



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL MISC. APPL. NO. 239 OF 2019

ELIJAH MURIITHI.....1ST APPLICANT

IBRAHIM MWANGI NJENGA.....2ND APPLICANT

VERSUS

PETER CHRISTOPHER KAHORO MBOGO.....RESPONDENT

RULING

1) The applicants herein took out the motion dated 7th December 2020 whereof they sought for the following orders:

i. THAT this application be certified urgent and service thereof be dispensed with and the application herein be heard ex-parte and in the first instance.

ii. THAT this honourable court be pleased reinstate the orders granted on the 27/02/2020 by honourable Lady Justice Njuguna and thereafter enlarge or extend time within which to comply with the said court orders pending the hearing and determination of this application.

iii. THAT this honourable court be pleased upon reinstatement, to extend and/or grant interim orders of stay of execution of the judgment/decree issued by the honourable court on the 18th January, 2019 pending hearing and determination of this application and pending hearing and determination of the intended appeal.

iv. THAT this honourable court grant the applicants leave to file their memorandum of appeal out of time.

v. THAT this honourable court be pleased to give any other and or further orders that it may deem fit, just and expedient in the circumstances and in the interest of justice.

vi. THAT the costs of this application be provided for.

2) The applicants filed the affidavit sworn by Pauline Waruhiu in support of the motion. The respondent filed the replying affidavit he swore to oppose the application.

3) The applicants aver that on 27th February 2010, Lady Justice Njuguna issued an order for stay of execution pending appeal on condition that the appellants pay half the decretal sum to the respondent and to deposit the balance in an interest earning account within 60 days.

4) The applicants aver that they paid half the decretal sum to the respondent. They stated that they have been unable to make the deposit of the balance because of financial constraints they are undergoing due to the outbreak of covid 19 pandemic.

5) They also aver that they have been unable to file the appeal within the time fixed because the court registry could be accessed due to the scaling down of court operations as a result of the outbreak of covid 19 pandemic. The applicants aver that they are now in a position to make the deposit.

6) The respondent opposed the application arguing that the application was filed with the sole intention of delaying the respondent from enjoying the fruits of his judgment. The respondent pointed out that the affidavit filed in support of the motion is sworn by a stranger to these proceedings.

7) It is stated that Pauline Waruhiu is a legal counsel for Directline Assurance Co. Ltd which is not a party to these proceedings. It is also stated that there is no evidence tendered to prove the alleged relationship between the purported insurer and the applicants herein hence the deponent deponed on facts she had no knowledge.

8) It is the respondent's further submission that in the absence of a competent affidavit, the instant application lacks foundation.

9) The respondent also stated that the applicants are engaged in a tactical and strategic scam of frustrating the respondent by filing a plethora of applications to deny him an opportunity to enjoy the fruits of his judgment. It is pointed out that the judiciary gave clear guidelines on the court operations at the time covid 19 pandemic arose hence if the applicants had challenges in complying with the court orders they should have sought for assistance but they instead chose to stay put until 10 months lapsed.

10) Having considered the material placed before this court plus the rival submissions, it is not denied that the applicants filed the affidavit sworn by Pauline Waruhiu in support of the instant motion. The deponent specifically deponed that she is the legal counsel at Direct Line Assurance Company limited, the insurers of motor vehicle registration no. KBZ 837F. She also averred that she is conversant with the facts related to this suit and the application and that has authority to swear the affidavit of support.

11) It is apparent from the replying affidavit that the respondent did not controvert some of the averments made by deponent of the affidavit of support sworn by Pauine Waruhiu. I am therefore satisfied that by virtue of the doctrine of subrogation the insurer took over the case in place of its insured. The learned advocate was therefore entitled to swear the affidavit whose facts are within her knowledge. I therefore find the supporting affidavit sworn by Pauling Waruhiu to be competently before this court.

12) The other substantive issue raised by the respondent is that the applicants have abused the court process by filing a plethora of applications with the sole intention of delaying the conclusion of this matter. A careful perusal of the record will reveal that judgement was delivered on 18th January 2019 whereof the court ordered the applicants to pay the respondent ksh.1,112,040/- plus costs and interest.

13) On 11th March 2019, the applicants filed an application seeking to stay execution of the decree and for leave to file an appeal out of time. On 4th April 2019 this court granted the applicants leave of 60 days to file an appeal out of time. It would appear the applicants did not comply with the court order issued on 4th April 2019. The applicants filed an application dated 2nd December 2021 seeking for enlargement of time to comply with the orders issued on 4th April 2019.

14) On 27.2.2020, Lady Justice Njuguna acceded to the applicants' Request for extension of time to comply and granted them leave to file their intended appeal within 30 days. The applicants again did not comply with the aforesaid orders. They are now before this court vide the instant application seeking to reinstate and further enlarge time within which to comply with the orders issued on 27th February 2020.

15) The applicants have put forward two main reasons for their failure to file the appeal within the time fixed by court. First, they allege that due to the outbreak of covid 19 pandemic they were unable to access the court. Secondly, they averred that due to the outbreak of the covid 19 pandemic, their insurer's business went down.

16) I have carefully considered the grounds put forward by the applicants and I am not convinced that they are plausible. It is a matter of common notoriety that by mid 2020, this country economy was reopened and business operations begun. The courts adopted the e-filing system and therefore the averment that the applicants were unable to access the court premises cannot stand.

17) With respect, I am persuaded by the respondent's submission that the applicant have filed the instant application with a view of delaying the conclusion of this matter. This court cannot countenance such a practice which in my view amounts to an abuse of the court process.

18) In the end, I find no merit in the applicants' motion dated 7th December 2020. The same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 26TH DAY OF AUGUST, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent