



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC NO. 18 OF 2016(FORMERLY HCC NO. 18 OF 2016)**

**KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF/RESPONDENT**

**VERSUS**

**DR. DAVY KIPROTICH KOECH.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**DUNSTAN MAGU.....2<sup>ND</sup> DEFENDANT**

**RULING**

- 1 The Applicant herein Dr. Davy Kiprotich Koech filed a Notice of Motion dated 17<sup>th</sup> November 2018 seeking the following orders:-
  - a) *Spent*
  - b) *The Honourable court be pleased to grant leave to the 1<sup>st</sup> Defendant to appeal the entire Ruling/decision of the court (Hon. Justice R.E. Ougo) dated 15<sup>th</sup> September, 2014.*
  - c) *The Honourable court be pleased to enlarge time for filing of the Notice of Appeal and any other relevant documents towards the intended appeal.*
  - d) *The Notice of Appeal herein be deemed to have been properly filed.*
  - e) *The Honourable court be pleased to order a stay of further proceedings and in any consequential order/decree in the matter, pending hearing and determination of the 1<sup>st</sup> Defendant's application herein and the intended Appeal.*
  - f) *Costs.*
- 2 The above application was supported by the affidavit of the 1<sup>st</sup> Defendant averring that vide a plaint dated 2<sup>nd</sup> June 2010 the Plaintiff sued him alongside the 2<sup>nd</sup> Defendant for alleged misappropriation of funds. Thereafter, the Plaintiff was also allowed to amend it's Plaint sometimes on 25<sup>th</sup> April, 2012.
- 3 Meanwhile, vide a Notice of Motion dated 23<sup>rd</sup> December, 2010 he filed an application seeking to strike out the suit since the same was scandalous, frivolous and an abuse of the court. However, on 14<sup>th</sup> September 2014, the Court delivered a Ruling in the matter dismissing his Notice of Motion with costs to the Plaintiff.
- 4 He contended that the said ruling was delivered in the absence of his counsel and neither did his previous counsel inform him that the ruling was ever delivered. During this period, the Plaintiff had already caused cautions to be registered against all his properties and he could not transact on any of them. Apparently, there was a life threatening medical situation in his family which needed a substantial amount of money so, he requested the Plaintiff to release one of his assets to enable him sell it in order to raise funds.
- 5 He accuses the Plaintiff of coercing him on 22<sup>nd</sup> January 2016 to sign a consent in the matter by promising him that the whole suit would be settled. The Plaintiff gave him a condition that led to preparation of a consent which according to him was ill- advised and done in a hurry under extreme coercion, duress, desperation and psychological trauma.
- 6 He thus contended that it was only this year upon appointing his Advocates (DKK 1a and DKK -1b) herein that they perused the file and

told him that his application of 23<sup>rd</sup> December 2010 had been dismissed.

7 It was thus his contention that a mistake of an advocate should not be visited upon a client and that he had an arguable Appeal which raises weighty issues of law and fact; that he should be allowed an opportunity to ventilate it fairly on appeal and that the Respondent will suffer no prejudice should the instant application be allowed.

8 A summary of the grounds is that:

1. The 1<sup>st</sup> Defendant/Applicant has always been represented by Counsel who should have advised him appropriately.

ii. There is inordinate delay which has not been explained.

iii. The intended Appeal is an apparent collateral challenge to the consent entered into between the Plaintiff and 1<sup>st</sup> Defendant and adopted on 18<sup>th</sup> January 2016. There is partial judgment as a result of the consent.

iv. That the Notice of Motion is a delaying tactic to the execution of the decree herein. That the 1<sup>st</sup> Defendant has made similar applications in the past.

v The interest of justice demands that the application be dismissed.

9 Mr. Midenga for the 1<sup>st</sup> Defendant submitted that the 1<sup>st</sup> Defendant filed an application in 2010 for the claim against him to be struck out but his application was dismissed by R.E Ougo J, and they wished to appeal against the said ruling delivered on 15/9/14 in the 1<sup>st</sup> Defendants absence and that of his counsel.

10 Counsel further submitted that this was a mistake not to be visited on his client as section 7 of the Appellate Jurisdiction Act gives this court jurisdiction to extend time. He relied on the cases of **Edward Njane & Another v Damaris Wanjiku & Another [2016]Eklr**, **Stanley Kahoro Mwangi & 2 Others v Kanyamwi Trading Co. Ltd[2015]Eklr**; **Hon John Njoroge Michuki & Anor v Kentazuga Hardware Ltd[1998]Eklr**.

11 Counsel submitted that KEMRI funds are not public funds as a Trust deed has already been filed which calls for arbitration in any matter. He thus submitted that their appeal is not frivolous and has a high chance of success. He relied on the case **Joan Jelagat Biwott & 2 Others v Regional Beach Ltd & Anor[2016]eKLR**.

