



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA MERU**

**CIVIL APPEAL NO. 88 OF 2018**

**ACE ENGINEERING & BUILDING CO. LTD.....APPELLANT**

**VERSUS**

**NATIONAL BANK OF KENYA LTD.....RESPONDENT**

**RULING**

1. The parties in this matter were in a business relationship whereby, the respondent extended some financial accommodation to the appellant. It would seem that for some reason, the appellant defaulted and the respondent sought to realize its security. The appellant rushed to the **Maua CM's Court in ELC Case No. 65 of 2018** seeking an interlocutory injunction. By a ruling delivered on 20/7/2018, the lower Court dismissed that application.

2. Aggrieved by that decision, the appellant lodged a Memorandum of Appeal before this Court on 17/8/2018 challenging the same. Simultaneous with the filing of the Memorandum, the appellant filed an application for injunction pending appeal under **Order 40 of the Civil Procedure Rules**. That application was dismissed by Gikonyo J on 16/5/2019.

3. In the meantime, the trial Court sent the original record together with typed proceedings to facilitate the hearing of the appeal. The file was placed before me on 29/5/2019 for the admission of the appeal under **Section 79 of the Civil Procedure Act** and for further directions. Although the Form that shows that the appeal was admitted to hearing is missing from the cover of the Court file, the appeal was admitted for hearing and the Court directed that the matter be mentioned on 3/6/2019 for directions and the parties be served.

4. The parties were duly served on 30/5/2019 and the matter was listed for directions under **Order 42 of the Civil Procedure Rules** on 3/6/2019 as directed. On that day, neither the appellant nor its advocate appeared, although served. Mr. Kimaita Advocate for the respondent appeared.

5. On the said date, the Court gave the following directions:-

***"1) The date of 3<sup>rd</sup> October, 2019 is hereby vacated.***

***2) Record of Appeal be filed and served within 14 days of today in default the appeal stands dismissed.***

***3) The appeal be determined by way of written submissions.***

***4) The appellant to file and serve written submissions within 14 days of today.***

**5) The respondent to respond thereto within 7 days of service.**

**6) Time is of the essence.**

**7) Mr. Kimaita to personally notify the Appellant's Advocates on phone and in writing the contents of these directions within 3 days of today.**

**8) Hearing on 5/7/2019 before Chitembwe J”.**

6. The record shows that on 6/6/2019, the respondent's advocates communicated the aforesaid directions to the appellant's advocates by way of a letter dated the same day and in which the extracted order was enclosed.

7. The Record of Appeal was filed on 1/7/2019 and when the appeal came up for hearing before Chitembwe J on 5/7/2019, the respondent objected to the hearing on the basis that the appeal stood dismissed. On that basis, Chitembwe J ordered that the matter be placed before me on 5/9/2019 for me to deal with it as the directions that had been breached had been made by me.

8. When the matter came up on the said 5/9/19, the court observed that according to **direction no. 2** of the directions of 3/6/2019, the appeal stood dismissed on 18/6/2019 when the 14 days given expired. The Court therefore observed that in the premises, there was nothing before it to consider and that there was no application on record for extension of time.

9. The foregoing is then the background to the application before me dated 19/9/2019 which is the subject of this ruling. The Motion was expressed to be brought under **sections 3 and 3A of the Civil Procedure Act and Order 12 Rule 3 of the Civil Procedure Rules**. In the Motion, the appellant sought the following prayers: -

**“1. ...**

**2. THAT this Honourable Court be pleased to set aside/vary its orders made on 5<sup>th</sup> July 2019 dismissing this suit and reinstate the same for hearing.**

**3) THAT the record of appeal dated 28<sup>th</sup> June 2019 and filed on 1<sup>st</sup> July 2019 and the Appellants submissions dated 4<sup>th</sup> July 2019 and filed on 5<sup>th</sup> June 2019 (sic) be deemed duly filed.**

**4) THAT upon grant of prayer 2 above this Honourable Court be pleased to extend the time within which the appellant/applicant can file the record of appeal/supplementary record of Appeal and submissions on the appeal therein and grant any other order as the court may deem fit/necessary towards hearing and determination on merit of the appeal herein.**

**5) ...”.**

10. The application was supported by the affidavit of **Shadrack Kimathi Ntarangwi** sworn on 18/9/2019. He averred that the appeal was dismissed on 5/7/2019 on account of non-compliance with the Orders dated 6/6/2019 which Orders were given in the absence of the appellant and his counsel. That the two day notice given to the appellant's advocates for court attendance was too short.

11. He contended that due to pressure of work and the delay in the procuring the typed proceedings, the record of appeal could not be filed on time. That the directions gave specific timelines which was too short. That the appellant stands to suffer irreparable damage unless the appeal is reinstated and heard on merit since the charged property could be auctioned yet it is the deponent's matrimonial home.

12. The application was opposed by the respondent through the replying affidavit of **Anne Murithi** sworn on 15/10/2019. She averred that the Orders sought to be varied and/or set aside were a mere re-affirmation of the Orders issued on 03/06/2019 as the appeal stood dismissed on 18/06/2019. There was

no order of 5/7/2019 dismissing any appeal.

