



Britam General Insurance Co. Kenya Limited v Raveco Hauliers Limited (Civil Appeal E022 of 2021) [2023] KEHC 2408 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2408 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E022 OF 2021
OA SEWE, J
MARCH 24, 2023**

BETWEEN

BRITAM GENERAL INSURANCE CO. KENYA LIMITED APPELLANT

AND

RAVECO HAULIERS LIMITED RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated October 11, 2022. It was filed by the respondent/applicant, Raveco Hauliers Limited, pursuant to Article 159 of the [Constitution of Kenya](#), Sections 1A, 1B, 3A, 65, 66, 72, 78 and 95 of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya; order 42, order 50 rule 6 and order 51 rule 1 of the [Civil Procedure Rules](#), and all other enabling provisions of the law. It seeks orders that:
 - (a) Spent;
 - (b) The Court be pleased to enlarge time within which the respondent/applicant may file and serve the Notice of Appeal in respect of the judgment delivered herein on May 5, 2022, and that the Notice of Appeal filed on September 12, 2022 be deemed duly filed.
 - (c) The Court do grant the respondent leave to file an appeal out of time from the judgment delivered herein on May 5, 2022.
 - (d) The Court be pleased to validate and deem the draft Memorandum of Appeal as filed.
 - (e) Spent
 - (f) Pending the hearing of the intended appeal, there be a stay of execution of the judgment and decree arising from the suit herein.
 - (g) Costs of the application be provided for.



2. The application is premised on the grounds that the preliminary objection raised herein touching on jurisdiction which occasioned Mombasa CMCC No 1468 of 2016: Raveco Hauliers Limited v Britam General Insurance Co. Kenya Limited to be struck out was mischievously not raised at the earliest opportunity, thereby wasting both courts' and litigants' time and ultimately denying the respondent a hearing on the merits. It was further averred that the respondent, being aggrieved by the said judgment, filed an application for enlargement of time; which application was dismissed on June 22, 2022.
3. The application was supported by the affidavit of one of the directors of the respondent, Mr. Ravinder S. Mahal, sworn on October 11, 2022. He explained that, upon delivery of the judgment dated May 5, 2022, the respondent's advocate in his wisdom attempted to institute a fresh suit out of time vide Mombasa High Court Misc. Application No 3 of 2022, but the application to do so was dismissed on June 22, 2022. He added that, uncharacteristically, counsel failed to immediately file an appeal due to the fact that both counsel in the firm were attending to their sick parent (now deceased). Mr. Mahal further averred that a Notice of Appeal was duly filed out of time but cannot be served until and unless the leave of the Court is given. He believes that the respondent has an arguable appeal and to that end attached a draft Memorandum of Appeal to his Supporting Affidavit as Annexure "RSM-6".
4. At paragraphs 11 to 14, Mr. Mahal averred that the respondent equally seeks for an order of stay of execution against the judgment dated May 5, 2022 considering that the appellant has commenced execution proceedings that shall cripple the respondent's operations unless stayed. He added that such execution if carried out, may well result in the closure of the respondent company, thereby rendering the appeal nugatory. Thus he foresees the respondent suffering substantial harm unless the orders sought are granted by the Court.
5. Directions were thereafter given on November 23, 2021 that the application be canvassed by way of written submissions. Thus, in his written submissions filed herein on February 8, 2023, counsel for the respondent proposed the following issues for determination:
 - (a) Whether the delay was inordinate; and whether it has been sufficiently explained;
 - (b) Whether the appeal is arguable and whether the Court should validate and deem the draft Memorandum of Appeal duly filed;
 - (c) Whether the Court ought to grant stay of execution pending the hearing and determination of the appeal; and,
 - (d) Who should pay the costs of the application.
6. Mr. Kalimbo submitted that the delay was occasioned by events beyond the control of the respondent's counsel as it was due to personal physical medical attention that needed to be accorded to their father, who has since passed on. He submitted that, despite the 5-month delay, which in his view is not inordinate, the respondent has already filed a Notice of Appeal and prays that the same be deemed duly filed. In his submission, the mistakes and misfortunes of counsel ought not to be visited upon the appellant; and that, if not granted extension of time as prayed, the appellant shall suffer an injustice not capable of being compensated by money damages. He relied on *Eres N.V. & Eres Enterprises Limited v Maina Murage & Co. Advocates*, Civil Application No 16 of 2013 in which extension of time was granted despite a delay of one year.
7. On whether the proposed appeal is arguable, counsel made reference to the draft Memorandum of Appeal dated October 11, 2022 and urged the Court to find that there was an error on the procedure adopted which can be cured by the appellate court. He accordingly submitted that the intended appeal has very good chances of success. He relied on *Nicholas Muriuki Kangangi v Attorney General*, Civil



