



Fidelity Shield Insurance Co. Ltd v Machini (Civil Miscellaneous Application E316 of 2022) [2023] KEHC 21740 (KLR) (Civ) (25 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21740 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS APPLICATION E316 OF 2022
AN ONGERI, J
AUGUST 25, 2023

BETWEEN

FIDELITY SHIELD INSURANCE CO. LTD APPLICANT

AND

CYRUS OMBUNA MACHINI RESPONDENT

RULING

1. The application coming for consideration in this ruling is the notice of motion dated January 25, 2023 brought under Section 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 43 Rule 2 and 3 of the Civil Procedure Rules Article 48, 50 and 159 (22) (d) (2) (d) of the Constitution of Kenya and all enabling provisions of the law.
2. The respondent/applicant is seeking the following prayers in the application dated January 25, 2023
 - i. That the application herein be certified as extremely urgent and the same be heard on priority basis.
 - ii. That this honourable court pleased to grant the applicant leave to file the instant application out of time.
 - iii. That this honourable court be pleased to grant leave to the applicant to appeal against the ruling of Hon Justice Joseph K Sargon dated and delivered on July 15, 2022 and allowing the miscellaneous application herein in its entirety.
 - iv. That Notice of Appeal lodged on August 2, 2022 and annexed hereto and marked as “COM 1” be admitted as duly lodged and served.



- v. That this honourable court does not grant any further orders as may be just and expedient and for the interest of justice.
 - vi. That costs do abide by the decision of the intended appeal.
3. The application is supported by the affidavit of the respondent Cyrus Ombuna Machini sworn on January 25, 2023 which states that the appeal against the ruling dated July 15, 2022 without leave was an inadvertent mistake on the part of his advocates which ought not to be visited against him. He added that procedural errors and lapses which do not go deep into the root of the jurisdiction of the court ought no to debar him from pursuing his appeal.
 4. He deposed that the intended appeal raises arguable grounds which are meritorious and should the instant application be denied he will be denied an opportunity to pursue and ventilate his appeal to its logical conclusion.
 5. The application was opposed by the replying affidavit of Sammy Kamau Wanjiku dated February 14, 2023. In it he deposed that the impugned ruling was delivered on July 15, 2022 in the presence of both counsel for the parties. The applicant ought to have sought for leave to appeal the ruling within the 14 days and has further not preferred the reasons for the delay.
 6. The parties filed submissions as follows; the applicant submitted that Order 50, Rule 6 of the [Civil Procedure Rules](#), the courts have power to enlarge the time required for the performance of any acts stipulated in the Rules notwithstanding the fact that such time has expired. In the course of undertaking research for the submissions of appeal the applicants counsel discovered that he forgot to seek leave to appeal against the impugned ruling. As a result they promptly made the instant application on herein.
 7. The applicant submitted that that procedural errors and lapses which does not go into the root of the jurisdiction of the court ought not to debar him from pursuit of an appeal. In the case of [Belinda Muras & 6 Others -vs- Amos Wainaina](#) [1978] KLR in which Madan, JA, (as he then was) defined what constitutes a mistake as follows:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate.”
 8. The applicant argued that his appeal raises arguable grounds which merit serious judicial consideration, that he filed the notice of appeal within the 14 days from the delivery of the ruling and in strict compliance with rule 75 of the *Court of appeal Rules*.
 9. The respondent submitted that the Court does not have the discretionary powers to extend/ enlarge the period for leave to appeal outside the statutory period of fourteen (14) days, that even if such discretion exists, a period of seven (7) months has since lapsed from the date of delivery of the ruling which period is inordinate, and lastly, the Applicant having filed an appeal from the impugned Ruling, without leave of the Court, the Orders sought (if granted) will disadvantage the Respondent who has already acquired a defense of lack of jurisdiction, before the Appellant Court.



10. Further, it was submitted that the grant of leave being a discretionary remedy, the Applicant is undeserving of the prayers sought that under the Principle of Equity "he who seeks equity must do equity".
11. The respondent submitted that if the Court were to proceed and grant the prayers sought, then that will work to the disadvantage of the Respondent who has already acquired a Defence to the alleged appeal, which is; lack of jurisdiction to hear and determine the appeal filed for want of leave being sought and granted. The respondent further contended that the Court ought to look at the Application cautiously and find that in as much as the Applicant had the right to appeal; leave of the Court was a pre-requisite condition for any competent appeal to be lodged.
12. It was further submitted that it follows that the Court cannot be used as an avenue for sanitizing an already flawed process.
13. Section 95 of the *Civil Procedure Act* and Order 50 Rule 5 Civil Procedure Rules states as follows;

Section 95 Enlargement of time

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.

[Order 50, rule 5.] Time for giving security for costs, when not to be reckoned

The day on which an order for security for costs is served, and the time thenceforward until and including the day on which such security is given shall not be reckoned in the computation of time allowed to plead, or take any other proceeding in the cause or matter.

14. This appeal to the Court of Appeal on an interlocutory application will only serve the purpose of delaying the dispensation of this suit.
15. I direct that the respondent defers the appeal until the main appeal has been heard in order to expedite this matter.
16. I therefore grant the respondent leave to file an appeal to the Court of Appeal against the ruling delivered on July 15, 2022.
17. The notice of appeal dated August 2, 2022 is also deemed as properly filed.
18. However, the respondent did not seek stay of this case pending the intended appeal.
19. In order to expedite this appeal, the appellant is granted 30 days to file and serve Record of Appeal.
20. Mention on September 19, 2023 before the Deputy Registrar for preparation of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF AUGUST, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

.....**FOR THE APPLICANT**



.....FOR THE RESPONDENT

