



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CIVIL APPEAL NO. 142 OF 2013**

**DILPACK KENYA LIMITED.....APPLICANT**

**VERSUS**

**WILLIAM MUTHAMA KITONYI.....RESPONDENT**

**RULING**

1. On 2<sup>nd</sup> November, 2017 this Court (**Nyamweya, J**) delivered a short ruling in this matter in which the Learned Judge found that this appeal was filed out of time without leave, the appellant's memorandum of appeal having been filed on 5<sup>th</sup> July, 2013 yet the judgement appealed from was delivered by the lower court on 17<sup>th</sup> January, 2013. However as the appeal had not yet been admitted, the Court held that the appellant was at liberty to apply for leave to appeal out of time and that a fresh date be fixed in the registry once this was done. The Court however proceeded, upon an oral application by counsel for the Respondent, to vacate the orders of stay issued by the lower court on 28<sup>th</sup> October, 2015 and directed that the guarantee executed by the appellant be discharged with liberty to the appellant to re-apply.

2. It is this decision that aggrieved the appellant herein and provoked the applications the subject of this ruling which are dated 8<sup>th</sup> November, 2017 and 14<sup>th</sup> December, 2017, which applications together with the preliminary objection raised by the Respondent were directed to heard together.

3. In the application dated 8<sup>th</sup> November, 2017, the applicant herein seeks the following orders:

1) **THAT** this matter be certified urgent and be heard *ex-parte* in the first instance.

2) **THAT** pending *inter partes* hearing of this Application this Honourable Court be pleased to stay the Orders issued on 2<sup>nd</sup> November, 2017.

3) **THAT** pending the hearing and determination of this Application this Honourable Court be pleased to issue an order of stay of the orders issued on 2<sup>nd</sup> November, 2017.

4) **THAT** this Honourable Court be pleased to grant the Applicant leave to lodge an Appeal out of time against the decision delivered on 16<sup>th</sup> June, 2013 by the Chief Magistrate's Court in *Machakos CMCC No. 1045 of 2011*.

5) **THAT** upon grant of leave to appeal out of time, the Memorandum and Record of Appeal lodged herein be deemed as duly filed.

6) **THAT** this Honourable Court be pleased to reinstate the Orders of 28<sup>th</sup> October, 2015.

7) **THAT** this Honourable Court be pleased to issue any Order it deems mete and just in the circumstances.

8) **THAT** the costs of and incidental to this Application be costs in the intended Appeal.

4. In the application dated 14<sup>th</sup> December, 2017, the applicant sought the following orders:

1) **THAT** this matter be certified urgent and be heard *ex-parte* in the first instance.

2) **THAT** pending *inter partes* hearing of this Application this Honourable Court be pleased to stay the execution proceedings herein.

3) **THAT** pending the hearing and determination of this Application this Honourable Court be pleased to issue an order of stay of the orders issued on 2<sup>nd</sup> November, 2017.

4) **THAT** this Honourable Court be pleased to stay the execution of the judgment pending the hearing and determination of the Appeal.

5) **THAT** this Honourable Court be pleased to issue any Order it deems mete and just in the circumstances.

6) **THAT** the costs of and incidental to this Application be costs in the intended Appeal.

5. It is clear that in both applications the only substantive orders sought are as follows:

1) **THAT** this Honourable Court be pleased to grant the Applicant leave to lodge an Appeal out of time against the decision delivered on 16<sup>th</sup> June, 2013 by the Chief Magistrate's Court in *Machakos CMCC No. 1045 of 2011*.

2) **THAT** upon grant of leave to appeal out of time, the Memorandum and Record of Appeal lodged herein be deemed as duly filed.

3) **THAT** this Honourable Court be pleased to reinstate the Orders of 28<sup>th</sup> October, 2015.

4) **THAT** this Honourable Court be pleased to stay the execution of the judgment pending the hearing and determination of the Appeal.

6. According to the applicant, whereas the Judgement appealed from was delivered on 17<sup>th</sup> January, 2013 the Applicant herein lodged Memorandum of Appeal on 5<sup>th</sup> July, 2013 without procuring the requisite leave of Court. It was deposed that the delay in lodging the Appeal as outlined herein-above was inadvertent.

7. According to the applicant, the intended Appeal is arguable and has high chances of success and that this Court has unfettered discretion in granting leave to file an appeal out of time.

8. The applicant averred that there was an imminent threat of the Respondent procuring the sums under the Bank guarantee procured by the Applicant pursuant to the Orders of this Court issued on 28<sup>th</sup> October, 2015.

