



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

MISC. CIVIL APPLICATION NO. E006 OF 2021

MADISON INSURANCE COMPANY LIMITED.....APPLICANT

- VERSUS -

DESTERIAN INYA OMARI.....RESPONDENT

RULING

By a Notice of Motion dated 25th May 2021 filed herein on 10th June 2021 the Applicant seeks orders;

“1. (Spent)

2. **THAT** this Honourable Court be pleased to enlarge time within which the Applicant may lodge its intended appeal against the judgment delivered on 15th February, 2021 in NYAMIRA CMCC NO. 169 OF 2019, MADISON INSURANCE COMPANY V DESTERIAN INYA OMARI.

3. **THAT** this honourable Court be pleased to order stay of execution of the decree issued on 15th February, 2021 in NYAMIRA CMCC NO. 169 OF 2019, MADISON INSURANCE COMPANY V DESTRIAN INYA OMARI pending the hearing and determination of this application.

4. **THAT** in the alternative to prayer number 3, the honourable Court be pleased to grant a temporary injunction in such terms as the Honourable court may deem fit restraining the Respondent, third parties, his agents and/or representatives from catering away the Applicant's movables, in execution of the decree on 15th February, 2021 in NYAMIRA CMCC NO. 169 OF 2019, MADISON INSURANCE COMPANY V DESTERIAN INYA OMARI pending the hearing and determination of this application.

5. **THAT** the orders sought under prayer 3 and 4 above be confirmed upon hearing of the application till the hearing of the intended appeal.

6. That costs of this Application be provided for.”

The application is expressed to be brought under **Order 50 rule 6, Order 42 Rules 1 and 6, Order 51 rule 1** of the **Civil Procedure Rules 2010, Sections 3A, 63, 79G and 95** of the **Civil Procedure Act** and all other enabling provisions of the law.

The gist of the application, as can be discerned from the grounds on its face as well as in the supporting and further affidavit of KIBET KEMBOI (an advocate acting on behalf of the applicant) is that judgment in the lower court was delivered on 15th February 2021 but in March 2021 an advocate in the firm contracted Covid-19 necessitating a closure of the chambers; that on 13th April 2021 upon reopening the chambers the advocate wrote a letter to the client informing it of the judgment and on 29th April 2021 the client being dissatisfied with the judgement gave the advocate instructions to appeal the judgement. (Exhibits in proof of the allegations that an advocate in the firm contracted Covid-19 (Covid-19 test results), the letter to the client dated 13th April 2021 and an e-mail from the client dated 29th April 2021 were annexed as exhibits KK1 and KK3). Counsel deposed therefore that the delay in filing the appeal was not intentional but was beyond the applicant's control and further that the inadvertent mistake of the advocate in filing the appeal should not be visited upon the client. Further, that the applicant has an appeal which has high chances of success and that the applicant stands to suffer irreparable harm if the application is not allowed. It is also urged that no prejudice shall be occasioned to the respondent if the orders sought are granted and further that the application was lodged without unreasonable delay.

In the affidavit sworn by Moses Mwariri, the Legal Officer of the applicant Company, the averments of Kibet Kemboi are confirmed and it is

further deposed that the applicant is ready and willing to abide by such terms as this court would impose on the applicant as a show of good faith.

In opposition to the application, Counsel for the respondent filed a replying affidavit sworn by Desterian Inya Omari on 29th June 2021 in which he deposed that the application is malicious and devoid of merit and that the applicant only wants to deny justice to the respondent. It is also the respondent's contention that the appeal as drawn and filed procedurally and substantially lacks merit and hence has zero chances of success. It is further contended that the issue of the Covid-19 infection ought not to be used as an excuse as the same arose several weeks after the trial court had delivered its judgment and there had been enough time for the advocate and his client to move the court. The respondent further deposed that granting the orders sought would contravene the provisions of **Article 159 (2) (b) of the Constitution** which provides that justice shall not be delayed. It is also contended that the applicant has not demonstrated any substantial loss likely to be suffered if the application is declined and further that the applicant did not point out how the intended appeal would be rendered nugatory. Lastly, the respondent deposes that he would be prejudiced if the orders sought were granted and urged this court to dismiss the application with costs.

Parties canvassed the application by way of written submissions.

Counsel for the applicant submitted that the court is vested with wide powers to enlarge time within which to file an appeal. For this proposition, Counsel relied on the case of **Samwel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR** and the case of **Edith Gichugu Koine v Stephen Njagi Thoithi [2014] eKLR**. Counsel submitted that the reasons for the delay in filing the appeal had been explained and the same had been demonstrated to be beyond the applicant's control. Counsel urged this court to enlarge time for filing the appeal as the applicant has an arguable appeal as can be discerned from the draft memorandum of appeal annexed. The applicant's Counsel further reiterated that the respondent does not stand to suffer any prejudice that cannot be compensated by way of damages if the application was allowed. Also, that the applicant has satisfied the conditions precedent for grant of an order of stay of the intended appeal. Counsel contended that if the appeal is successful, it will be rendered nugatory as the respondent is a person of unknown means. On the issue of security, Counsel for the applicant submitted that the applicant is willing to abide by such terms as this court may impose, including, but not limited to, issuance of insurance bond or bank guarantee. On delay, Counsel submitted that a delay of two months was not inordinate and further that the mistakes of an advocate should not be visited upon a client.

