



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 177 OF 2006

KANIKI KARISA KANIKI PLAINTIFF

V E R S U S

COMMERCE BANK LIMITED 1ST DEFENDANT

GIRO COMMERCIAL BANK LIMITED2ND DEFENDANT

MATHENE-MALINDI ENTERPRISES LIMITED 3RD DEFENDANT

RULING

1. This case was filed by Plaintiff on 21st July 2006. It has to date not been heard. Because of that delay in concluding this case the 1st and 2nd Defendants filed application by Notice of Motion dated 10th October 2013 seeking for an order dismissing Plaintiff's suit for want of prosecution. This Court by its Ruling delivered on 6th November 2014 made the following orders-
 - a. **The Notice of Motion dated 10th October 2013 is dismissed and the costs, thereof, shall be in the cause.**
 - b. **The parties are hereby ordered to file and serve each other within thirty (30) days from today's date with the following-**
 - (i) **paginated documents arranged in the order which they shall be adduced at the hearing.**
 - (ii) **witness statements.**
 - c. **If documents and statements set out in (b) above are not served within the period of thirty (30) days no party shall rely on those documents or witness evidence at the hearing of the case without the leave of the Court.**
 - d. **The Plaintiff shall fix this case for full hearing on or before the last day of March 2015 and in default this suit shall stand as dismissed with costs to Defendants.**
2. The Plaintiff complied with order (b) above and filed on 2nd December 2014 his witness statements supplementary documents and a Notice to produce.

3. The Defendants, collectively, did not comply with the time line of filing witness statements and documents.
4. The 1st and 2nd Defendants (hereinafter referred as Applicants) have moved this Court by Notice of Motion dated 18th February 2015 seeking an order that the time to file their witness statement of Tilas Muringi and documents dated and filed 5th February 2015 be extended to 5th February 2015 and time to file witness statement of David Fawcett be extended to 10th February 2015.
5. The Plaintiff vigorously opposed the application.

1ST AND 2ND DEFENDANTS' SUBMISSIONS

6. It was deponed by Ms Deborah Bubi, the Advocate for the Applicants that her firm of Advocates were informed of the orders in the Ruling of 6th November 2014 on 3rd December 2014 by the Advocate Kishore Nanji who held their brief. The deponent further stated that it took her some time to review this case because she was recently stationed at the firm's offices in Mombasa. In so reviewing she prepared witness statements and forwarded to their client's witnesses for signature and prepared the documents which were filed on 5th and 10th February 2015. The deponent attributed the delay in complying with the time line on-
 - a. **The delay in receiving notification from Kishore Nanji of the Ruling that was delivered on 6th November, 2014.**
 - b. **The time I took to review and familiarize myself with this mater and thereafter prepare the witness statements and bundle of documents.**
 - c. **The time it took to receive some of the documents to be relied on by the first and second Defendants from the first and second Defendants' Officers.**
7. The deponent then deponed in the affidavit in support of the application that-
 - a. **These inadvertent mistakes and delays by the first and second Defendants' Advocates ought not to be visited on the first and second Defendants.**
 - b. **The first and second Defendants have a good defence to this case and it is in the interest of justice that the first and second Defendants be granted leave to rely on the list of witnesses, witness statements and bundle of documents filed on 5th and 6th February, 2015.**

PLAINTIFF'S OPPOSITION

8. Plaintiff's opposition was based on Applicant's failure to get an affidavit sworn by Kishore Nanji to confirm that he had failed to communicate the contents of the Ruling of 6th November 2014; on the Applicant's failure to file statement and documents in time which Plaintiff alleged was mischievous and mala fide and was actuated by their motive to have the Plaintiff's suit dismissed for want of prosecution; and that to entertain the application would delay the trial of this suit which is now fixed to be heard on 11th March 2015.

3RD DEFENDANT'S SUBMISSIONS

9. The 3rd Defendant did not oppose the application and from the bar the Learned Counsel for 3rd Defendant equally sought an order of extension for it to file its statements and documents out of time which were filed on 11th December and 13th November 2014 respectively but were only served in January 2015.

ANALYSIS

10. The application before Court is brought under the provisions of Order 50 Rule 6 of the Civil Procedure Rules, which provides-

“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 or 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.”

11. It is clear that the Court is afforded discretion by the above Rule to extend time. Such discretion ought to be exercised judicially. The Court of Appeal in a pertinent case where it considered an Applicant’s application to lodge a record of appeal out of time discussed that discretion. That case is AVIATION CARGO SUPPORT LIMITED v ST. MARK FREIGHT SERVICES LIMITED [2014]eKLR where the Court stated-

“The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an Applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the Applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the Applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.”