9. It was deposed that Eastern Kenya Auctioneers acting on the Respondent's instructions on 11<sup>th</sup> December, 2017 served the Applicant with a proclamation notice seeking to attach the Applicant's goods in a bid to enforce the impugned Judgment which proclamation was set to lapse on 17<sup>th</sup> December, 2017 hence the Applicant herein was apprehensive that if the orders sought were not granted the Respondent's Auctioneers would proceed to attach the Applicant's goods thereby rendering this Application and indeed the entire intended Appeal nugatory.

10. The applicant averred that if the execution was permitted to proceed, the Applicant would not be able to continue its business operations and would be forced to shut down thereby rendering over Three Hundred (300) employees jobless. Further, if the Application herein was not certified urgent and the Orders sought herein granted the Respondent would enforce the bank guarantee but would subsequently not be able to repay the amount in the event the Applicant is successful in the Appeal thereby occasioning the Appellant substantial financial loss and damage.

11. It was therefore the applicant's case that such extreme and highly prejudicial consequences before the hearing and determination of the appeal would subvert the ends of justice and render the Appeal nugatory hence it was in the interest of justice and fairness that the Application be certified urgent and the prayers sought in the Application granted.

12. The applicant asserted that it was the Court's Constitutional Mandate to protect and safeguard the Applicant's Constitutional Rights and further it was in the interests of Justice that the Application be allowed and heard at the earliest.

13. The applicant undertook to prosecute its Appeal expeditiously and disclosed that it was willing to abide by any conditions set by this Honourable Court for the grant of the Orders sought herein.

14. It was submitted on behalf of the applicant while setting out the background of the appeal that to the extent that the Appellant intends to contest the jurisdiction of the lower court and further argue that it has an undoubted right to be heard in its defence the appellant has an arguable appeal. It was the applicant's case that the failure to defend the suit was caused by inadvertence or error.

15. It was submitted that this Court had granted the applicant a conditional stay of the judgement of the lower court which conditions were complied with. To the applicant since the stay was only disturbed by the holding on the question of time, it was in the interest of justice that the same be reinstated. To the applicant, as the guarantee was still in place the Respondent was secure.

16. It was the applicant's submission that the issue of filing of the appeal out of time only came to fore on 2<sup>nd</sup> November, 2017 and that this was an error which the applicant had moved with haste to resolve by an application which was made within 6 days of the determination of the appeal hence there was no delay in moving the Court.

17. While appreciating that the matter at hand suffered delays on account of what the applicant considered were technical considerations, it was the applicant's submissions that the same could be addressed by way of costs if need be but the Court should strive to attain substantive justice between the parties without regard to technicalities.

18. It was submitted that the Court is clothed with both the constitutional and legal mandate to grant the prayers sought by allowing the filing of the appeal out of time. In this regard the applicant relied on **APA Insurance Limited vs. Michael Kinyanjui Muturi [2016] KLR** and **Civicon Group Limited vs. Express DDB Kenya Ltd.**

19. The application was however opposed by the Respondent. In so doing the Respondent filed a Notice of Preliminary Objection in which he averred that:

**(1) The application is res judicata in view of this Court's orders of 28<sup>th</sup> October, 2015.**

**(2) There cannot be a stay of execution of the lower court's decree pending hearing of an appeal which does not exist.**

20. Apart from that the Respondent filed grounds of opposition in which he stated that:

**(1) The application is frivolous, vexatious, incompetent, bad in law and is an abuse of this Court's process.**

**(2) There cannot be a stay of execution of the lower court's decree in view of this Court's orders dated 2<sup>nd</sup> November, 2017; and in the absence of an appeal.**

**(3) This Court's orders dated 2<sup>nd</sup> November 2017 are not capable of being stayed.**

**(4) Orders sought in the application are not capable of being granted.**

**(5) The applicant herein, being fully aware of this Court's orders dated 2<sup>nd</sup> November, 2017 appeared before this Court on 15<sup>th</sup> December, 2017 and deliberately misled the court in issuing unlawful interim orders of stay of execution; which now ought to be discharge.**

**(6) The Respondent has since the year 2013, been denied the right to execute a valid decree, and the applicant has all this while misled the Court into issuing orders of stay of execution on the basis of a non-existent "appeal".**

**(7) The application ought to be dismissed with costs.**

**(8) There must be an end to litigation.**

21. It was submitted on behalf of the Respondent, while setting out the history of the litigation that appeals from the decisions of the Magistrate's Courts in matters of this nature lie to the Employment and Labour Relations Court and not to this Court pursuant to Article 162(2) of the Constitution and the ***Employment and Labour Relations Court Act***.