Application No Nai. 244 of 2010 and [*Judicial Commission of Inquiry into the Goldenberg Affair & 3 others v Kilach*](#), Civil Application No Nai. 77 of 2003, for the proposition that an arguable appeal is not necessarily one that must succeed; and that one such arguable point is sufficient.

8. On whether the Court ought to grant stay of execution pending the hearing and determination of the intended appeal, Mr. Kalimbo urged the position that the respondent stands to suffer substantial loss unless stay is granted to preserve the *status quo*. The case of [*UAP Provincial Insurance Co. Ltd v Michael John Becket*](#), Civil Application No 204 of 2004 (Nairobi) and [*Board of Governors, Moi High School, Kabarak, & Another v Malcolm Bell*](#) [2013] eKLR were cited to buttress the argument that the appeal will ultimately be a futile exercise unless the order of stay is granted. Counsel also prayed that costs of the application be pegged on the outcome of the intended appeal.
9. It appears that no written submissions were filed by the respondent as there is no such document on the file. I have nevertheless considered the application in the light of the applicable provisions of the law, starting with Section 95 of the [*Civil Procedure Act*](#). It provides that:

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

10. Similarly, in Order 50 Rule 6 of the [*Civil Procedure Rules*](#), it is provided that:

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 for the same is not made until after the expiration of the time appointed or allowed."

11. It is noteworthy however that the intended appeal is not an appeal to this Court, but to the Court of Appeal; in respect of which Order 42 Rule 6(6) of the [*Civil Procedure Rules*](#) states:

For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

12. Of course the High Court has powers under Section 7 of the [*Appellate Jurisdiction Act*](#), Chapter 9 of the Laws of Kenya to, *inter alia*, extend time for giving a notice of intention to appeal. The provision states:

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired..."

13. It noteworthy however that for purposes of appeals to the Court of Appeal, Rule 75 of the [*Court of Appeal Rules*](#), is explicit that:

- (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
- (2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.



14. In this instance, the respondent filed a Notice of Appeal herein on September 12, 2022 in respect of the Court’s judgment dated May 5, 2022; and therefore, in a technical sense, an appeal to the Court of Appeal was thereby duly filed, its competence notwithstanding. I therefore take the view that any procedural defects in connection therewith can only be canvassed before the Court of Appeal. This must be why Rule 86 of the [Court of Appeal Rules](#) stipulates that:

A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—

- a. that no appeal lies; or
- b. that some essential step in the proceedings has not been taken or has not been taken within the prescribed time...”

15. Moreover, Rule 4 of the [Court of Appeal Rules](#) provides that:

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

16. I find succour for my finding in the decision of Hon. Kasango, J. in [Cosmas Mutiso Muema v Kenya Road Transporters Limited & Another](#) [2014] eKLR in which the learned judge held:

19 ...a closer look at Section 7 of the Appellant jurisdiction shows that the High Court is merely given the power to extend time to give notice of intention to appeal. That Section does not give the High Court any further power relating to an appeal to the Court of Appeal.

20. It is Rule 4 of the Court of Appeal Rules that gives the Court of Appeal general power to extend time limited under those Rules...It is Rule 74 of those Rules, as stated before, that limits the period within which a Notice of Appeal should be filed. That Notice should be filed within fourteen (14) days of the date of the decision being appealed from. If the Notice is filed out of the period provided by that Rule it is only the Court of Appeal which can extend the time of filing the Notice. The Plaintiff in my view was right to say that once the Defendant filed the Notice of Appeal out of its time, it removed itself from the ambits of the High Court. The filing of that Notice outstayed the jurisdiction of the High Court. That is the specific position of the law, and that being so the overriding principle in the [Civil Procedure Act](#) cannot be applicable...”

