



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

MISC. APPLICATION NO. 181 OF 2021

JOSEPH NDAU KYENGO.....DEFENDANTS/APPLICANT

VERSUS

JOHN MUASYA MUTINDA Alias JOHN MUASYA.....PLAINTIFF/RESPONDENT

RULING

1. By a Motion on Notice dated 16th September, 2021, the applicant herein seeks the following orders:

1. **THAT** this application be certified as urgent and be heard *ex parte* in the first instance.
2. **THAT** this honorable court be pleased to grant leave to the applicants to appeal out of time against the judgment of the Honourable C. A. Ocharo in Machakos Principal Magistrate's delivered on 11th June, 2021 at Machakos
3. **THAT** this honorable court be pleased to stay execution of the judgment and decree in Machakos Principal Magistrates Court Civil Suit No. 671 of 2019 pending the hearing and determination of the application herein.
4. **THAT** this honorable court be pleased to stay execution of the judgment and decree in Machakos Principal Magistrates Court Civil Suit No. 671 of 2019 pending the hearing of the application and determination of the intended appeal herein.

2. The application was supported by an affidavit sworn by **Kelvin Nguire**, the Claims Legal Assistant at Directline Assurance Company Limited, the insurers of the vehicle the subject of the suit in the lower court.

3. According to the deponent, judgement was on 11th June, 2021, against the applicants herein in the sum of Kshs 250,0000/- in which the applicants were held 90% and hence were to pay Kshs 225,000.00 together with Kshs 4,150.00 being special damages plus costs and interests.

4. According to the information from the advocates, the advocate handling the matter left the firm without proper hand over leading to the delay as the judgement was discovered after the period of stay had lapsed upon receipt of the letter from the Plaintiff.

5. Aggrieved by the judgement they instructed the firm of Messrs Kimondo Gachoka & Company Advocates to appeal against the judgement. They were however informed that the time prescribed for appealing had expired.

6. It was deposed that the intended appeal is merited, arguable and raises pertinent points of law thus had overwhelming chance of success particularly as regards the quantum which in their view was excessive.

7. According to the deponent, the decretal sum is substantial and the applicants are apprehensive that if the Respondents are paid the same and the appeal succeeds they might not recover the same from the Respondents whose means were unknown as the Respondents did not disclose their financial standing.

8. It was deposed that the Applicants were ready, able and willing to furnish the Court with a Bank Guarantee of a reasonable amount of the decretal sum as security for the said appeal. The deponent averred that the inadvertent delay was regretted but was not inexcusable since the Applicant had nothing to do with the same.

9. As regards the limb for stay, it was deposed that the Respondent had not disclosed or furnished the Court with any documentary evidence to prove his financial standing or that he was a man of means hence the Respondent does not stand to suffer any prejudice or any damage that is incapable of being compensated by way of costs. On the other hand, the Applicant stands to suffer prejudice and irreparable loss as there is a likelihood that they will not recover the decretal sum if paid over to the Respondent.

10. In their submissions, the Applicants In their submissions, the Applicants stated that in the circumstances of this case where the Applicants have a genuine, viable, strong and merited appeal the ends of justice demand that the intend appeal be heard on its merit so that all the matters in controversy are finally determined. In this regard the Applicants relied on **Wachira Karani vs. Bildad Wachira [2016] eKLR**. Based on section 3A of the **Civil Procedure Act** and the case of **Patel vs. E A Cargo Handling Services Ltd [1974] EA 75**, it was submitted that the intended appeal should be admitted so as to ensure the ends of justice are met. According to the Applicant, an applicant should not be denied an opportunity to prosecute his appeal or driven from the judgement seat unless the appeal is unarguable. According to the Applicants their intended appeal is arguable and raises serious points of law and fact on liability. The applicant cited **Bake 'N' Bite (Nrb) Limited vs. Daniel Mutisya Mwalonzi [2015] eKLR**, it was submitted that it is not a condition precedent in application of this nature to prove that the intended appeal has high chances of success.