22. It was further submitted that there has never been a valid appeal before this Court as the ruling and decree purportedly being appealed against do not exist and that the trial court's judgement dated 17<sup>th</sup> January, 2013 was not appealed against within the time prescribed under section 75G of the ***Civil Procedure Act***. To the Respondent, this appeal was filed on 15<sup>th</sup> July, 2013, over six months of the date of the lower court's judgement/decree.

23. To the Respondent, there being no valid appeal, there is no basis upon which stay of execution can issue under Order 42 rule 6(1) of the ***Civil Procedure Rules*** and that the prayers for stay of execution are res judicata.

23. According to the Respondent, since this Court lacks jurisdiction to entertain these proceedings the entire proceedings should be struck out with costs to the Respondent.

### **Determination**

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

26. 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.***

27. 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.

28. 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.

29. In this case the Court while vacating the orders of stay found as a fact that the appellant’s memorandum of appeal was filed on 5<sup>th</sup> July, 2013 yet the judgement appealed from was delivered by the lower court on 17<sup>th</sup> January, 2013, which was 5 months after the judgement. The finding that the appeal was filed out of time was however made on 2<sup>nd</sup> November, 2017, more than four years after the judgement. Therefore for four years the appellant/applicant never realised that its appeal was filed out of time till the Court itself made the finding. By any standards four years in rectifying a default is inordinate delay. In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See **Ratman vs. Cumarasamy [1964] 3 All ER 933; Savill vs. Southend Health Authority [1995] 1 WLR 1254 at 1259**.

30. What then is the explanation for the default in this matter? The only reason given by the applicant for not taking action within the prescribed time is that of inadvertence. However the nature of the inadvertence is not explained at all. In **Itute Ngui & Anor vs. Isumail Mwakavi Mwendwa Civil Application No. Nai. 166 of 1997, Omolo, JA** held that whereas advocate’s *bona fide* error is a special reason for extension of time within which to appeal, the nature and quality of the mistake must be considered. It is therefore clear that whereas inadvertence may be a ground for extension of time, the nature and quality of the inadvertence must be disclosed for consideration by the Court. It therefore does not suffice to simply state that the failure to comply with the prescribed timelines was due to inadvertence, as the applicant did in this case.

31. Section 79G of the Civil Procedure Act requires that before the Court enlarges the time for appealing the applicant must satisfy the court that he had good and sufficient cause for not filing the appeal in time. In **Alibhai Musajee vs. Shariff Mohammed Al-Bet Civil Appeal No. 283 of 1998**, the Court of Appeal held that whereas the *Civil Procedure Act* allows for extension of time for filing appeal, if good and sufficient cause shown, failure to act does not constitute a good or sufficient cause.

32. The Applicant however contended that it has a constitutional right to appeal. However in **Velji Shahmad vs. Shamji Bros. and Popatlal Karman & Co. [1957] EA 438**, it was held that:

**“In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgement has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgement which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgements should be brought within the prescribed time and no extension of time should be granted except under very special circumstances.”**

33. In this case the applicant has not expounded on the nature and quality of the inadvertence alluded to. This seems to be a case of mere inaction and as was held in **Berber Alibhai Mawji vs. Sultan Hasham Lalji & 2 Others [1990-1994] EA 337**, inaction on the part of an advocate as opposed to error of judgement or a slip is not excusable. Therefore pure and simple inaction by counsel or a refusal to act cannot amount to a mistake, which ought not to be visited on the client.

34. I am therefore not satisfied that the contumelious delay or default on the part of the applicant has been satisfactorily explained. As the applicant has failed in satisfying the first ground for extension or enlargement of time to file an appeal out of time, this application must fail and without an order extending time the stay cannot be granted in vacuum.

35. Accordingly both applications fail and are dismissed but with no order as to costs for failure by the parties to fully comply with the directions of the Court to furnish the Court with soft copies of their relevant pleadings and submissions.

36. What then should the Court do in those circumstances? The Court of Appeal in the case of **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** held *inter alia* that:

**“...the applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will...All provisions and rules in the relevant Acts must be “O2” compliant because they exist for no other purpose. The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court’s view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are**

**not postponed to another day.”**

37. It would therefore be pointless sustaining this appeal whose substratum no longer exists. It therefore follows that this appeal is incompetent and is struck out and subject to paragraph 35 above, the costs of the appeal are awarded to the Respondent.

38. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 6<sup>th</sup> day of August, 2018.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Watta for Mrs Nzei for the Respondent**

**CA Geoffrey**