosecuting the appeal since the first letter requesting for proceedings was one year after the appeal was filed while the second later was four years later and was only prompted by the Respondent's application seeking to dismiss the appeal for want of prosecution. It was therefore contended that the applicant has acted indolently and as a result delayed the prosecution of the appeal. To the Respondent the applicant has had more than 7 years to prosecute his appeal and has not demonstrated that his conduct would be any different if this application is allowed.

6. Without going into the merits of the matter, it is clear that the order made on 23<sup>rd</sup> January, 2019 was what is known as "unless order".

**Determination**

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

8. The main and only ground for seeking extension of time is that the applicant was unable to file the record of appeal due to the unavailability of the proceedings from the lower court and that the proceedings relied upon when the court granted the appellant 21 days to file the record were not the proceedings appealed from.

9. 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.*

10. 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. In my view since the said 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. In this case the order that was issued on 23<sup>rd</sup> January, 2019 is the kind of order commonly referred to in legal parlance as "unless order". That is my understanding of the decision in Samuels vs. Linzi Dresses Ltd. (1980) 1 ALL ER 803 where it was held that:

**"A court has jurisdiction to extend time where "unless" order has been made and not complied with, but the power is to be exercised cautiously and with due regard to maintaining the principle that orders are made to be complied with and whether to grant the extension or not is within the discretion of the Judge."**

11. 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 be 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.

12. In this case, the reason advanced by the applicants for not complying with the order of this court has not been seriously disputed. The only issue taken by the Respondent is that the applicant has in the past been indolent in filing the record. It was however the realisation that the applicant has taken too long in lodging the appeal that the said "unless order" was made. However, it is clear that the basis upon which the order was made was erroneous as the court relied on the fact that proceedings were by then available when the proceedings that were available were for a different matter.

13. In Re Jokai Tea Holdings Ltd. (1993) 1 ALL ER 630 it was held that:

**"Where the Court has to decide what consequences should follow from non-compliance with an order that a pleading be struck out unless further and better particulars are served within a specified time, the relevant question is whether such failure to comply with the "unless" order is intentional and contumacious...The court should not be astute to find excuses for such failure since obedience to such peremptory orders is the foundation of its authority, but if the non-complying party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, the failure ought not be treated as contumacious and ought not to disentitle him to the rights which he would otherwise have enjoyed."**

14. 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."**

15. Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure. In this case, I did not hear the Respondents contend that if the application is allowed they will suffer such prejudice that cannot be compensated by an award of costs. Yes, the appeal has taken quite a long time to determine and the appellant has not been "aggressive" in pursuing the same. However, I cannot entirely place the blame on the appellant's doorstep in the absence of the evidence that the material proceedings were available. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.

16. In the premises, I find this application merited. Accordingly, I hereby revive this appeal, and extend time within which the appellant is to lodge the record of appeal with a further period of 30 days.

17. As the Appellant did not comply with the court's directions to furnish soft copies, the applicant will bear the costs of this application and the Respondent is at liberty to have the same taxed forthwith.

18. It is so ordered.

**Ruling read, signed and delivered in open Court at Machakos this 21<sup>st</sup> November, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the absence of the parties**

**CA Geoffrey**