17. A similar position was taken by Hon. Ngugi, J. in [Sammy Kuria Ndung’u v Samuel Mbugua Ikumbu](#) [2021] eKLR thus:

13. The binding reasoning of the Court of Appeal in the Trimborn Agricultural Engineering Limited Case and the persuasive reasoning of the High Court in the Cosmas Mutiso Muema Case appear self-evidently dispositive of the case. While the High Court is clothed with jurisdiction by section 7 of the [Appellate Jurisdiction Act](#) to extend time for a litigant who is desirous of filing a Notice of Appeal to the Court of Appeal for the first time and before he has taken any action at the Court of Appeal, such authority dissipates once the intended Appellant has taken any step at the Court of Appeal. This is so however incompetent the Notice of Appeal filed at the Court of Appeal is. Once a party has filed a Notice of Appeal, the authority to



strike it out, extend time, deem it regular or any other action related to it lies with the Court of Appeal not the High Court.

14. This is not a mere formalistic fetish which can be cured by an appeal to Article 159(2)(d) of the Constitution which admonishes Courts to eschew undue regard to technicalities in dispensing justice. It makes sense that once a Notice of Appeal has been lodged, any further applications related to the appeal should be filed at the Court of Appeal which is then seized of the matter. This prevents the ugly spectacle or contretemps of a litigant litigating the same issue in two different layers of our Courts. It provides for a predictable docket management system. For example, a party who brings an application in the High Court in such circumstances and whose application is declined on its merits might approach the Court of Appeal with the same application hence getting two bites at the cherry. This is because in such a situation, the Court of Appeal would not be exercising its appellate powers over a decision of the High Court but an original jurisdiction. Even where a party whose such application is denied at the High Court chooses not to pursue a similar application at the Court of Appeal, he is still left with a comatose Notice of Appeal at the Court of Appeal. This often leads to increased numbers of inactive files which have to be cleaned up frequently.”
18. Lastly, in Trimborn Agricultural Engineering Limited v David Njoroge Kabaiko & Another[2000] eKLR, the Court of Appeal held:

The powers of the superior court to enlarge the time for lodging a notice of appeal out of time have been well defined by now. This Court in a recent decision delivered in the case of Peter Njoroge Mairo vs Francis Gicharu Kariri & another, Civil Appeal (Application) No 186 of 1999, (unreported), said:

“In our view section 7, above, should be given a construction which would obviate ridiculous result. The intention of the Legislature in enacting section 7, above, clearly appears to us to be that it can only be used and more specifically the very first time the intending appellants manifests his intention to appeal.
19. In the premises, I take the view that, given the circumstances of this case, the best course was for the respondent to make its application for extension of time in connection with its Notice of Appeal dated September 5, 2022 before the Court of Appeal. In the same vein, it is plain that the respondent’s prayer for leave to file an appeal out of time from the judgment delivered herein on May 5, 2022 as well as the prayer that the Court be pleased to validate and deem the draft Memorandum of Appeal as duly filed are not only misconceived but also untenable.
20. The next issue to consider is whether sufficient cause has been shown for stay of execution of the judgment delivered on May 5, 2022. In this regard, Order 42 Rule 6 (2) of the Civil Procedure Rules, provides that:
 - (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
21. From the above provision, an applicant for stay is obliged to satisfy the Court that substantial loss may ensue unless stay is granted; that the application has been made without unreasonable delay and that the applicant is ready to fulfill such requirements as to security for the due performance of the decree



as may be ordered by court. However, in a situation such as this where the competence of the Notice of Appeal is in doubt, it is my considered view that no useful purpose will be served by an order of stay. In this regard, I am in agreement with the position taken in *Charles Gacheche Gicheru v SBI International Holdings Ag (Kenya)* [2020] eKLR that:

...without any appeal or a competent Notice of appeal on record, a stay order would not issue under Order 42 of the Civil Procedure Rules, because the purpose of the stay order is to safeguard the right to hearing of an appeal and not for the sake of it. Accordingly the application herein is also incompetent and it must fall down on its face.”

22. In the result, I find no merit in the defendant’s Notice of Motion dated October 11, 2022. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF MARCH 2023

OLGA SEWE

JUDGE

