NCBA Bank Kenya PLC (Formerly National Industrial Credit Bank (K) PLC) v Shikanga & 2 others (Miscellaneous Application E074 & E075 of 2022 (Consolidated)) [2023] KEHC 584 (KLR) (30 January 2023) (Ruling)

Neutral citation: [2023] KEHC 584 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

MISCELLANEOUS APPLICATION E074 & E075 OF 2022 (CONSOLIDATED)

PJO OTIENO, J

JANUARY 30, 2023

BETWEEN

NCBA BANK KENYA PLC (FORMERLY NATIONAL INDUSTRIAL CREDIT BANK (K) PLC) .... APPLICANT

AND

DOUGLAS IHANJI SHIKANGA .... 1ST RESPONDENT

ERNEST KANDU ISIAHO .... 2ND RESPONDENT

CHARLES MUNDIA CHAMA .... 3RD RESPONDENT

RULING

1. By two identical applications, both dated September 2, 2022 and filed on the same day, the applicant sought a raft of orders including leave to appeal out of time, stay of execution pending determination of the application and the intended appeal and one for leave to come on record in place of the firm of Onyinkwa & Company advocates.

2. The grounds preferred to premise the application were that on the April 13, 2022 when the lower court files were scheduled for delivery of judgment, the same aborted due to the fact that the trail court was on leave and the judgment was that set for delivery upon notice.

3. Judgments were subsequently delivered on the July 6, 2022 and the same dissatisfied the applicant as the Judgment debtor therein, who desired to appeal but could not do so because it only became aware of the information and developments well after the 30 days timeline had passed. That was occasioned by the notice of delivery of the judgments on counsel thereon acting for the applicant.

4. It was then asserted that the delay had been explained, was not inordinate and the intended appeal raises arguable and not frivolous ground which would be rendered nugatory unless stay is granted pending the determination of the appeal.

5. The application was then supported by the affidavit sworn by Stephen Ateya who is a legal counsel of the applicant who depones to the same facts on the face of the Notice of Motion and then exhibits certificates of change of names, gazette notices for publications of the changes of names, the judgment sought to be challenged; letters by advocate acting for the applicant seeking to be told when the judgment would be delivered and draft memoranda of appeal.

6. When served, 1st respondents filed replying affidavit whose gist was that the applicant and the 2nd respondent in both files were not only jointly registered as owner of the offending motor vehicle but were equally jointly insured over the same, were jointly sued but the current application sought to be struck out from the suits but such applications were dismissed by the trial court and that dismissal stands without challenge on appeal.

7. On notice, it was contended that the said advocates were indeed aware of the judgment date and infact attended at the delivery and that in addition the said advocates were written to and a copy of the judgment forwarded to them by way of email and a letter dated July 6, 2022. Copies of the letter and email were thus exhibited.

8. For such position, the applicant was accused of being sluggish and indolent in handling of the matter therefore deserved not the discretion of the court being exercised in its favour. When compiled with failure to offer security for the due performance of the decree in the event of failure of the appeal, the application is viewed to only headed to no other outcome but failure. In conclusion it was asserted that the grant of the order sought could work prejudice upon him unless it be ordered that ½ of the decretal sum be paid out to him pending determination of the appeal given that no plausible reason had been advanced why the decretal sum should not be deposited as security.

9. When parties attend court on the September 26, 2022, it was by consent directed that the two matters be handled together and a decision in one bind the other.

10. Consequently the two files are treated consolidated for purposes of the applications seeking extension of time and stay and therefore, this ruling will therefore bind both files.

11. The court considers the main prayer to be that of extension of time which could determine whether or not stay be granted. The starting point is thus whether reasons have been advanced to merit grant of orders of leave to file an appeal out of time.

12. There is the prayer for leave to come on record by his Mwamuye Kimathi & Kimani Advocates in place of Onyinkwa & Company Advocates; which I consider is a mundane issue that should not engage the court unnecessary. It is mundane and unnecessary because Order 9 Rule 9 of the *Civil Procedure Rules* is only activated into application once a judgment is delivered in a file.

13. This application is indeed fresh matter filed by the advocate seeking to be granted leave. Ms Onyinkwa and Company advocates have never been on record. It is thus wholly erroneous for a counsel to seek to be allowed to prosecute a matter he has himself initiated.

14. This court's position is that being a new matter initiated by the advocate who drew the papers it defeats logic how the court can purport to grant the leave to him when he is already on record.

