REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL CASE 20 OF 2021

HILAA ABDULLAH AMIN.....PLAINTIFF

~VERSUS~

SAUMU UMAZI BINZI & SAHA DZUYA ANGATSI..... DEFENDANT

RULING

Coram: Hon. R. Nyakundi

Mr. Njoroge Mwangi Advocate for the Defendant

Mr. Kimondo Gachoka Advocate for the Applicant

Background:

The Respondent had filed the claim against the Applicant before the Magistrates Court at Kaloleni on 23rd October 2019 seeking damages in tort arising out of a Road Traffic Accident which occurred on or about 24th January 2019. Before that Court both liability and damages were in issue. However, in the course of time, parties entered into a consent on liability apportioned at 10%:90% as against the Applicant. The parties only called evidence and submitted on assessment of damages. The trial court on appraisal of the issues and the guiding principles assessed quantum at **Ksh 2,466, 539** plus costs and interest.

The Applicant being aggrieved with the Judgement failed to prefer an Appeal within the stipulated thirty days provided under Section 79 (G) of the Civil Procedure Act. He has now approached this court vide notice of motion dated 19th March 2021 seeking leave of the court to extend time for lodging an appeal. Secondly, a stay of execution of the Judgement pending the hearing and determination of the intended appeal.

In support of the Application, is an Affidavit sworn by Pauline Waruhiu ostensibly representing Directline Assurance Company as the insurers of Motor Vehicle Registration Number KCD 001U. In challenging the Application, the Respondent filed a Replying Affidavit dated 15th March 2021. Indeed, for the Applicant to succeed I will be looking at the affidavit's evidence and the principles that govern Applications of this nature.

Determination

The Law

The timeframe of thirty [30] days in which a party aggrieved with the decision of the subordinate court can appeal provided for in Section 79 (G) of the Civil Procedure Act. However, in the event of a lapse, the same section under the proviso, 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 in time.

The observance as to what constitutes sufficient and good cause was decided in the cases ***Veroze, Begum, Qureshi VS Magahphal Patel (1964) EA633***. ***Dapune Parry VS Murray Alexander (1963) EA546***. Once a breach of the statute on timeline is established, the decision made to enlarge time has been guided by the general principles raised in the cases of the ***First American Bank of Kenya Ltd VS Gulabu P. Shah & 2 others HCC No 2355 of 2000 1EA*** in which the Courts expressed themselves as follows:

a) **Explanation for the delay**

b) **The merits of the contemplated action and whether the intended appeal is arguable with a prospect of success if the applicant is granted leave to appeal out of time**

c) **The degree of prejudice to the respondent if the application was to be granted**

d) **The effect of the delay on public administration and the importance of compliance with time limits (See also BI-MACH ENGINEERS LIMITED VS JAMES KIHORO (2011) EKLR).**

It follows therefore from these principles and the proviso under Section 79 (G) of the Act granting the extension of time is a discretionary power donated to the Court by the Statute that will then be exercised in favour or against the applicant for sufficient cause and good reasons or lack of it.

I will now apply these principles to the facts of the case beginning with the length of delay and whether sufficient explanation has been stated by the applicant. From the record, the impugned judgement of the trial court was delivered on 8th September 2020 against the Applicant. The Applicant if aggrieved with any portion of the judgement had a countdown of the time with effect from the 8th of September 2020 to the 9th October 2020.That apparently did not happen until the 10th March 2021 when the instant application was filed seeking leave of the court to enlarge time. The first reason the applicant gives for the delay to meet the deadline was the aspect to obtain a copy of the judgement delivered on the matter which could have formed the basis of his memorandum of appeal. That then occasioned a delay of about 6 months between the date of delivery of judgement to the period within which the applicant woke up from slumber to file an application for this equitable relief. This to me is an inordinately long delay and can only be justified if there is a good reason for that conduct which occasioned a breach of Section 79 (G). So what the Applicant was in effect labouring with, for all that time, if indeed he was aggrieved with the judgement, is not clear. It is my view that a judgement of the court does not take that long for it to be typed and supplied to the litigants in the case.

What else can I say, is it not therefore surprising that even in an archaic system of Justice, a judgement pronounced by the Court does not take six [6] months before it is made known or supplied to the parties within a reasonable time. Incidentally, the applicant was represented by Council before the lower court and there is therefore a rebuttable presumption that he was kept abreast of all the happenings of the Court including delivery of judgement.

Having heard the argument from both parties, I am not convinced that the issue of delay for the applicant not to file an appeal of time was as a result of non-availability of the judgement of the trial court. I consider this to be a routine matter where parties disguise and hide behind the Constitutional Right of Appeal to delay the adjudication of disputes only as an afterthought to vex the Court by way of an avalanche of Applications to file an appeal out of time. I consider the thrust of some of the Applications being filed are admittedly aimed at delaying the enforcement and execution of the decree of the Trial Court. There is always an obvious temptation for the losing party to try and suppress a tall cost the execution of the money decree. So by the applicant telling this Court that he had to take six [6] months to apply and obtain a copy of the judgement is indeed impermissible and is an affront to the expeditious and efficient administration of justice. As much as the applicant is laying blame squarely on the administration of the court nevertheless he forgot even to support his explanation with a Certificate of Delay from that office which deals with transcripts, record of proceedings and the decree. It is unlikely that the applicant's reasons for the delay had something to do with the Judgement as alluded to in the affidavit. That to me is not an excusable mistake or blunder which the Court ought to consider to extend time in favour of the applicant. On this ground, the explanation has no prospect of satisfying the test of sufficient cause and reasons for the delay for the applicant to be accorded the discretionary power of the Court.