11. As regards the conditions for grant of leave to appeal out of time the Applicants relied on **Esther Wamaitha Njihia & 2 Others vs. Safaricom Limited [2014] eKLR** and submitted that since the delay was occasioned by restrictions imposed by the Government due to the pandemic, the same is excisable and the Applicants should not be punished for the same. In the Applicants' submissions, they have established a good and sufficient cause for not filing the appeal in time based on the decision in **Wachira Karani vs. Bildad Wachira** (supra).

12. As regards the stay, it was submitted that the Respondent has not disclosed or furnished the court with any documentary evidence to prove their financial standing hence their ability to refund the decretal sum in the event that the appeal succeeds. Based on **Edward Kamau & Another vs. Hannah Mukui Gichuki & Another [2015] eKLR**, it was contended that the Respondents are the only ones who can specifically show that they have the means to repay the decretal amount if the appeal succeeds. In the absence of the affidavit of means, it was submitted that the court should allow the application.

13. As for the delay, it was submitted that there was no inordinate delay in bringing the application since upon receipt of instructions the Applicants' advocates immediately took steps and filed the application. It was reiterated that the Applicants are ready and willing to provide a Bank Guarantee as security. In this regard the Applicants relied on **Empower Installations Limited vs. Eswari Electricals (Pvt) Limited [2016] KLR**.

14. It was therefore submitted that the Applicants have satisfied all the conditions for the grant of stay pending the hearing and determination of the appeal.

15. In opposition to the Application the Respondents filed 7 grounds of opposition.

16. It was submitted that no evidence has been adduced in the Supporting Affidavit to demonstrate that the said **Kelvin Ngure** is an employee of Direct Line Assurance Company Ltd and that Direct Line Assurance Company Ltd is the Insurer of the Motor-Vehicle Registration No. KAJ 532G. Further, no evidence has been adduced in the Supporting Affidavit to demonstrate relationship of the Motor-Vehicle Registration No. KAJ 532G and the present Application as well as the Intended Appeal or even the parties to this Application. It was noted that the said **Kelvin Ngure** is also neither the Applicant in this matter nor even a party in the intended Appeal or even a party in the Lower Court Suit **Machakos CMCC No. 671 of 2019- John Muasya Mutinda-vs- Joseph Ndaui Kyengo**.

17. It was further noted that most of the Paragraphs of the Supporting Affidavit consist of averments that the said **Kelvin Ngure** alleges to have been informed by their Advocate on record and that it was very much easier for the said Advocate to swear the supporting Affidavit since most of the matters pleaded in the Supporting Affidavit appear to be within the knowledge of the Advocate. While the said deponent averred that there is likelihood that they will not recover the Decretal Amount if it is paid to the Respondent, it was contended that he has not demonstrated how he has come to know that there is likelihood that they will not recover the Decretal Amount if it is paid to the Respondent and as such, he has deposed to matters which are not within his knowledge. In this regard the Respondent relied on Order 19 Rule 3(1) of the **Civil Procedure Rules, 2010, P.M.M Private Safaris vs Kevin Ijatia [2006] eKLR, Lalji Bhimji Sanghani Builders & Contractors -vs- Nairobi Golf Hotels Kenya Limited [CA No. 1900 of 1995]** and **Oyugi-vs-Law Society of Kenya & Another [2005] 1 KLR 463** and it was submitted that the affidavit in support of the Application is incurably defective and the application is equally incurably defective since it is supported by and incurably defective supporting affidavit

