Kigio Group Company Limited v Portsman Bridge Limited & another (Civil Application E081 of 2024) [2024] KECA 1645 (KLR) (15 November 2024) (Ruling)

Neutral citation: [2024] KECA 1645 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E081 OF 2024

PM GACHOKA, JA

NOVEMBER 15, 2024

BETWEEN

KIGIO GROUP COMPANY LIMITED ..... APPLICANT

AND

PORTSMAN BRIDGE LIMITED ..... 1ST RESPONDENT

MALEWA BUSH VENTURES LIMITED ..... 2ND RESPONDENT

(An application for leave to file appeal out of time from the judgment in ELC Case No. 30 of 2018 (Formerly HCCC No. 60 of 2008))

RULING

1. The applicant has filed a Notice of Motion dated 14th August 2024. It is hinged upon rules 4 and 5 (2) of this *Court's Rules* seeking a germane raft of prayers as follows: this Court be pleased to enlarge time within which the applicant has to file the memorandum of appeal from the judgment and decree of the Environment and Land Court at Nakuru (L.A. Omollo, J.) dated 17th November 2022 in ELC case no. 30 of 2018; this Court be pleased to grant leave to file a notice of appeal and memorandum of appeal out of time; and there be a stay of execution of the judgment and decree of the Environment and Land Court at Nakuru (L.A. Omollo, J.) dated 17th November 2022 in ELC case no. 30 of 2018 pending the hearing and determination of the intended appeal or until further orders of the Court.

2. At the onset, I must point out that it is trite law that an application seeking stay of execution of a judgment can only be ventilated before a three judge bench in this Court. Further, such a prayer can only be considered once a single judge has decided whether the extension of time will be granted or not. Consequently, I will not consider that prayer.

3. The application is supported by the grounds on its face and the supporting affidavits of Stanley Njenga Ndegwa and Charles Kariuki Ndung'u, chairmen of the board of directors of the applicant. In

summary, the applicant is dissatisfied with the findings of the learned judge (L.A. Omollo, J.) delivered on dated 17th November 2018 in ELC case no. 30 of 2018. The applicant discovered that the suit was never defended in spite instructing its former advocates, Havi & Company Advocates, to come on record on its behalf and defend it yet they had paid a significant amount of money. Those instructions were issued on 15th May 2008. The applicant only became aware of the judgment during a meeting of its board when it received a letter dated 12th January 2023.

4. Subsequently, the applicant filed an application dated 1st February 2023 seeking to review the ex parte judgment entered on 17th November 2018. However, that application was dismissed on 16th November 2023. The applicant learnt of this dismissal on 8th April 2024 through Havi & Company Advocates, its appointed firm of advocates. The applicant computed that it was intent on filing its notice of appeal and memorandum of appeal albeit 20 months later hence the present application. That the delay in complying with the provisions of this Court was not deliberate.

5. The applicant urged this Court to allow the application on the following grounds: it risked imminent execution without being afforded a fair hearing; it stood to suffer substantial loss and irreparable harm; the failure to file a defence was a mistake of the advocate that should not be visited upon it; it was in the interest of justice that the application be allowed as prayed; and the present application was filed timeously.

6. The application is vehemently opposed. Vide a replying affidavit dated 19th September 2024, sworn by Christine Mary Campbell Clause, the 2nd respondent's director, the 2nd respondent urged this Court to dismiss the application on the following grounds: the application is fatally defective as the applicant's Counsel did not seek leave to come on record for the applicant; the applicant's former advocates contacted the 2nd respondent on 11th December 2023 seeking to settle the decretal sum; the applicant had deployed crafty machinations to defeat the realization of the judgment; this application was served 21 days after filing and not three days as directed by this Court; the former advocates for the applicant did enter appearance; the applicant was guilty of inordinate delay for only filing this application 11 months after the impugned ruling had been delivered; the applicant was dilatory in conduct and is not deserving of the orders sought before this Court; the applicant still delayed in filing this application if computed from 8th April 2024 when they allegedly discovered the ruling was delivered; no good or sufficient cause has been demonstrated for this court to exercise its discretion; the delay in filing the appeal is inordinate and inexcusable; and there was no mistake of an advocate as the applicant was duly aware of the progress of the matter. For those reasons, the applicant urged this Court to dismiss the application with costs.

7. In brief rejoinder, the applicant filed a supplementary affidavit sworn by Charles Kariuki Ndung'u on 10th October 2024. The applicant reiterated the contents of its application and cited the following grounds to persuade this Court to allow the application: leave was not a prerequisite before this Court where a party instructed a new firm of advocates; it only received the Court's directions on 16th September 2024; the suit was, as admitted by the 2nd respondent, transferred to the ELC without notice; the suit was concluded in the absence of the applicant's pleadings; and it has since sought an explanation from its advocates as to their conduct and shall take action accordingly.

