



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 67 OF 2017

(Coram: Odunga, J)

TABRO TRANSPORTERS LIMITED.....DEFENDANT

VERSUS

FRANCIS NJENGA.....PLAINTIFF

RULING

1. These proceedings, from their inception are improperly intitled. Whereas the proceedings are commenced as Miscellaneous Civil Application, the parties are described as Defendant and Plaintiff respectively. It would seem that the applicant has used the description of the parties in the proceedings before the Magistrate's Court. In proceedings before this Court in the exercise of its appellate jurisdiction triggered by a decision of the Magistrate's Court, the parties are always appellants and applicants on one hand and the Respondents on the other hand. In other words there is no room for plaintiffs and defendants in appellate proceedings.

2. Nevertheless, as no issue was taken by the Respondent in these proceedings regarding the description of parties, I will say no more on that issue at this stage.

3. In these proceedings, the applicant herein, **Tabro Transporters Limited**, seeks in substance, that this Court grants to them leave to file an appeal against the judgement and/r decree in the SPM's Court Mavoko in Civil Case No. 296 of 2014 delivered on the 23rd January, 2017 by Honourable **L A Kassin, SPM**.

4. The application was based on the grounds that upon conclusion of the said suit and the filing of submissions, the case was fixed for judgement on 27th November, 2016 on which day the same was not delivered and no fresh date for its delivery was given. The said judgement was however delivered on 23rd January, 2017 but without notice and in the absence of the parties. Subsequently on 28th February, 2017, the Respondent's advocate served the applicant's advocates with the notice to execute the said decree. The applicant then on 3rd March, 2017 applied for certified copies of the proceedings, judgement and decree and paid the necessary fee. In the meantime on 29th March, 2017 the Respondent proclaimed and attached the applicant's properties giving the applicant seven days' notice of sale by public auction. It was then that the applicant moved the Magistrate's Court and obtained a temporary order of stay of execution.

5. It was the applicant's case that having now obtained the certified copies of the proceedings, judgement and decree it was now ready to file the appeal subject to the time for doing so being extended. It was its view that the delay was not inordinate in the circumstances.

6. In the supporting affidavit the applicant reiterated the foregoing and added that the failure to file the appeal within time was occasioned by the unavailability of the aforesaid documents.

7. On his part the Respondent opposed the application. It was his case that in arriving at his judgement the Court considered all the issues raised and proceeded to pronounce its decision in accordance with the law. It was averred that the applicant and its advocate were served with the decree and the notice to execute. According to the Respondent since the applicant has filed an application for stay of execution before the Magistrate's Court and obtained a stay, no execution is taking place. It was further revealed that the applicant had applied for the review of the lower court judgement hence the intended appeal is an abuse of the court process.

8. To the Respondent, the applicant and its advocates have been aware of the judgement since February, 2017 hence there is inordinate delay on their part and no good reason has been given for the same. It was the Respondent's case that he would suffer prejudice if the application was granted as it would result in him being denied the enjoyment of the fruits of the judgement.

9. The Respondent also took issue with the fact that the supporting affidavit as sworn by the advocate rather than the applicant.

10. In its rejoinder the applicant disclosed that though it applied for a review of the judgement sought to be appealed against, which application was scheduled to come up for hearing on 23rd June, 2017, the applicant withdrew it on 20th June, 2017

Determination

11. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.

12. Section 79G of the *Civil Procedure Act* provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

13. Therefore an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show 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. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

14. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

15. In this case the Applicant contended that though judgement was initially slated for delivery on 27th November, 2016 the same was not delivered and no fresh date for its delivery was given. It was not until 23rd January, 2017 that the same was delivered without notice to the parties.

16. Order 21 rule 1 of the *Civil Procedure Rules* provides that:

In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.

Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment.

17. It therefore follows that parties are entitled to a notice of the date of delivery of judgement and where such notice is not given, that omission may well amount to a sufficient reason for the purposes of enlargement of time to appeal if the applicant moves the Court for regularisation of his position expeditiously. See **Kwach, JA in Zacky Hinga vs. Lawrence Nthiani Nzioki & Another Civil Application No. Nai. 359 of 1996**. In fact the Court of Appeal held in **Ngoso General Contractors Ltd. vs. Jacob Gichunge Civil Appeal No. 248 of 2001 [2005] 1 KLR 737** that:

“The failure by the Superior Court Judge in an application for extension of time to file an appeal, to consider, as a matter of law, whether the Appellant, who was admittedly absent when the Judgement was delivered, was served with notice of delivery of the Judgement was a misdirection...The law under Order 20 r 1 is explicit in terms and mandatory in tone that a Judgement which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates and where only the successful party in the Judgement had prior knowledge of the delivery of the Judgement and no apparent reason was advanced for the failure to serve or to attempt to serve the Appellant or his advocate, the Appellant’s right of appeal was grossly compromised...An order was made by the Magistrate granting a right of appeal within 28 days and directing the party in attendance to inform the other side does not cure the flagrant breach of the mandatory procedural rule which accords with fundamental rules of natural justice and the right to be heard which the Constitution safeguards.”