12. Going by the above decision the Applicants in this case must demonstrate-

- **The delay is not inordinate;**
- **If inordinate the reason for the delay and the steps taken to ensure early compliance.**

13. The Applicants ought to have filed their documents and statements on or before 6th December 2014. They however filed them on 5th and 10th February 2015. The reason given for delay as partly stated from the bar and in affidavit evidence was that Kishore Nanji Advocate delayed to relay the Ruling of 6th November 2014; the firm of Hamilton Harrison and Mathews (incorporating Oraro & Company) Advocates recently set up an office in Mombasa and the Advocate posted to that office had to review their client’s statements and documents before compiling the same. In all the above explanation it becomes clear that the blame, if any, lays squarely on the Applicant’s Advocate.

14. Should the consequences of that delay, then be visited on the Applicants? I must state that I am not persuaded by the decision relied upon by the Plaintiff, that is the case KIPTOO –Vs- KIPTOO [2009]2EA 237. In that decision of the High Court the Judge held thus-

“The time honoured principle of law that mistakes of Counsel should not be visited upon his client is no longer good law in the peculiar circumstances of the 21 century. It should be departed from KETTERMAN v HANSEL PROPERTIES LTD [1988]1 ALL

ER 38 followed.”

The Judge in making the above decision stated that the Advocate failed to use the technological advancement available, such as cell phone, to call his client or another Advocate to inform them that he had mechanical problems which prevented him to attend Court. Those circumstances are very different to the present ones.

15. The case that I find is useful is the one relied upon by the Applicants, namely; **LINGAM ENTERPRISES LTD & 4 OTHERS –Vs- RADIO AFRICA LTD [2015]eKLR** where the Court of Appeal refused to have the Applicant suffer the consequences of its Advocates mistake. The Court in that case stated-

“In denying the Applicants an opportunity to file their intended appeal, which this Court had found was arguable, having acknowledged that the blame lay with the Applicants’ Advocate and/or the office clerk, we think the learned Judge punished the Applicants unduly. That, in our respectful view, amounted to erroneous exercise of discretion. In NURA AWADH BAWAZIR v CHRISTOPHER STEPHEN AKILANO AKIWUMI & ANOTHER, CIVIL APPLICATION NO. NAIROBI 256 OF 2000; [2001]LLR 6820 (CAK).

Tunoi, J.A. (as he then was) held that where the omission to lodge an appeal within the prescribed time falls entirely on the part of Counsel who accepts full responsibility and the delay is otherwise satisfactorily explained, the Applicant should not be denied the chance to canvass the appeal. We respectfully adopt that position herein.”

16. I am of the view that the Learned Counsel has satisfactorily explained the reasons why the Applicants failed to comply with the time line of filing documents and statements. The fact Kishore Nanji has not sworn an affidavit to support what the Applicants’ Advocate deposed does affect this Court’s exercise of its discretion in favour of the Applicant.

17. In also considering the overriding objective as set out in Section 1A and 1B of the Civil Procedure Act Cap 21 and Article 159(2) (d) of the Constitution I do find that the Court needs to exercise its discretion in favour of the Applicants. The Court of Appeal in the case **NICHOLAS KIPTOO ARAP KORIR SALAT –Vs- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS [2013]** discussed similar facts and stated-

“In Abdirahman Abdi also known as Abdirahman Muhumed Abdi –Vs- Safi Petroleum Products Ltd. & 6 Others, Civil Application No. Nai. 173 of 2010 where a Notice of Appeal was served on the Respondent out of time and without leave of the Court, upon being asked to strike it out, the Court (Omolo, Bosire and Nyamu J.J.A) observed that-

‘The overriding objective in Civil litigation is a policy issue which the Court invokes to obviate hardship, expense, delay and to focus on substantive justice ...

In the days long gone the Court never hesitated to strike out a Notice of Appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159(2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in Civil litigation in which the Court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the Court strike out the offending document. In short, the Court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159(2) (d) of the Constitution makes it abundantly clear that the Court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The

Court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the Court strikes out its document.’ ”

18. In considering the overriding objective I do find that greater injustice will be suffered by the Applicants if they are not allowed to rely on their statements and documents than will be suffered by the Plaintiff if leave is granted as sought. To allow the application will in my view lead to a just, expeditious, proportionate and affordable resolution of this dispute. To ensure the Plaintiff does not suffer prejudice another date, before the end of the month of March 2015 shall be given for the hearing of this suit.

19. In conclusion the Court grants the following orders-

- a. **The documents and witness statements filed by the 1st, 2nd and 3rd Defendants shall henceforth be deemed as though filed and served with the leave of the Court. To that end the 1st, 2nd and 3rd Defendants shall rely on such documents and statements at the trial.**
- b. **The Court shall at the reading of this Ruling fix a convenient hearing date of this case.**
- c. **The costs of the Notice of Motion dated 18th February 2015 shall be paid to the Plaintiff by the 1st and 2nd Defendants on one part and the 3rd Defendant on the other part on a 50% basis.**

DATED and DELIVERED at MOMBASA this 4TH day of MARCH, 2015.

MARY KASANGO

JUDGE