8. I have considered the application, the affidavit in support and the annexures thereto. I have also considered the list of authorities filed by the applicant dated 24th October 2024. An applicant seeking extension of time must demonstrate good and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction

of both the above that the court will use its discretion to grant the application. (See *Njoroge vs. Kimani* [2022] KECA 1188 (KLR))

9. In light of the above, I am inclined to look at the annexures relied on by the parties commencing with the impugned ruling. A cursory perusal of the annexed ruling seeking to set aside the ex parte judgment revealed that the email of nhavi@haviandcompany.com belonged to the applicant's former Counsel. The applicant was duly served with the hearing notice. Evidently, the applicant's erstwhile advocates did in fact represent its interests as it did not deny that the email address was that of its Counsel.

10. In that application, the applicant blamed the respondents for not updating it when the suit was transferred from the Nakuru High Court to the ELC. It was also served with a Notice of Show Cause dated 12th August 2021. Finally, although the applicant stated that the email address namely nhavi@haviandcompany.com ceased being operational, it did not update the court or parties on its new address. The trial court thus found that it was the author of its own misfortune.

11. Taking cue from the above, I find that from an analysis of these facts, the applicant is not candid with the truth. Firstly, it is clear that his former advocates executed instructions from the applicant. The argument that the advocates never filed its defence was thus well within the knowledge of the applicant all along. Secondly, the applicant blames his former advocates but had initially blamed the respondents for not informing it of the transfer of the suit. What is the exact position? Is the blame to be shouldered on the respondents or its former advocates? Either way, it was incumbent upon it to remain vigilant insofar as the progress of the dispute was concerned. Finally, if indeed the applicant's former Counsel on record was to shoulder the blame on account of negligence, why did they remain on record on behalf of the applicant and even updated the applicant in their letter dated 8th April 2024?

12. I have also looked at the 2nd respondent's annexures. Firstly, I observe that the applicant's former advocates entered appearance on 10th July 2008 in Nakuru HCCC No. 60 of 2008. Secondly, it is this same advocates that filed the application dated 1st February 2023 seeking to set aside the ex parte judgment. Thirdly, it is clear that from the letter dated 11th December 2023, the applicant was aware of the judgment. Through its former advocates, Havi and Company Advocates, the applicant sought to settle the decretal sum in installments. If indeed they were professionally negligent, why did they continue to retain their services following the ex parte judgment?

13. The applicant further complained that there was confusion when the suit, originally filed in the High Court, was transferred to the ELC. If indeed there was incertitude as alleged by the applicant, what steps had been taken even prior to the filing of the application for setting aside the ex parte judgment to establish that the said matter was still in existence? There is no evidence laid out before me to explain what steps the applicant took the moment it filed its memorandum of appearance.

14. I will not tire to remind parties that it is incumbent upon litigants to follow up on their matters whether with their instructing counsel or personally in court registries. The applicant ought to have been way more vigilant than it purports to suggest. After all, equity aids the vigilant and not the indolent. I am satisfied to hold that the applicant was never interested in defending this case. If anything, the applicant is simply employing delaying tactics so as to defeat the realization of the judgement entered in favor of the respondents.

15. The applicant was aware of the dismissal of the application seeking to set aside the ex parte orders granted as at 11th December 2023 when it wrote to the respondents seeking to settle the decretal sum. However, even then, it did not file the present application. Even if I believe the applicant for a moment, it ought to have filed this application soon after 8th April 2024 but delayed once more in filing the application five months later. No reasons have justified that delay.

16. Before penning down, I would also like to address whether the application was incompetent on account of the failure of the applicant's advocates to seek leave to come on record in lieu of the former advocates. This court in the case of *Mary Nchekei Paul vs. Francis Mundia Ruga* [2019] eKLR emphasized that it has its own rules and procedure and as such the *Civil Procedure Rules* are inapplicable. In the circumstances, I find that the requirement to seek leave to come on record in this Court does not apply. Resultantly, the fact that the applicant did not seek leave thus did not render its application incompetent.

17. In the end, I find that the applicant filed the application mala fides. I am further not persuaded that the applicant's former advocates were to blame for its misfortune and even if there were, the applicant still had a duty to remain vigilant and follow the progress of the case that had been filed against it. No sufficient reasons have been advanced to urge this Court to exercise juridical discretion in extending time. Consequently, I find that the application herein lacks merit. It is hereby dismissed with costs to the 2nd respondent.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF NOVEMBER 2024.

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR