



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

MISC. CIVIL CASE NO. E004 OF 2021

THE GUARDIAN COACH LTD.....APPLICANT

=VRS=

POB & LKM (Minor suing as personal and legal representative of the estate of

DOUGLAS BUNDI OMBOGO (DECEASED).....RESPONDENTS

RULING

By its Notice of Motion dated 23rd February 2021 the applicant seeks orders that: -

“1. Spent.

2. Spent.

3. THAT this Honourable Court be pleased to grant leave to the Applicant to file an appeal out of time from the ruling of Hon. B. M. KIMTAI, PRINCIPAL MAGISTRATE delivered on 27.10.2020 at KEROKA PMCC NO. 68 OF 2018; POB & LKM (Minor suing as personal and legal rep of the estate of DOUGLAS BUNDI OMBOGO (DECEASED) =V= THE GUARDIAN COACH LTD.

4. THAT upon grant of prayer (3) herein-above, this Honourable Court be pleased to grant an order for stay of proceedings in KEROKA PMCC NO. 68 OF 2018; POB & LKM (Minor suing as personal and legal rep of the estate of DOUGLAS BUNDI OMBOGO (DECEASED) =V= THE GUARDIAN COACH LTD herein pending hearing and determination of the intended appeal.

5. THAT the costs of this Application be provided for.”

The gist of the application is that the applicant is aggrieved by the ruling of the trial court dated 27th October 2020 in its entirety and that the delay in filing the appeal was occasioned by the internal process of transmission of communication of the ruling from the advocate to the applicant and transmission of the instructions from the applicant to the advocate as more time was needed to peruse and appreciate the ruling. Further, that the delay is excusable and has been explained and the same is not inordinate and should not be visited upon the client. It is also argued that the intended appeal raises triable issues and unless the stay sought is granted the appeal shall be rendered nugatory. The applicant has expressed willingness to abide by any conditions that may be set by this court.

The application is vehemently opposed. According to the respondents the same is an afterthought and is intended merely to frustrate the respondents. It is also the respondents' contention that the application is an abuse of the court process and that to allow it would be to aid a party that relies on its own faults, a thing which ought to be discouraged. It is also contended that the delay in bringing the appeal has not been explained and it is in the interest of justice that litigation comes to an end.

The ruling sought to be appealed is one where the trial Magistrate refused the applicant's application to introduce new witnesses and documents in the course of the trial. The applicant did not attach a copy of the impugned ruling although the order arising therefrom is annexed. The reasons for the ruling are not therefore clear to this court. Be that as it may I have carefully considered the rival submissions of the Learned Advocates for the parties and my finding is that whereas this court has a wide and unfettered discretion to grant the leave sought it cannot do so as leave to appeal was not sought from the trial court as required in **Section 75 (1)** of the **Civil Procedure Act** and in **Order 43 Rule 1 (2)** of the **Civil Procedure Rules**. **Section 75 (1)** of the **Civil Procedure Act** states: -

“(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;**
- (b) an order on an award stated in the form of a special case;**
- (c) an order modifying or correcting an award;**
- (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;**
- (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;**
- (f) an order under section 64;**
- (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;**
- (h) any order made under rules from which an appeal is expressly allowed by rules.”**

The order being sought to be appealed from is not listed as one of those that the right to appeal lies as of right. **Order 43 Rule 1 (1)** of the **Civil Procedure Rules** sets out the orders from which an appeal shall lie as of right and in my view the order appealed from is not among them. **Order 43 Rule 1 (2)** then states: -

“(2) An appeal shall lie with the leave of the court from any other order made under these Rules.”

The applicant was therefore required to seek the leave of the trial court to appeal the ruling dated 14th May 2020. Such leave has not been exhibited here and this appeal does not therefore lie.

As for the stay pending appeal, the provisions of **Order 42 Rule 6 (1)** of the **Civil Procedure Rules** make it clear that a stay can only be granted where there is an appeal already filed. In this case there is yet no appeal upon which an order of stay can be granted and in the premises I find no merit in this limb of the application either and the application is dismissed in its entirety and the costs thereof are awarded to the respondents. It is so ordered.

RULING SIGNED, DATED AND DELIVERED AT NYAMIRA ELECTRONICALLY VIA MICROSOFT TEAMS THIS 15TH DAY OF APRIL 2021.

E. N. MAINA

JUDGE