



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 378 OF 2017

GROWTH AFRICA (K) LIMITED

ERASTUS MBAU KALISEE.....APPLICANTS

Versus

CHARLES MUANGE MILU

(suing as the legal administration in the estate of

TERESIA MUTONO MUANGE (DECEASED).....RESPONDENT

RULING

1. The Applicant herein vide a Notice of Motion dated 16/11/2017 seeks for an order that this court extend the time within which the Applicants may file their Memorandum of Appeal from the judgement in **Kithimani RMCC NO. 161 of 2015 CHARLES MUANGE MILU** suing for and on behalf of the estate of **THERESIA MUTONO MUANGE – deceased) =VS = GROWTH AFRICA (K) LTD AND ERUSUTS MBAU KALISEE.**

2. The Application is supported by an annexed affidavit of Joseph Mwai Senior Claims Officer of the Applicants underwriters sworn on even date in which he deposed inter alia that the delay to lodge the appeal on time was caused by extensive consultations by the underwriter, that the Applicant will be locked out of justice if the court does not extend time within which the appeal should be filed, that the Applicant be given an opportunity to fully ventilate their intended appeal, that no prejudice shall befall the Respondents should time be enlarged as costs would be sufficient compensation and lastly that the Respondent has already filed a declaratory suit being **Kithimani RMCC No. 95 of 2017** against the Applicants underwriters.

3. The Application was strenuously opposed by the Respondent who raised the following grounds of opposition:-

- i. The suit sought to be appealed again was properly defended by the Applicant to its logical conclusion and even entered into a consent on liability.
- ii. The Applicant having failed to settle the judgment and having been notified by the Respondent that a declaratory against its insurers, the same was subsequently filed and which proceed to judgment.
- iii. That upon levying execution on the declaratory judgement, the Applicants insurers rushed to court and secured a stay and subsequently the declaratory suit was set down for pre-trial directions only for the Applicants to file the present Application.
- iv. The Applicants are making the present application almost one year down the line after the judgement in the primary suit had been delivered.
- v. The Applicants and their insurer have been abusing the court process by filing various applications with the sole aim of avoiding and evading to settle the decretal sum and costs.
- vi. The Applicants have not given good reasons as to why they did not lodge appeal on time since practically no consultations can take almost over year between the Applicants and their insurers.
- vii. The Applicants are guilty of inordinate delay.

viii. The application has been brought in bad faith and should be dismissed.

ix. That in the event the court is inclined to grant the leave sought by the Applicants, the Applicants should be ordered to pay the Respondents two thirds of the decretal sums plus costs and interest in the primary suit and the balance be deposited in a joint bank account in the names of the Advocates for the Applicants and Respondent .

Submissions:

4. It was submitted for the Applicant that the Applicant's underwriter had been involved in extensive consultations which ran beyond the 30 days right of appeal and it would be prejudicial to deny the Applicant an opportunity to fully ventilate the appeal. It was also submitted that the delay was not inordinate as reasons therefor have been furnished and that the appeal is arguable in the sense that the trial court erred in failing to discount the award under the law Reform Act as the beneficiary was the same as well as on the aspect of the multiplier applied. It was finally submitted that any prejudice suffered by the Respondent would be compensated by an award of costs. The following cases were relied upon namely:-

(a) **SHAH =VS= MBOGO & ANOTHER [1967] EA 116**

(b) **JOHN GAKOBO MACHARIA VS KENYA POWER & LIGHTING & CO.LIMITED [2009]**

5. It was submitted for the Respondent that the Applicant has not given sufficient reasons for the delay warranting this court to exercise its discretion in its favour since they have failed to show that the delay was beyond their control and further failed to present evidence of the alleged consultations yet no such things as correspondences were shown. It was submitted for the Respondent that the Applicant had been aware of the outcome of the primary suit and had been alerted by the Respondent that a declaratory suit would be filed if it did not settle the decretal sums and it was therefore unusual for the Applicant to wait that long to approach this court even after the declaratory suit had been filed and judgement entered. It was finally submitted that the Applicant is not serious and the Application herein is only meant to frustrate the Respondent from realizing the fruits of the judgement.

Determination

6 I have considered the Applicant's Application and the Affidavit in support as well as the replying affidavit of the Respondent. I have also considered the submissions of the learned counsels for the parties as well as the authorities cited. It is not in dispute that judgement in **Kithimani PMCC No. 161 of 2015** was delivered on the 9/2/2017 in favour of the Respondent against the Applicant. It is also not in dispute that upon the Applicants failure to settle the said judgement and decree the Respondent duly filed a declaratory suit against the Applicant's insurers being **Kithimani PMCC No. 95 of 2017** which proceeded and in which a default judgement was entered but which was later set aside and is yet to be heard. The only issue I raise for determination is whether the Applicant has furnished sufficient reasons to warrant this court to allow it to lodge appeal out of time.

