



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCC MISC APPL. NO. 5 OF 2020

HORIZON COACH COMPANY LIMITED.....1ST APPLICANT/ DEFENDANT

BASARI COMPANY LIMITED.....2ND APPLICANT/ DEFENDANT

-VERSUS-

JOSEPH NDIRANGU WAIGWA

PAMELA MANGA NYANGALA (*Suing as the Legal Administrator*)

Of the estate of Gerald Wahome Waigwa).....1ST RESPONDENT/PLAINTIFF

SPRINGS.....2ND RESPONDENT/PLAINTIFF

KYALO GREGORY3RD RESPONDENT/PLAINTIFF

RULING

1. Before me is an application dated 13th February 2020 brought under section 3A, 79G and 95 of the Civil Procedure Act (Cap 21), Order 22 Rule 22, Order 42 Rule 6, Order 59 Rule 6, Order 51 Rule 1 and 3 of the Civil Procedure Rules 2010. The prayers that are presently for this court's decision are prayers 2, 4 and 5 as follows –

1) (spent)

2) That this honourable court be pleased to grant the Applicants leave to appeal out of time against the judgment of the Resident Magistrate J.D Karani delivered on 01/10/2019 in Makindu CMCC No. 345 of 2014 and delivered on 1st October 2019.

3) Spent

4) That this honourable court be pleased to stay execution of the judgment and decree in Makindu CMCC No. 345 of 2014 pending the hearing and determination of the intended appeal.

5) That the costs of this application abide the outcome of the intended appeal.

2. The application has grounds on the face of the Notice of Motion. The grounds are that the judgment was delivered on 01/10/2019 and the 30 days allowed for appeal had lapsed, that the Applicants were aggrieved by the judgment delivered and are seeking leave to appeal out of time, that the application was made without unnecessary delay, that the Applicants would suffer substantial or irreparable loss and damage as there was the likelihood that they would not recover the decretal amount awarded, that the intended appeal would be rendered nugatory, that the Applicants had a good and arguable appeal with high chances of success, that the Respondents would not suffer prejudice or damage which could not be compensated by way of costs of the application if the application was allowed.

3. The application was filed with a Supporting Affidavit sworn by Isabella Nyambura the Legal Counsel of Directline Assurance Company Ltd the insurers of the subject motor vehicle registration No.KBM 225X. It was deposed in the affidavit that in terms of the provisions of the Insurance 3rd Party Risks Act (Cap. 405) the limit of damages was Kshs.3,000,000/= plus interest and costs. Also filed with the application was a draft Memorandum of Appeal which was unsigned.

4. Parties' counsel filed written submissions to the application. The Applicants' counsel M/s Kimondo Gachoka & Company filed submissions on 3/11/2020 while the Respondents' counsel M/s Kanyi & Company Advocates filed their submissions on 4th February 2021. I have perused and considered both sets of submissions. I note that a number of legal authorities were cited in the submissions of counsel.

5. This is an application for leave to appeal out of time, as well as an application for stay of execution of judgment. Interim stay pending the hearing and determination of the application was granted by this court. I will first of all deal with the request for leave to appeal out of time.

6. With regard to the period within which to file an appeal, section 79G of the Civil Procedure Act (*Cap 21*) gives the period within which an appeal from the subordinate court should be filed in the High Court. Such period is 30 days. The section specifically provides as follows –

79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty (30) days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the Appellant for a copy of the decree or order.

Provided that an appeal may be admitted out of time if the Appellant satisfies the court that he had good and sufficient cause for not filing the appeal out of time.

7. Coming to the powers of the court to extend time under the rules, Order 50 Rule 6 of the Civil Procedure Rules is relevant, and it provides as follows –

50(6) Whether a limited time has been fixed for the doing of any act or taking any proceedings under those Rules or by summary notice or by an 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 was not made until after the expiration of the time appointed or allowed.

Provided that the costs of any application to extend such time and if any order made thereon shall be borne by the parties making such application unless the court orders otherwise.

8. Thus both under section 75G of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure rules there is provision for extension of time by the court.

9. The main consideration in exercising such discretion to extend time, in my view, is for the court to do justice to all the parties. The trial court herein did not fix a time for filing an appeal, as such time is governed by section 79G of the Civil Procedure Act which sets a time limit of 30 days. The Applicants herein claim that though their advocate was in court when judgment was delivered he did not take any further necessary steps to appeal, nor did he inform them of the delivery of the judgment and left service. They say that when they became aware of the delivery judgment, they came to court without undue delay. The Respondents have given no contra version of the situation.

10. Having considered the request, I find that in accordance with the provisions of section 3A of the Civil Procedure Act, and Article 159(2) (d) of the Constitution of Kenya 2010 as well as section 75G of the Civil Procedure Act, denying the Applicants extension time to appeal will deny them substantive justice which will be unjust. I will thus extend the time within which to file their intended appeal.

11. I now go to the request for stay of execution of decree or order of the court. In this regard, Order 42 Rule 6(2) of the Civil Procedure Rules, provides as follows –

6(2) No order of 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;

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.

12. On whether the application for stay was made without undue delay, I note that the judgment was delivered on 01/10/2019 and the application filed 5 months later on 25th February 2020 by M/s Kairu & McCourt advocates for the Applicants. In the application the Applicants say that their advocate left service without proper handover. Though the Applicants did not give the date when they became aware of the judgment herein, in my view, in the circumstances of this case where the court is not able to get a word on the delay from the said advocate, I find that the application was filed without unreasonable delay.

13. Will the Applicant suffer substantial loss if the stay of execution sought is not granted? The Applicants argument is that the award is beyond what the insurance company is liable to pay. Having perused the grounds of appeal, I am of the view that the appeal is an arguable appeal. Since the main ground of appeal appears to be on quantum, in this money decree matter where the deceased died, I will grant stay of execution but with a condition that the Applicants pay part of the decretal amount.

14. With regard to provision of security, since I have decided above that I will grant stay of execution of decree subject to payment of part of the decretal amount, the amount to be so paid in my view, will cover the security to be offered by the Applicants.

15. In conclusion therefore, the orders of this court are as follows-

1) Leave be and is hereby granted to extend the time within which to appeal herein. The Applicants are granted 30 days from today to file their appeal.

2) I grant stay of execution of the decree herein, subject to the Applicants paying to the decree holders part of the amount awarded that is Kshs.800,000/= (eight hundred thousand shillings) within 30 days from today. If the said amount is not paid within the time set herein the stay of execution of decree herein granted will automatically lapse.

3) The costs of this application will abide the decision in the intended appeal.

Delivered, Signed & dated this 16th day of March, 2021 in open court at Makueni.

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GEORGE. DULU

JUDGE