What about the ground on the prospects of high chances of succeeding on appeal? The Court in ***Chris Bichage VS Richard Tongi & 2 others (2013)*** **ekLR held in *interalia* "that the applicant to an appeal has the duty to show that the intended appeal is arguable and not frivolous and secondly, if the appeal were to succeed with exercise of discretion to extend time, the appeal would be rendered nugatory" (See also *Athumani Nubira Juma VS Afwa Mohammed Ramadani CA No. 227 of 2015)***

In case this appeal is admitted, the only Question this Court has to decide in the future is whether the lower Court exercised its discretion properly in the award of damages which the applicant describes as punitive and manifestly excessive. This grievance in the memorandum of appeal is in the real sense the touchstone of the intended appeal and this has to be weighed alongside with the submissions made on behalf of the parties before the trial court. From the combined effect of the submissions, the applicant urged the trial court to consider an award of **Ksh 858, 533/=** as a fair and just award in favour of the respondent. On appraisal of the judgement, there is material difference between the proposed award by the applicant and the final outcome as founded by a learned trial Magistrate. However, that alone cannot be described as a substantial reason and cogent evidence to persuade the Court that the applicant appeal has high chances of success. It is in my view that against the backdrop of the facts and the decision made by the Court, there is no dispute that the respondent is entitled to a measure of damages under the Law Reform Miscellaneous Act and the fatal accidents act. The point of departure between the Applicant's and Respondent case as canvassed before the trial court is in the nature of the quantum on the various heads of damages claimed in the suit. The judgement of the lower court delivered therein specifically awarded **Ksh 2,515,599/=** for loss of dependency.

Therefore, in the circumstances of the intended appeal, I do consider this to be the central issue of the appeal. To this end, given the concessions between both parties with regard to consent judgement on liability, the entire decretal sum cannot be said to be in issue in the main appeal. I say so because an appeal's court is guided by the principles expressed in ***Peters v Sunday Post (1958 EA424*)**. The live issue that will be highlighted on appeal is whether the learned trial Magistrate in assessing damages overreached his discretion to award excessive damages. That is what the appeal Court will be asked to entertain and if the evidence availed is persuasive, to go ahead and interfere with the decision of the trial Court.

Looking at the matter from a panoramic view of the intended appeal, this Court should be cautious in its exercise of discretion so as not to deprive the successive respondent of the fruits of the judgement without a just cause. The discrete point here which I find disturbing is for an aggrieved party to a judgement obtained on the merits in accident claims in absence of proper factual situation withholds the entire decretal sum in which liability was not contested. Accordingly, it does not lie in his mouth till complain that the entire decretal sum is in dispute and thereafter turn up to file an appeal discrediting the judgement of the court. That I verily believe in the normal course of events in assessment of compensation in accident claims a successive party should not merely be deprived of the fruits his/her judgement for a reason of an appeal

being preferred to a higher court, more so, where liability has been settled by consent.

A typical guideline principle in answer to that question will be to find a compromise between the proposed award of damages submitted by the Defendant/Applicant on Appeal and the actual award finally settled by the court in the impugned judgement. I consider that there are compelling features in accident claims which make it appropriate for the defendant to settle part of the decree in appropriate cases which may not be contestable and the special leave so granted focus as a whole on the disputed sum. Although I do not think that this is an appropriate time to canvass in detail the intended appeal, submissions filed by both Councils at that trial court mirror some of the concerns touching on what I call the prospect of an arguable appeal with high chances of success and trying to get a balance with the prejudice/justice test against the Respondent.

Unfortunately, the applicant has not shown exactly that on appeal he will be rewriting or reasserting the entire claim on award of damages to dilute completely the judgement set to be executed. It is evident from the procedural history of the matter, the claimant/ respondent victim suffered fatal injuries on 24th January 2019 soon after the accident which occurred along Mwembeni Stage. Nearly two years following the filing of the suit and the pronouncement of judgement on 8th October 2020, the respondent has been kept out of the fruits and outcome of the litigation.

The Applicant has not revealed before this court what prejudice and irremediable loss he is likely to suffer if part of the decree is released to the Respondent. This is majorly informed by the consent order under liability. The principles under which the cases are founded are universal to satisfy the criteria on the interest of justice. This means that the prejudice claimed by the respondent is real, actual and of substance as it relates with the decree of a valid judgement. It is important to recall that this court, unlike the trial court does not have the benefit of scrutinizing all the evidence and statements made by the various witnesses. It is a duty I intend not to embark on as it will mean that the distinction drawn by the constitution between an appeal's court and that of a trial court will remain an illusory.