7. The only reason given by the Applicant for the delay to lodge appeal against the judgment in **Kithimani PMCC NO. 161 of 2015** is that the Applicant was engaged in extensive consultations with their underwriters. It is noted that the judgment had been delivered on the 9/2/2017 and the appeal ought to have been lodged within 30 days. It is apparent that the Applicant did not lodge the appeal within the statutory period. The present application is dated 16/11/2017 which is a period of over eight months after the statutory period for lodging the Appeal. I find the said period to be quite inordinate since it is not convincing when the Applicant claims that all that period was used up in extensive consultations with its underwriters. Again it is noted that upon the entry of default judgment against the Applicant's insurers vide the declaratory suit **Kithimani PMCC No. 95 of 2017**, the Applicant moved to court vide its application dated 31/07/2017 and managed to set aside the said default judgement. There is no explanation as to why the Applicant then had to wait for about four months until the 16/11/2017 to file the present Application seeking to lodge appeal out of time against the judgement in the primary suit **Kithimani PMCC No. 161 of 2015**. It is obvious that the Applicant had been aware of the said judgment in the primary suit even when it sought to set aside the default judgement in the declaratory suit but it did not bother to move the court in reasonable time. In any event the extensive consultations claimed have not been backed by any documentary evidence such as letters or correspondences. I am therefore inclined to accept the Respondent's submissions that the Applicants have not given good reasons for the delay in lodging the appeal in time.

8. The prayer sought by the Applicants' is a discretionary one and the Applicants' were under obligation to give satisfactory explanation for failure to lodge appeal in time. The averments by the Respondent in the replying affidavit left no doubt that the Applicants had been aware of the progress of both the primary suit as well as the declaratory suit at Kithimani Law Courts but they failed to take proactive steps to file the appeal in time. In the case of **SHAH =VS MBOGO & ANOTHER [1967] EA 116** the court held as follows:-

“ The exercise of discretion is intended so as to be exercised to avoid injustice or hardship resulting from accident inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.”

Again in the case of **BAGAJO =VS= CHRISTIAN CHILDREN FUNDING [2004] 2 KLR 73** Ringera J (as he then was) gave the following guidelines with regard to exercise of discretion as follows:-

“In exercising its discretion, the court's primary concern should be to do justice to the parties. The court should, inter alia consider:

- a. The length of the delay in lodging the notice and record of appeal;
- b. Where applicable, the delay in lodging the Application for extension of time as well as the explanation thereof;

- c. Whether or not the intended appeal is arguable;
- d. The prejudice to the Respondent if the Application is granted;
- e. The public importance, if any, of the matter
- f. Generally the requirements of the interest of justice in the case;
- g. It is for the person seeking the favourable exercise of the discretion of the court to place such material as well as adequately inform the court in the exercise of such discretion. The nature of the case before the superior court, the judgement thereon and reasons for desiring to appeal should be outlined if the court is not to exercise its discretion in the dark.”

9. Looking at the decision of the court and the above authorities *vis a vis* the explanation offered by the Applicants. I find the Applicants have not satisfied this court that they have a good and sufficient reason for failing to file the appeal within time. Indeed the Applicants were alerted by the Respondent’s counsel that a declaratory suit would be filed if payment of the decretal sums was not made. The declaratory suit was duly filed and by the time the Applicants filed the Application dated 31/07/2017 seeking to set aside the default judgment in the declaratory suit, they were fully aware of the judgment in the primary suit. the Applicant did not even bother to file an application for extension of time to lodge appeal out of time and waited for another four months from 31/07/2017 to 16/11/2017 to file the present Application. The Applicant’s claim that all this time they were engaged in extensive consultations with their insurers is not convincing. They were aware that the statutory period for lodging appeal had since elapsed. There was nothing preventing them from filing the appeal since there is no allegation that lower court proceedings had not been supplied to them. There is nobody to be blamed for the delay other than themselves and hence the issue of extensive consultations is likely to be an afterthought stemming from the filing of a declaratory suit by the Respondent.

10. In view of the inordinate delay in bringing the application and coupled by lack of sufficient explanation for the said delay, I find that there is no just cause to warrant this court to exercise its discretion in favour of the Applicants. Consequently the Applicant’s Application dated 16/11/2017 is ordered dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Machakos this 4th day of June, 2018.

.....

D. K. KEMEI

JUDGE

In the presence of:

Wata for Muia - for Respondent

No appearance for Githae - for the Applicant

Josephine - Court Assistant