13. That the appellant had not advanced any good reasons why there had been non-compliance with the directions of this Court. That the appeal had no chances of success and the main suit is still pending and no attempts had been made for its disposal.

14. The parties filed their respective submissions which the Court has duly considered.

15. The application as sought is a non-starter. None of the provisions cited in the motion do give this Court any jurisdiction to grant the prayers sought. **Sections 3 and 3A of the Civil Procedure Act** merely provide for the discretion of the Court which is inherent. **Order 12 Rule 3 of the Civil Procedure Rules** provide for dismissal of suits or applications for non-attendance. There was no any dismissal of any matter for non-attendance.

16. The correct provision should have been **Order 50 Rule 5 of the Civil Procedure Rules** which provides for extension of time. The jurisdiction of this Court having not been invoked, I doubt if it can be properly exercised. Rules of procedure are the hand-maidens of justice. I doubt if the saving provisions of **Article 159 (2)(d) of the Constitution** can save the application.

17. Even if the Court disregarded the failure to properly invoke its jurisdiction and consider the same as a mere technicality, can the prayers sought be granted? I do not think so. The appellant has sought that the order made on 5/7/2019 dismissing the suit be set aside or be varied.

18. From the background given at the beginning of this ruling, there was no order that was made on 5/7/19 dismissing this appeal. The order made on that day only directed that the matter be mentioned before this court on 5/9/2019 for directions.

19. The orders which the appellant should have applied to set aside or vary are the orders of 3/6/2019 as confirmed on 5/9/2019. Although the issue was raised by the respondent in its replying affidavit, there was no application to amend the Motion. This Court cannot amend the same *suo motto*. It would be prejudicial to the respondent.

20. Notwithstanding the foregoing grave shortcomings in the application, I propose to consider the application on merit. This is an application for extension of time. The principles applicable are well known, *the Court will consider the length of time, reason for the delay, the chances of success of the appeal and the prejudice, if any, to be suffered by the other party if the orders sought is granted.* (See **Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission and 5 Others [2013] eKLR**).

21. As for the length of the delay, there are two periods to consider in the present application. The first period is between the time the appellant was supposed to have complied with the directions of 3/6/2019 while the second one is, the time taken to lodge the present application.

22. The appellant was supposed to have filed and served the Record of Appeal by the 18/6/2019. It filed the record on 1/7/2019. That was 12 days out of time. Since the order of 3/6/2019 was self-executing, as it had a default clause, the 12 days were inordinate. There was no explanation that was offered for that delay.

23. The second period was between 18/6/2019 and 19/9/2019 when the present application was lodged. That was 90 days. That delay was inordinate. It required an explanation.

24. From the supporting affidavit, the reason advanced was that the timelines given by the Court was too short to be complied with. That there was a delay in obtaining the typed proceedings from the trial Court.

25. Firstly, the advocate did not swear any affidavit to explain the so called pressure of work that held him back from complying with the directions given. Secondly, by the time the appeal was being admitted

on 29/5/2019, the typed copies of the proceedings together with the original Court file were in the appeal file in Meru. Thirdly, the appellant and its advocate were served with the notice for the court attendance of 3/6/2019 but chose not to attend for no reason at all. They were notified of the directions of the court on 6/6/2019 and had 12 days to comply with the same but did nothing. Fourthly, it was not disclosed when the typed proceedings were obtained.

26. The period between 18/6/2019 and 19/9/2019 was completely not explained. It was not clear why the appellant waited from 5/7/2019, when it learnt that the respondent was keen to insist on the enforcement of the directions of 3/6/2019, until 19/9/2019 to lodge the present application. No reason having been proffered for that delay, there is no good reason to exercise the discretion in favour of the appellant.

27. There was a complaint that the notice period between 30/5/2019 and 3/6/2019 was too short. Under **Article 159 (2) (b) of the Constitution**, justice is not to be delayed. There was no evidence that the distance the advocate was to cover between 30/5/19 and 3/6/19 was too onerous. In this regard, the 2 days was sufficient for the appellant's advocate to have appeared.

28. On the chances of success of the appeal, Gikonyo J was of the view in his ruling of 16/5/2019 that it has none. I propose to say no more about it.

29. The applicant has argued that the Orders issued on 5<sup>th</sup> July, 2019 dismissed the suit in its entirety. From the record, this is not the position. The Orders made on 03/06/2019 were self-executing and I am therefore inclined to agree with the respondent's averment that the directions made on 05/09/2019 were but a re-affirmation of the directions issued on 03/06/2019.

30. The applicant argued that the delay was occasioned by the trial court not processing the proceedings in time. The Court notes that by the time the directions of 3/6/2019 were being given, the trial Court's record was ready before this Court with the typed proceedings. It is therefore not true that there was any delay in having the proceedings processed by the trial Court.

31. Accordingly, the application dated 18/09/2019 is without merit and the same is hereby dismissed with costs to the respondents.

**DATED** and **DELIVERED** at Meru this 11<sup>th</sup> day of December, 2019.

**A. MABEYA**

**JUDGE**