In the circumstances, it is clear that under Section 79 and the set principles in the cited cases, the purpose sought to be achieved by the proviso as of necessity not being sufficiently and reasonably satisfied by the Applicant to be granted leave to file an Appeal out of time on application of the traditional test. On the other hand, I consider it prudent that the discretion conferred upon the Court under Section 1 [A], 1[B] & 3 [A] of the Civil Procedure Act be invoked to exercise it for the benefit of the Applicant in the interest of justice to entitling the right of appeal and access to the court to ventilate any residual issue that might arise as part of the claim on award of damages. I think in allowing in the alternative leave to the Applicant to challenge the mode of assessment of damages by the learned trial Magistrate will in a sense give this court an opportunity to answer any question that there is in controversy between the parties. So that it may be determined with a possibility of finality.

Having made the above mentioned findings, this court proceeds to consider the second limb of the motion on stay of execution. The main rule on stay of execution is conferred by Order 42 Rule 6 of the Civil Procedure Rules. The law is crystal clear from the legal principles that when a Court is considering an application for stay of execution pending an appeal, the following conditions must be fulfilled: ***Stephen Wanjohi v Central Glass Industries Ltd, Nairobi High Court civil case number 6726 of 1991(Hayanga, J on 3 March 1995)***

a. For the Court to order a stay of execution there must be:

i. Sufficient cause;

ii. Substantial loss;

iii. No unreasonable delay; and

iv. security

b. The grant of stay is discretionary and the High Court is also a Court of equity.

c. It is not just to deny a successful party the benefit of judgement because he is poor.

d. The Court does not make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which, prima facie he is entitled pending appeal.

e. Financial ability of a decree holder solely is not a reason for allowing stay;

It is enough that the decree holder is not a dishonourable miscreant without any form of income.

f. 26 days after judgement is not an inordinate delay for purposes of stay pending appeal.

Vishram Ravji Halai v Thornton & Turpin, Nairobi civil application number 15 of 1990 [1990] KLR365 (Gicheru, JA Chesoni and Cockar, AJJA on 8 May 1990)

a) Conditions for grant of stay of execution in the Superior Court: substantial loss, lack of delay and security

b) The Court of Appeal's discretion in an application for stay of execution is unfettered.

The bottom-line is that the Applicant must demonstrate the existence of the above conditions precedent to warrant stay of execution, as a

mere fact of filing appeal does not operate as a stay of execution of a judgment of the court. The second most important issue on stay is for the Appellant to convince the court that in the event that stay is denied, he will suffer irreparable or substantial loss not capable of being compensated by way of damages and further that the appeal will be rendered nugatory unless stay is granted. This Court takes the view from the facts of the Case that the applicant has shown that he will suffer substantial loss and the appeal rendered nugatory. Essentially as stated elsewhere in this ruling on account of part of the decretal sum. I am satisfied to that extent that substantial loss and the appeal being rendered nugatory will only ensue from a refusal to grant stay of execution for that part of the portion which shall proceed on Appeal. I take cognizance that all what the Applicant was seeking before this court are equitable reliefs on extension of time and stay of execution. In equity he who comes to equity must come with clean hands, the logic and common sense of it in the instance case is for the Applicant to entitle the Respondent access part of the assessed damages which turn on the essentials submitted before the trial court. The relative strengths of the case that parties canvassed before the trial court within the fulcrum of the scales of justice need not be entirely erroneous.

Viewed from the prism of this observation, it is imperative that the principles cutting across on the interests of justice and the ends of justice to be met be read and applied together with Order 42 Rule 6 of the Civil Procedure Rules under Section 1 [A] on overriding objective. It is apparent to the Court that the Applicant in exploiting the Right of Appeal may or may not succeed to overturn the entire judgement on award of damages but I am persuaded that the threshold on a balance of convenience does tilt in his favor to grant partial stay of execution of the decree said to be challenged on appeal. Bearing those statutory provisions in mind and the outlined principles, it is appropriate that I make the following orders:

a. The Applicant has leave of the court for extension of time to file and serve the memorandum and record of appeal within 30 days from the date hereof.

b. The Applicant to pay the respondent part of the decretal sum of Ksh 750,000 within the foresaid period in (a) above and the balance be deposited in an interest earning bank account with the joint names of the advocates of the parties within the stipulated 30 days from the date hereof. The deposit on security for Due performance in the joint names of the advocates shall lapse if not complied with within the declared period in consonant with order 42 Rule 6 (1) of the Civil Procedure Rules. That therefore accords the applicant stay of execution conditions on compliance with release of part of decretal sum to the respondent and providing of security for due performance of the decree pending the hearing and determination of the intended appeal.

c. In default of compliance with any of these conditions within the time appointed, the applicant's notice of motion and the orders underpinned thereof shall stand dismissed with costs. Costs of the application shall otherwise abide the outcome of the appeal. Each party has leave of the Court to apply. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF APRIL 2021.

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R. NYAKUNDI

JUDGE

NB:

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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