18. Though the Respondent raised factual issues concerning the averments in the supporting affidavit by way of submissions, without controverting the allegations in an affidavit, the challenges taken in the submissions cannot be taken seriously. It follows that the averment that the applicant was unaware of the date of delivery of the judgement till 28th February, 2017 when the Respondent’s advocate served the applicant’s advocates with the notice to execute the said decree remains unchallenged.

19. It is however clear that the applicant was aware of the delivery of the judgement by 28th February, 2017. According to it, it applied for certified copies of the proceedings, judgement and decree. This Court cannot understand why it was necessary for the applicant to obtain

“certified” copies instead of just copies to enable it appeal. It is similarly not disclosed when the applicant received copies of the aforesaid documents. This application was filed on 10th May, 2017 which was more than two month after being made aware of the delivery of the judgement. In the meantime the applicant applied for review of the judgement which application according to the Notice of Withdrawal was dated 31st March, 2017. One presumes that at least by that date the applicant was aware of the contents of the judgement which it sought to review. Yet it did not take any step towards appealing until 10th May, 2017.

20. In my view the applicant is clearly guilty of unexplained inordinate delay in bringing this application. It would seem that this application was an afterthought. Apart from that though the applicant has exhibited a copy of the Notice of Withdrawal of the application for review there is no evidence that the said intention was in fact endorsed by the Court. In **Theluji Dry Cleaners Ltd vs. Muchiri & 3 Others [2002] 2 KLR 764 Etyang, J** said:

“the legal position is that the Notice of Withdrawal of the earlier suit did not take effect from the date of its filing but from the date it was adopted as an order of the court when it was endorsed by the Deputy Registrar”.

21. In the case of **Riverside Farm Nursery School Ltd & Another vs. The Cooperative Bank of Kenya Limited Nairobi (Milimani) HCCC No. 255 of 2008, Kimaru, J** expressed himself as follows:

“It is clear to the court that the plaintiffs failed to disclose that they had previously filed a suit against the defendant’s predecessor and in the said suit they applied to be granted an order of injunction which application was considered by the court and subsequently dismissed. The plaintiffs were therefore guilty of material non-disclosure. Although the plaintiffs claimed that they had withdrawn the previous suit before filing the present one, it was apparent to the court that the plaintiffs filed a notice of withdrawal of the previous suit a day before the filing of the present suit. There is no evidence that the notice of the withdrawal was endorsed by the court. A suit is only deemed as withdrawn when an order of the court is endorsed in the file approving such withdrawal. A party cannot argue that he has withdrawn a suit on the basis of a notice of withdrawal of suit...The failure by the plaintiffs to disclose to the court the fact that they had previously made a similar application for injunction means that they are undeserving of the exercise of the equitable jurisdiction of the court. It was apparent that the plaintiffs set out to dupe and mislead the court into granting them ex parte interim reliefs pending the hearing and determination of the application. The court’s equitable jurisdiction was invoked by the plaintiffs when they clearly knew that they had unclean hands...In the circumstances it is evidence that the plaintiffs have failed to establish a prima facie case. In fact they have abused the due process of the court in canvassing an application similar to the one that was previously disallowed by the court without disclosing such fact to the court”.

22. Accordingly, there is no evidence that the application for review has been withdrawn.

23. What then are the consequences of that? In the case of **Billy George Ng’ong’ah vs. Khan & Associates Kisumu HCCA No. 47 of 1996** which decision was upheld by the Court of Appeal in **Billy Ngongah vs. Khan & Associates Civil Appeal No. 104 of 2001** it was held that it is an abuse of the process of the Court to bring several applications to challenge the same judgement or order as common sense dictates that a party brings one application at a time, to challenge a Judgement or order.

24. Accordingly, without evidence of proper withdrawal of the application for review of the judgement which the applicant seeks to challenge if time is extended to it, would also amount to an abuse of the process of the court and that would render the instant application incompetent.

25. In the premises I find no merit in this application which I hereby dismiss.

26. As regards costs, although this Court directed the parties to furnish it with soft copies of the pleadings and submissions in word format, none of the parties complied. Section 1A(3) of the ***Civil Procedure Act*** provides as hereunder:

A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

27. One of the overriding objectives of the ***Civil Procedure Act*** is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. Accordingly, there will be no order as to the costs of this application.

28. Before penning off, there is an application dated 22nd February, 2018 seeking stay of execution pending appeal. The fate of the said application was pegged on the outcome of the instant application. As the application for leave to appeal out of time is unsuccessful, it follows that the said application seeking stay pending appeal is stillborn.

29. In the premises, the application dated 22nd February, 2018 is struck out with no order as to costs.

30. It is so ordered.

Read, signed and delivered in open Court at Machakos this 11th day of October, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Macharia for Mr Nyakiangana for the Respondent

CA Geoffrey