12 Counsel further submitted by challenging the grounds of opposition filed by the Plaintiff since they contained some evidence. He further submitted that the Plaintiff never talked about prejudice or delay. He relied on the case of **Trust Bank Limited v Mohammed Bakarimbwana[2004]Eklr** and urged the court to allow the application.

13 Mr. Muraya for the Plaintiff in response submitted that the order to extend time to apply for appeal is discretionary and must be done judiciously. He relied on the case of **Annah Mwiwaki Wairuru v Hannah Wanja Wairuru [2017]Eklr** which lists down factors to be considered like the reason for the delay and degree of prejudice to the Respondent. Counsel further submitted that it is the duty of the Applicant and not the Respondent to explain the delay. He cited the case of **Edward Njane Ng'ang'a (supra)** to support this submission.

14 Counsel submitted that the delay in this case is inordinate as the ruling was delivered in September 2014 after which the 1<sup>st</sup> Defendant went ahead and negotiated with the Plaintiff to pay them Kshs. 200M with a further consent that the balance goes to trial and also for payment through instalments as at 20/1/16 where counsel and 1<sup>st</sup> Defendant were present.

15 He contended that this matter had come up severally to confirm compliance with Order 11 of the CPR. He argued that several other advocates had taken over the case and an application had already been filed by Waiyaki Advocate to set aside an order of execution.

16 Counsel submitted that the conditions of stay of execution of a decree have not been met as the 1<sup>st</sup> Defendant has not made any offers on security nor given any grounds of appeal. Counsel further submitted that this case deals with a defined benefits scheme where the employer acts as the insurance for the employee. In his view this is public money. He relied on the case of **Association of Retirement Benefits Schemes v A.g [2017]Eklr**. Counsel thus urged the court to disallow the application for the reason of undue delay which has not been explained.

17 Mr. Midenga for the 1<sup>st</sup> Defendant on rejoinder submitted that they had attached proceedings showing the basis of their application and urged the court to ignore the Plaintiffs submissions on delay.

## **DETERMINATION**

18 I have considered the above Notice of Motion by the 1<sup>st</sup> Defendant, the affidavits, grounds of opposition and oral submissions. The only issue of determination is whether the 1<sup>st</sup> Defendant has presented sufficient evidence for this court to exercise its discretion and allow him to file his Appeal out of time

19 It is needless to say that this Court does have the requisite jurisdiction and the discretion to grant extension of time as sought herein. **Section 7 of the Appellate Jurisdiction Act, Chapter 9 of the Laws of Kenya**, is explicit that:

**"The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired."**

Similarly, **Order 50 Rule 6** of the **Civil Procedure Rules, 2010** 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 time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."**

20 It is however trite that such discretion be exercised judiciously; not capriciously or whimsically. Thus, in **Haywood vs. Cope [1958] 25 BEAV 140**, Lord Romilly, MR expressed the view that:

**"...the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So the person who seeks an equitable remedy must be prepared to act equitably, and the court may oblige him to do so."**

21 Accordingly, in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others: SC Application No. 16 of 2014**, the Supreme Court had occasion to consider the applicable principles in an application for extension of time; and had the following to say:

**"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:**

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."**

22 The same principles were echoed by the Court of Appeal in **Lucas Mwita Machera & Another vs. Gati Maroa Wangera & Another [2017] eKLR**. Thus, with the said principles in mind, I have given consideration to the averments of the 1<sup>st</sup> Defendant in its Supporting Affidavit and supplementary affidavit, the Replying Affidavit by the Plaintiff and the court record of the proceedings to date. There is no dispute that a period of about more than 4 years had elapsed by the time the instant application was filed. To the Plaintiff this is inordinate delay.

23 An explanation has been proffered by the 1<sup>st</sup> Defendant for this state of affairs as he blames the advocate on record at that time for not appearing on 14<sup>th</sup> September 2014 when Ougo J read the ruling dismissing his application. However, a perusal of the record of proceedings clearly shows that several other advocates have taken over this matter and an application was in fact filed by Waiyaki Advocates to set aside an order of execution. Furthermore, this matter has also come up severally to confirm compliance with Order 11 of CPR.

24 It is clear that the 1<sup>st</sup> Defendant is not sincere that he did not know the outcome of the ruling by Ougo J. I say so because after the Ruling the 1<sup>st</sup> Defendant went ahead and negotiated with the Plaintiff to pay Kshs. 200M and a further consent dated 20/1/2016 was also entered into for the balance to be paid by instalments. When the said consent was entered into, he was all along represented by counsel. Any attempts to have this matter proceed to hearing have been thwarted by the defence herein.

25 The above application by the 1<sup>st</sup> Defendant in my humble view is an afterthought which amounts to abuse of the process of the court. I find no merit in it and hereby dismiss it with costs to the Plaintiff. The parties to appear before the DR on 13<sup>th</sup> December 2018 for purposes of fixing a hearing date.

26 Orders accordingly.

Dated, signed and delivered this 7<sup>th</sup> day of December 2018 in open court at Nairobi.

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**H.I ONGU'DI**

**JUDGE**