



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E511 OF 2021

BARCLAYS BANK OF KENYA LTD.....APPELLANT/APPLICANT

-VERSUS-

AMITY EQUIPMENT LTD.....1ST RESPONDENT

KENINDIA ASSURANCE COMPANY LTD.....2ND RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 19th August, 2021 taken out by the appellant/applicant and supported by the grounds set out on its body and the facts stated in the affidavits of advocate Daniel Mwenda Muriuki and Michael Massawa, Legal Counsel at Absa Bank Kenya PLC. The orders being sought are for leave to lodge an appeal out of time against the judgment and decree in Milimani CMCC NO. 1125 OF 2017 delivered on 11th June, 2021; an order that the memorandum of appeal filed out of time on 19th August, 2021 be deemed as duly filed; and a further order for a stay of execution of the aforesaid judgment pending the hearing and determination of the appeal.
2. The 1st respondent responded to the Motion by way of the replying affidavit sworn by advocate Anne Lilande on 17th September, 2021.
3. At the interparties hearing of the Motion, the parties put in written submissions.
4. According to the record, it is apparent that the 2nd respondent did not file any documents in respect to the Motion or participate at the hearing.
5. I have considered the grounds laid out on the body of the Motion; the facts deponed in the supporting and replying affidavits respectively; and the competing written submissions and authorities cited.
6. From a reading of the instant Motion it is evident that the orders sought therein are two-fold. The first is the order seeking for leave to appeal out of time against the impugned judgment and decree.
7. The provisions of Section 79G of the Civil Procedure Act are clear that the timelines for lodging an appeal against the decision of a subordinate court are within 30 days from the date of the decree or the order being appealed against. Furthermore, under the provisions of Section 95 of the Civil Procedure Act and Order 50, Rule 6 of the Civil Procedure Rules, the courts have discretionary power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
8. In the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** the Court of Appeal developed various conditions to offer guidance in deciding whether to extend the period for filing an appeal out of time and which I will address hereunder. The conditions were restated by the court in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** quoted in the submissions by the 1st respondent.
9. The first condition concerns the length of delay. In his supporting affidavit, Daniel Mwenda Muriuki states that the Motion has been brought without unreasonable delay, adding that the impugned judgment was delivered on 11th June, 2021. His sentiments are echoed in the affidavit of Michael Massawa and further echoed in the applicant's submissions.
10. The 1st respondent is of the view that the instant Motion is a mere afterthought.
11. Upon my perusal of the record and as pointed out to me by the parties, it is apparent that the impugned judgment was delivered on 11th

June, 2021 while the Motion was brought sometime on or about the 19th day of August, 2021; about two (2) months later. I therefore do not find the delay to be unreasonable.

12. Concerning the reason(s) for the delay, it is the applicant's assertion and submission that the delay was occasioned by the fact that the judgment was delivered without notice to the parties and that attempts at obtaining a copy of the same were further delayed until 10th August, 2021.

13. The 1st respondent on its part states and submits that the parties were notified of the delivery of the judgment via SMS on 14th June, 2021 whereas the decree was served upon the applicant's advocate on 10th August, 2021 which seems to have triggered the instant Motion.

14. Upon taking into account the rival averments indicated above, I find the explanation offered by the applicant for the delay to be reasonable in the circumstances.

15. On the principle touching on whether an arguable appeal exists, the applicant on the one part states and submits that its appeal is arguable and has high chances of success, further submitting that it is aggrieved by the decision of the trial court finding that it required the consent of the 1st respondent before renewing its insurance policy held with the 2nd respondent.

16. The 1st respondent is of the view that no arguable appeal exists since the trial court properly considered the material placed before it and arrived at a reasonable finding.

17. It is apparent from the grounds to the memorandum of appeal on record that the intended appeal is challenging the finding of the trial court in relation to an insurance policy taken out by the applicant with the 2nd respondent. In the premises, I am satisfied that the applicant has raised arguable grounds in its appeal.

18. On the final condition touching on prejudice, the applicant states that the 1st respondent will not be prejudiced if the orders sought are granted. The 1st respondent did not specifically touch on this subject.

19. In the absence of any credible evidence of prejudice to be suffered by any of the respondents, I am convinced that it would be in the interest of justice to grant the applicant an opportunity to challenge the trial court's decision on appeal. I therefore find it reasonable in the circumstances to extend the time required for the applicant to lodge their appeal.

20. The second order sought is that of a stay of execution of the decree pending appeal.

21. The guiding provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the following conditions in determining an application for stay.

22. The first condition stating that the application must have been made without unreasonable delay has already been addressed above.

23. The second condition touches on substantial loss to be suffered by an applicant. Going by the averments made in the respective supporting affidavits to the instant Motion and the written submissions, it is the applicant's apprehension that unless an order for a stay of execution is granted, it is likely that the applicant will not be able to recover the decretal sum from the 1st respondent once the same is paid to it and the appeal succeeds. In reply, the 1st respondent is of the view that the Motion is purely intended to delay execution of the decree arising out of the impugned judgment.

24. The question on who has the burden of proof on the issue of refund of the decretal sum was aptly discussed by the Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** cited in the applicant's submissions, where it held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

25. In the absence of anything to indicate or ascertain the 1st respondent's financial standing, I am satisfied that the applicant has reasonably shown the likelihood of substantial loss occurring should the order for a stay of execution be denied.

26. Under the final condition which is the provision of security for the due performance of such decree or order, the applicant has indicated its readiness and willingness to comply with the same, whereas the 1st respondent urges that half the decretal sum be paid to itself while the remaining half be deposited in a joint interest earning account.

27. Upon my perusal of the record, I have not come across anything to justify release of part of the decretal sum to the 1st respondent at this stage and hence I am unable to grant the request made by the 1st respondent in this respect.

28. The upshot therefore is that the Motion dated 19th August, 2021 is allowed as prayed, giving rise to the following orders:

i. The memorandum of appeal on record shall be deemed as having been duly filed with leave of court upon payment of the

requisite court filing fees, where applicable.

ii. There shall be a stay of execution of the judgment delivered on 11th June, 2021 on the condition that the applicant deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within 45 days from today, failing which the order for stay shall automatically lapse.

iii. Costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF MARCH, 2022.

.....

J.K. SERGON

JUDGE

In the presence of:

.....for the Appellant/Applicant

.....for the 1st Respondent

.....for the 2nd Respondent