15. In *Jonathan Wepukhuli t/a Gati Cleaning Agency Limited vs Julius Odhiambo Oduor* in Civil Appeal No 82 of 2019 (Unreported) the court said:-

> “ 7. Giving the words of the Rule their ordinary and natural meaning, there ought to be a judgment in the file before the rule can be invited. I understand the position to be that an appeal file is an independent file from the file in which the judgment giving rise to the appeal was passed. The two must be treated as separate in that both are instituted differently. An appeal when instituted by a Memorandum of Appeal starts its new life and journey and is only determined when dealt with as by law provided. In the appeal file the judgment at trial is the dispute and cannot be treated as a judgment determining the appeal. As known to law, a judgment is a final adjudication of a court dispute and cannot in reality be deemed to exist before the dispute is heard and adjudged. In this file the appeal has not been heard and a decision made or as the Rule says, judgment passed, to require any court orders for a Notice of Change of advocate.
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> 8. To me to hold that a Notice of change is required in this matter is to stretch the law to extreme, ridiculous and very anomalous levels. I ask change from who? The memorandum of appeal instituting the appeal is drawn by the same advocate seeking to be granted leave to come on record. When did he cease to be on record after filing that document? I hold that the interpretation given to Order 9 Rule 9 by the two counsel in this matter is wholly erroneous and ought not be the case. In coming to this conclusion I am not questioning the decision by my sister Kemei J. in Muranga ELC No. 219 of 2017. That decision is clear that an advocate walked into the ELC file after judgment and purported to file a Notice of Appeal and an application without first seeking and obtaining leave in that regard. In that decision the invitation of Order 9 Rule 9 was apt and unquestionable.”

16. The prayer for leave deserves not being granted. It is dismissed for lack of merit.

17. For extension of time to file an appeal the consideration remains the length of delay and reason for delay. There are then the coronary questions of the argueability of the intended appeal and prejudice to be suffered by the respondent if leave is granted. Here it is not denied that on the date set inter-parties for delivery of judgment it was not so delivered and since the court was not setting it was only legal that notice be issued.

18. While the respondents contends that the applicant was aware and infact did attend court on delivery, no material has been put forth to support such an allegation. It was a clear case of whether or not a notice was issued for delivery of the judgment on July 6, 2022. If one was issued, the respondents counsel ought to have been a recipient and therefore in possession of a copy which he ought to have exhibited. He does not make any such attempt. It is thus clear to me that no notice was issued to the applicant advocate and they thus could not have been expected to be in the know.

19. The next question is notification by letter not email address. Having asserted that the applicant was notified, it was the duty of the respondent to demonstrate how the letter indeed reached. They needed to say when the letter was sent and by what means so that the expected date of delivery could be ascertained or approximated by the court to be satisfied that the applicant became aware of the existence of the judgment within time but opted to sleep on their laurels and nights. Here there is no evidence of dispatch nor delivery. The court thus finds that delivery of the letter has not been demonstrated.

20. For electronic mail, there was filed a further affidavit which denounced the address used and produced the proper address. That evidence was never controverted. It stands unchallenged and therefore the court finds that no notice of the judgment was brought to the attention of the applicant by the respondent's counsel as alleged. The effect is that the applicant heard no notice of the judgment and only became aware of it at the time asserted. Because of the foregoing, the application was never brought after an inordinate and undue delay.

21. It is therefore the finding of the court that the reason for delay has been plausibly explained by the applicant to the satisfaction of the court.

22. On the argueability of the appeal, the court has considered and given regard to the grounds given in the draft memoranda and I do consider same not frivolous but arguable. In stating so, the court is of the learning that an arguable point need not be the kind that must succeed.

23. Flowing from the above, it is the finding of the court that there has been demonstrated merit on the prayer for extension of time to appeal. It is allowed on terms that the appeal be filed within fourteen (14) days from the date hereof.

24. Having extended time to appeal, it would be a worthless an endeavor to allow execution to proceed and leave the appeal merely as an academic exercise. I consider it that it is the question whether money is payable by the applicant on the decree while it maintains that it was merely a financier of this motor vehicle. I consider that interests of justice and the need to protect the right to access justice, even by way of an appeal dictate that the substratum of the appeal be protected by an order of stay of execution but on terms that ensure that upon conclusion of the appeal the respondent, if the appeal fails, is not put on the treacherous journey that execution by attachment and sale entails.

25. It is equally appreciated that in aggregate sum in the two decrees is not modest or indeed insubstantial and if payment is made it may not be assured that a refund would be easy in the even the appeal fails and the decrees become due for satisfaction.

26. Accordingly stay is granted on terms that the applicant shall deposit the entire decretal sum, principle plus costs and interests, into an escrow account in the joint names of the advocate for the parties within 30 days from today.

27. In summary, the applications dated September 2, 2022 are allowed on terms that:

    a) Time is enlarged by fourteen (1 4) days within which to file and serve a memorandum of appeal.

    b) Stay is granted pending appeal on terms that the full decretal sum on the two decrees is deposited into an escrow account within 30 days from the date hereof.

    c) The prayer for leave to come on record in place of the firm of Onyinkwa & Company advocates in this matter is dismissed for being misconceived and wholly unnecessary.

    d) Time is of essence and if there shall be default to file the appeal, the leave hereby granted shall stand discharge and lapsed while if the default shall entail failure to deposit the decretal sum, the stay itself shall stand discharged. In both instances, the respondent shall be at liberty to execute.

28. Let the costs of the appeal abide the outcome of the appeal when filed.

DATED, DELIVERED AND SIGNED AT KAKAMEGA, THIS 30TH DAY OF JANUARY, 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for parties

Court Assistant: Polycap