



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Civil Appeal 90 of 2001

GATEWAY INSURANCE CO. LTD.....APPELLANT

VERSUS

ARIES AUTO SPRAYS.....RESPONDENT

(FROM ORIGINAL KISUMU CMCC NO. 1273 OF 1998)

RULING

This is an application by M/S Gateway Insurance Co. Ltd. the appellant for an enlargement of time to file to enable it and serve on the respondent a certified copy of the deposit slip for the sum deposited at the Housing Finance Company of Kenya (HFCK), Nairobi; vide the appellants' cheque No. 011425 of 25th October 2001 and that the documents filed on 9th June 2003 be deemed to have been filed within time. The application is brought under Sections 3A AND 95 of the c.p.a. and is supported by some grounds displayed on the face of the motion and affidavits of Mr. Siganga and Nancy Afandi both of M/S Siganga & Co. advocates. The respondent strenuously opposed the application relying on replying affidavits of Mr. Wasilwa its Counsel and of Mr. Dhanjal its director.

In his submission Mr. Siganga stated that on 22nd May 2003 he appeared in Court where he held brief for Mr. Mwaura Waihiga for the appellant in this case and that he recorded a consent order with Mr. H.M. Wasilwa for the respondent. He further claimed that one of the terms of the consent was that the appellant was to file and serve on the respondent a certified copy of the deposit slip for the sum deposited at HFCK Nairobi vide appellants' cheque No. 011425 dated 25th October 2001. Mr. Siganga added that on the following day he wrote to M/S Mwaura & Mwaura Waihiga, advocates informing them of the consent which had been recorded in Court. Mr. Siganga contended that on 6th June 2003 at 6 p.m. a colleague in his office went to see him in his house and informed him that the appellants' advocates' had rang to enquire whether they had filed the documents they had sent to them. Mr. Siganga said that on the following morning he discovered when he went to his office that a certified copy of the deposit slip had in fact been received in his office on 30th May 2003 which was within time but that it had been opened and filed away. Mr. Siganga explained that the 1st and 2nd June 2003 were public holidays and that although he was in the office on 3rd June 2003 he was not informed of a receipt of the document. He claimed that on 4th and 5th June he was indisposed and had to remain in his house. He added that he eventually filed the document in Court on 9th June 2003 which was only 2 days out of time. According to Mr. Siganga the appellant and its advocates had made every effort to comply with the consent and had forwarded the document in good time but unfortunately there was a human error which

caused a delay in filing in Court. It was Mr. Singanga's contention that the respondent has not been prejudiced by the error. He relied in the decision of the court of appeal in **Civil Application No. Nairobi 109 of 2000 – Niasons (k) Ltd Vs China Road and Bridges Corporation (k).**

The application was opposed by Mr. Wasilwa for the respondent who contended that due to the conducts of the appellant which showed that they prove to delays this court should not exercise its discretion so as to enlarge time as prayed. He added that in the light of the admitted breach of the consent order the appellant is not worthy of the equitable extension of time sought. According to Mr. Wasilwa there was a gap of 7 days which was unreasonable. He added that he had catalogued a chronology of events relating to this suit which disclosed that the appellant was not diligent in both the lower and this court in fixing the case for hearing. Mr. Wasilwa contended that an act of indolence on the part of the appellant to have had a document for about one year and inexcusable to fail to file and serve it within 14 days. On the issue of whether the Court has a jurisdiction to enlarge time Mr. Wasilwa contended that the consent order did not give the court a discretion to enlarge time as it set out the times within which to comply with it and the consequences of default were also set out. He also claimed that the appellant was estopped from by its own conduct of 22nd May 2003 from seeking the extension of time from court. He contended that a consent order can only be set aside where there has been fraud or error and not otherwise. He also submitted that as the respondent had acquired a right to enforce the decree if it was made to trial all over again it would amount to a serious prejudice especially as there was no usefulness of opening the case again. On the issue of the said certified copy of the deposit slip for the sum deposited at HFCK vide the appellant's cheque No. 011425 of 25th October 2001 Mr. Wasilwa contended that he had not signed any papers nor given any particulars to facilitate opening of an account in his joint name with the advocates for the appellant. He relied on the case of Shah Vs Mbogo (1968) E.A. 123, Kimani VS MS Connal (1966) E.A. 547. He urged that the application be dismissed with costs.

I have perused the record of this case and found that the appellant appears to have not been too diligent in prosecuting its case, but when considering the application before me that issue is really irrelevant. The parties willingly entered into a consent relating to the compromise of this case. They agreed to set aside judgment and decree in Kisumu CMCC No. 1273 of 1998 and that the case was to proceed to trial. The conditions for that decision was the payment of the thrown away costs of shs. 30,000/- and the filing and serving of a certified copy of deposit slip for a sum deposited at HFCK Nairobi by a cheque No. 011428 of 25th October 2001 meant to be held in the joint names of the advocates for the parties. The parties also agreed that if there was a default of any one of the two conditions the consent would stand vacated and the plaintiff would be at liberty to enforce its judgment in Kisumu CMCC No. 1273 of 1998.

It is evident to me that the parties in entering into that consent did not leave any room for the Court to exercise its discretion for enlargement of time. In those circumstances I would dismiss the application with costs.

Dated and delivered this 18th December 2003.

B.K. TANUI

JUDGE



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