



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 06 OF 2021

TIPPER HAULIERS LIMITED.....APPLICANT

-VERSUS-

SHADRACK KIPNGETICH SIGEI.....1ST RESPONDENT

EMILY CHEPKEMOI KIRUI

(Suing on behalf of the estate of the late

JACKLINE CHEPKOECH SIGEI.....2ND RESPONDENT

RULING

1. This ruling is predicated on the Notice of Motion dated 23rd November, 2021 taken out by the applicant and supported by the grounds set out on its body and the facts stated in the affidavit of the applicant. The applicant sought for an order for leave to appeal out of time against the judgment and decree delivered on 30th July, 2021 in Milimani CMCC No. 5031 of 2018 and a further order for a stay of execution of the aforementioned judgment pending the hearing and determination of the appeal.
2. The Motion is supported by the grounds presented on its face and the facts stated in the affidavit of Said Rashid Mbaruk.
3. To resist the Motion, Shadrack Kipngetch Sigei swore a replying affidavit on 16th September, 2021 on behalf of the respondent, to which Said Rashid Mbaruk rejoined with a further affidavit sworn on 3rd February, 2022.
4. The instant Motion was canvassed through oral arguments whereby the parties' respective advocates chose to rely on their averments made in their respective affidavits.
5. I have considered the grounds laid out on the body of the Motion, the facts deponed in the affidavits supporting and opposing the Motion and the brief oral arguments.
6. The orders being sought in the Motion are two-fold: first is the order seeking for enlargement of time to appeal and for leave to appeal out of time against the impugned judgment and decree.
7. Section 79G of the Civil Procedure Act stipulates that an appeal against the decision of a subordinate court shall be lodged within 30 days from the date of the decree or the order being appealed against. The provision further stipulates that an appeal can be admitted out of time where sufficient cause has been shown.
8. Moreover, under the provisions of Section 95 of the Civil Procedure Act and Order 50, Rule 5 of the Civil Procedure Rules, the courts have power to enlarge the time required for the performance of any act under the Rules even where such time has expired.

9. In the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** the Court of Appeal illustrated the conditions to be met in deciding whether to extend the period for filing an appeal out of time and which I shall address hereunder.

10. Under the first condition touching on length of delay, while it is apparent from the record that no copy of the impugned judgment was availed to this court, the parties are in agreement that the impugned judgment was delivered on 29th November, 2019 which is close to two (2) years prior to the filing of the Motion. In my mind, while there has clearly been a delay in filing the Motion.

11. Concerning the reasons for the delay, the applicant explained that they filed an application seeking to set aside the ex-parte judgment dated 4th August 2020 on the basis of negligence attributed by the Applicant's insurer and panel of advocates who never notified them on the participation wherein it proceeded ex-parte and judgment was entered for more than Kshs.10 million. The application was dismissed and directed that in case the complaint ought to be lodged against its insurers and panel of lawyers.

12. The Applicant stated that instead of filing an appeal, they filed a claim against its insurers, Africa Merchant Assurance Co. Limited in Milimani E5248/2020, as well as an application for a stay until the conclusion of the case, which was dismissed.

13. The applicant feels aggrieved by having adhered to the said court's directive and the same feels that they are not entitled to pay for judgment in which the same was never afforded an opportunity to be heard. The respondents have argued in their grounds that the delay by the applicant in filing the appeal is inordinate.

14. Upon considering the explanation given by the applicant, I find the same to be reasonable in the circumstances.

15. As relates to the condition on whether or not an arguable appeal exists, it is the applicant's assertion that the lower court reversed its opinion, which the Applicant had blindly accepted, and that they should have appealed against the decision not to set aside the ex-parte judgment.

16. The respondent on the other hand contends that the Applicant has never intended to appeal against the said judgment or any other consequential orders in the said suit and that its intention was to have the insurance company satisfy the decretal sum.

17. From the grounds set out by the Applicant it is evident that the Appeal is arguable, reason being is that the Applicants never got an opportunity to defend themselves and the inadvertence was on the part of the applicant's previous advocate who failed to proceed further to pre-trial directions which lead to the ex-parte judgment.

18. It is a matter of legal principle that the mistake of an advocate ordinarily ought not to be visited upon a client. I am therefore satisfied that the applicants have demonstrated arguable points of law and fact in their appeal.

19. Upon my perusal of the record, it is apparent that the judgment was in favour of the respondents herein and against the applicant. It therefore follows that the respondents are lawfully entitled to enjoy the fruits of his judgment. Suffice it to say that it would not be in the interest of justice to lock out the applicants who is aggrieved by the ex-parte judgment. I therefore find it reasonable for the applicant to be given the opportunity to be heard.

20. The second prayer is for stay of execution of the decree pending appeal, for which the guiding provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the conditions to be satisfied for such an order to be granted.

21. The first condition being that the application must have been brought without unreasonable delay has already been addressed hereinabove.

22. The second condition touches on substantial loss to be suffered by an applicant which is the cornerstone in an application for stay. The applicant in this matter avers that unless the interim orders are granted then the

Applicant's business stand curtailed, ruined and insolvent as over 32 of its assets have been attached and intended to be sold by way of public auction.

23. On the other hand the respondent is of the view that the applicants have not indicated any willingness to deposit the decretal sum in court and have not demonstrated by way of evidence the substantial loss they stand to suffer in the circumstances.

24. In the absence of anything to ascertain the respondent's financial capacity to refund the decretal sum, I am satisfied that the applicants have reasonably demonstrated that they stand to suffer substantial loss if the order for a stay of execution is not granted.

25. It also follows that if the Respondent executes the judgement and the Applicant's appeal succeeds, then not only will the Applicant suffer substantial loss but the appeal will also be rendered nugatory.

26. In *Harit Sheth Advocate -vs- Shamas Charania – Civil Appeal No. 68 of 2008*, this Court held:-

“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.”

27. In making an order for the provision of security, this court must balance the interest of the parties. In the present instance, it is noteworthy that the respondents has not shown any pressing need that would require payment of the decretal amount to them at this stage.

28. In the end therefore, the Motion dated 23rd November, 2021 is found to be meritorious and it is allowed, therefore giving rise to a grant of the following orders :

i. The applicants are granted leave of 14 days to file an appeal out of time.

ii. There shall be an order for stay of execution of the judgment and decree in Milimani CMCC No.5031 of 2018 pending the hearing and determination of the intended appeal on the condition that the applicant deposits a sum of Kshs.3,000,000/= being part of the decretal sum in an interest earning account in the joint names of the advocates and or firms of advocates within 45 days or in the alternative provide a bank guarantee for ksh.3,000,000/= within 45 days from the date of this ruling in default of which the stay order shall lapse.

iii. Costs of the Motion shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant

..... for the Respondent