



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL & TAX DIVISION

MISC APPLICATION NO E 621 OF 2019

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES.....APPLICANT

VERSUS

PROTECTIVE CUSTODY LTD.....RESPONDENT

RULING

1. By application dated 29th November 2019 the Applicant sought under **Article 159 of Constitution, Section 79 G IA & 95 of Civil Procedure Act & Order 42 Rule 6 (1) Civil Procedure Rules** extension of time to file an appeal vide against the Ruling of the Trial court of Ruling delivered on 14th June 2019 in **CMCC 7409 of 2018** grant of and stay of execution of the decree.
2. The Appellant relied on the pleadings more specifically paragraphs 13,14, 15,16 & 17 of Supporting affidavit and attached draft memorandum of appeal which the Applicant takes issue with striking out its Defense that it failed to raise any triable issue and that the Applicant did not deny that the Respondent rendered services to the Applicant who did not prove payment for those services. The decretal amount of Ksh 7,831,189 was not pleaded in the Plaintiff.
3. The Appellant agrees to the condition to provide security pending stay of execution of decree and hearing and determination of appeal.
4. The Respondent by Replying Affidavit of 26th February 2020 and Submissions of 5th March 2020, objected to the application for extension of time to file appeal and grant of stay of execution pending appeal on the following grounds;
 - a) The Application is an afterthought and was filed after inordinate delay.
 - b) The Applicant was aware of the delivery of Ruling of 14th June 2019 vide the Respondent's letter to the Applicant of 3rd September 2019 annexed by applicant as Annexure 7
 - c) The Application was filed in November 2019 more than 5 months since the Ruling.
 - d) No appeal has been filed yet to warrant the Applicant's application for stay of execution.
 - e) The Applicant already paid Ksh 7,409,750/- as shown by Annexure **HK-8**

DETERMINATION

5. The Applicant submitted that it sought leave to appeal out of time based on the grounds set out in the draft memorandum of appeal and they have an arguable appeal. The Appellant claims to have been condemned unheard as its Defense which raised triable issues was struck off and they were condemned unheard. The non-attendance during the hearing and reading of Ruling was attributed to the advocate on record then and that inadvertence and delay ought not to be visited on the Appellant and it is in the interest of substantive justice that they are heard.
6. The Appellant relied on **C.A. Civil Application 106 of 2018 George Gakio Kinoga vs Annah Wamaita Githinji [2019] eKLR** grant of leave to appeal out of time was granted as the right to be heard was Constitutionally entrenched which could only be withheld only in exceptional circumstances.
7. The Appellant relied on **C.A.Civil Appeal 162 of 2002 Thuita Mwangi vs Kenya Airways** extended time to file an appeal as there was by virtue of the draft memorandum of appeal an arguable appeal.

The Appellant relied on Misc Appl No 42 of 2011 Joseph Simiyu vs Agnes Naliaka Cheseto granted leave to appeal out time as execution would result in substantial loss.

8. The Respondent submitted in opposition to the application for leave to file appeal out of time as follows; the impugned Ruling was delivered on 14th June 2019 and filed the instant application 24 weeks later yet the Respondent wrote to the Appellant vide letter of 3rd September 2019 and informed on the outcome of the matter.

9. Secondly, the Respondent obtained the decree and informed the Appellant of the same vide the said letter of 3rd September 2019 And they remained silent for 12 weeks and 3 days before filing the instant application.

10. The Respondent relied on the case of C.A.Civil Appeal 162 of 2002 Thuita Mwangi vs Kenya Airways (supra) on the grounds the Court should consider in exercise of discretion to grant of leave to appeal; first; length of delay, secondly, reason for delay, thirdly, (possibly) Chances of success of the appeal and fourthly, the degree of prejudice to the Respondent.

11. In the instant application the Appellant sought leave to appeal out of time. The right to appeal is provided by **Section 65 of Civil Procedure Act**, the right of appeal ought to be within 30 days from date of Ruling, Judgment/Order or Decree as provided by **Section 79 G of Civil Procedure Act**.

12. The Appellant deposed that it is aggrieved by the Trial Court's Ruling of 16th June 2019 and realized that it was delivered way after the 30 days' period of filing appeal during execution. The failure to file the appeal within statutory period was occasioned by factors beyond its control, their then advocate's inadvertence caused delay. The advocate's mistake should not be visited on them as they are an innocent party.

13. They filed the instant application within reasonable period taking into account the circumstances, their advocate failed to inform them of the Ruling. Although the Respondent deposed that they informed the Appellant of the Ruling and decree in September 2019, the mandatory 30 days to file an appeal had already elapsed. The Court finds the Appellant's explanation plausible as they relied on Counsel who failed to obtain the Ruling on time, inform the Appellant and possibly advise the way forward.

14. The Appellant sought stay of execution pending appeal and that is governed by **Order 42 Rule 6 Civil Procedure Rules 2010** that provides that the Applicant ought to prove imminent substantial loss, the application ought to be filed without unreasonable delay and the Applicant shall provide security.

15. The Respondent deposed that the Appellant paid more than ½ the decretal amount, thus the anticipated substantial loss by execution is not imminent. The Appellant is entitled to exercise right of appeal as they deposed that they were condemned unheard as the Defense was struck off and also the liquidated claim pleaded in the Plaintiff was not the amount awarded.

DISPOSITION

- 1. The Appellant's application of 29th November 2019 seeking leave to file appeal out of time granted on condition;**
- 2. The Appeal is filed within 45 days from date of reading Ruling to Parties/Counsel and;**
- 3. The Appellant to deposit Ksh 1,000,000/- in a joint interest earning account within 45 days where both Advocates of the Appellant & the Respondent are signatories respectively.**
- 4. During the 45 days there shall be stay of execution of Ruling and decree until appeal is heard and determined ONLY IF CONDITIONS IN 2. & 3. Herein are complied with.**
- 5. In default the leave to file appeal out of time shall lapse automatically.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 31ST MAY 2021. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. BETT FOR THE RESPONDENT

P.K. MBABU & CO. ADVOCATES FOR THE APPLICANT – N/A

COURT ASSISTANT- TUPET