On his part Counsel for the respondent submitted that the power to extend the period for filing an appeal out of the statutory period is discretionary and must be granted on a case to case basis. Counsel contended that the applicant did not explain the delay of more than three months; that the issue of Covid-19 is merely an excuse; that the applicant has not placed before this court material that can incline this court to exercise its unfettered discretion in its favour and further that in the absence of an explanation for the delay even were the appeal arguable, the court ought not to grant such enlargement. Counsel placed reliance on the following cases: -

- **Jorim Obura Omollo & Another v Tobias Otieno Ayieko [2019] eKLR.**
- **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR.**
- **Moses Odero Owuor & 2 Others v Andronico Otieno Anindo [2013] eKLR.**
- **Aviation Support Limited v St. Mark Freight Services Limited [2014] eKLR.**
- **Hilda Kaari Mwendwa v Zakayo M. Magara & 2 Others [2016] eKLR.**

On the issue of stay of execution, Counsel for the respondent submitted that the applicant has not met the threshold set out in **Order 42 rule 6 of the Civil Procedure Rules** as it has not demonstrated how it will suffer substantial loss in the event stay is not granted. To support this submission Counsel cited the following cases: -

- **Kenya Shell Limited V Benjamin Karuga Kibiru & another [1986] eKLR.**
- **New Wide Garments EPZ(K) Ltd v Rith Kanini Kioko [2019] eKLR.**
- **Machira T/A Machira and Company Advocates v East African Standard (No.2) (2002) KLR 63.**

I have carefully considered the pleadings, the submissions of Counsel for the parties and the law. **What calls for determination is whether the applicant is entitled first, to leave to appeal out of time and second, to stay of execution pending appeal.**

The statutory period for filing appeals is provided for under **Section 79G of the Civil Procedure Act** which provides as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty 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 of 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 in time. (Underlining mine).

Section 95 of the Civil Procedure Act further provides that: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

This court therefore has a wide and unfettered discretion to extend the time limited for filing an appeal provided that there exists good and

sufficient cause.

The grounds which guide the court in considering an application for leave to appeal out of time were discussed in the Court of Appeal case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** where it was stated: -

“It is well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for delay; and thirdly; (possibly) the chances of the appeal succeeding if the Application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.”

In the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others Application No. 16 of 2014 [2014] eKLR** the Supreme Court settled the principles which must guide a court in exercising its direction in such an application in the following terms: -

- “1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

In this case, judgment was delivered on 15th February 2021 whilst the instant application was filed on 10th June 2021 a period of four months. Counsel for the applicant alleges that his firm did not bring the contents of the judgement to their client the applicant until 13th April 2021 because after the judgement was delivered and more particularly in the month of March an advocate in his chambers contracted Covid-19 and the chambers were shut down for 3 weeks. Counsel deposed that it was not until on 13th April that he was able to advise the client on the terms of the judgment and the client responded on 29th April 2021 via e-mail and gave instructions to appeal against the judgment. Counsel therefore blamed the delay on Covid-19 and on the closure of his firm/chambers.

In regard to the mistakes of Counsel, the Court of Appeal stated as follows in the case of **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR**: -

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.

....

Under this duty, counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the court must always stay alive to the interests of both parties. This is of paramount importance.

Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a *client*.” [Emphasis added].

Similarly, in the case of **Branco Arabe Espanol v Bank of Uganda (1999) 2 EA 22** cited with approval in the case of **Lucy Bosire v Kehancha Division Land Dispute Tribunal & 2 others in Miscellaneous Application No. 699 of 2007 reported in [2013] eKLR** it was stated that:

“The administration of justice should normally require that the substance of all disputes should be investigated on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.”

There is indeed evidence, which is not controverted, that a member of staff of Counsel for the applicant fell ill with Covid-19 in the month of March 2021 and the chambers were shut down. However, Counsel did not offer any explanation for the delay between 29th April 2021 when he received instructions to appeal and 10th June 2021 when he filed this application. In the case of **County Executive of Kisumu v County Government of Kisumu & 8 others Supreme Court Civil Application No. 3 of 2016 [2017] eKLR** the court stated: -

“[23] It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court.....”

The applicant and her advocate have not declared and explained the whole period of the delay but have instead elected to explain one part of the delay which as I have stated would have been excusable if it was not for the unexplained delay of one and half months obtaining from 29th April 2021 when Counsel received instructions to appeal and the time he filed this application. It is my finding that the delay which is unexplained is in any event inordinate. For that reason, this court finds there are no reasonable grounds that would warrant it to exercise its discretion in the applicant's favour. In the premises the **application for leave to appeal out of time is rejected and as stay of execution can only be granted where there is an appeal the prayer for stay of execution is also dismissed. The respondent shall have the costs of the application.** It is so ordered.

RULING SIGNED, DATED AND DELIVERED (ELECTRONICALLY VIA MICROSOFT TEAMS) AT NYAMIRA ON THIS 29TH DAY OF JULY 2021

E. N. MAINA

JUDGE