18. According to the Respondent, the Applicant has not demonstrated and /or placed any evidence before the court to show that the Respondent is a person whose means are unknown and from whom the decretal sum cannot be recovered. To the Respondent, it is not for the Respondent to avail evidence to show that he is a person of means as the Applicant is trying to allege in his Application and Supporting Affidavit. In law, it is the Applicant to avail evidence to demonstrate that the Respondent is a man of Straw or rather a person whose financial standing is unknown. It was therefore contended that without any evidence being placed before the court to that effect the Respondent is a man of Straw and/ or a person of unknown Financial Means, the Applicant's averments in his Application remain mere allegations which carry no weight. The Applicant has not met the threshold for grant of the Orders of Stay and Leave to Appeal out of time sought in Application and the Court was urged to dismiss it with costs. It was further contended that the Applicant has not placed any cogent reasons in his Application and Supporting Affidavit as to why there was such delay almost four (4) months before filling the Application. According to the Respondent, the decision of the Applicant to present the present Application was an after-thought and the Application was brought in bad faith out of fear that the Respondent might execute to recover the Decretal sum in the lower court suit.

Determination

19. I have considered the application, the respective affidavits and the submissions filed as well as the authorities relied upon.

20. Section 79G of the *Civil Procedure Act* provides that:

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.

21. Under the proviso to section 79G of the *Civil Procedure Act*, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so. This must be so since it was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633** that there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

22. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

23. As regards the reason for the delay, in this case the Applicants contended that the delay in filing the appeal was due to the fact that the counsel who was handling the matter left the firm without handing over and the judgement was only discovered after the time limited for filing the appeal had lapsed.

24. I have carefully considered the application, the affidavits filed, submissions made as well as authorities cited by counsel for both parties. In this case the Applicants contended that the delay in filing the appeal was due to the fact that the counsel who was handling the matter left the firm without handing over and the judgement was only discovered after the time limited for filing the appeal had lapsed. However, that averment, as noted by the Respondent was made, not by the advocate, in whose firm the said counsel was, but by a person employed by the insurance company that insured the subject motor vehicle. No explanation has been given as to why the supporting affidavit could not have been sworn by a person from the said firm who would have had personal knowledge as to the circumstances under which the said advocate left the firm.

25. **Waki, JA** in **Gerphas Alphonse Odhiambo vs. Felix Adiego Civil Application No. Nai. 352 of 2005** held that where the basis for the delay is knowledge derived from the advocate’s court clerk who was dealing with the file, there should be an affidavit from the Court clerk or an explanation why he could not state the information personally and that ordinarily an affidavit should not be sworn by an advocate on behalf of his client or clerk when those persons are available to swear and prove the facts of their knowledge and in appropriate cases such affidavits may be struck out or given little or no weight at all. The learned Judge went ahead to hold that no reason was given why the Court clerk who had personal knowledge of the disappearance of the Court file could not swear the supporting affidavit as required under the rules and the said affidavit was thereby disregarded.

26. In this case the supporting affidavit was sworn, not by the insured and not by the advocate but by the Claims Legal Assistant, Directline Assurance Company Limited, the insurance company that insured the motor vehicle concerned. The supporting affidavit in my view amounts to hearsay and is hence inadmissible. As was held by **Ringera, J** (as he then was) in **Lalji Bhimji Sanghani Builders & Contractors -vs- Nairobi Golf Hotels Kenya Limited [CA No. 1900 of 1995] (UR)**:

“Let this also be a warning that as far as possible, executives in Insurance Companies and advocates for parties should unless absolutely necessary or clearly from the record desist from swearing affidavits on contested matters and for which they have no personal knowledge.”

27. In this case the deponent has not disclosed when the said advocate handling the matter left the firm and when it was discovered that the appeal ought to have been lodged. This information would have been important in determining whether upon discovery of the omission the Applicant moved with speed since as was held in **Samwel Ayienda Mokuva vs. Tinga Trading Company Limited Civil Application No. Nai. 184 of 2007**, it is now well settled that wherever there is a delay, even for one day, there must be some explanation for it otherwise extension may not be granted. It therefore follows that as the reasons for the delay is based on inadmissible evidence, the limb seeking extension of time cannot be granted. Without extension of time, no stay pending an intended appeal can issue since there is no intended appeal in the first place.

28. However, even if the application was to be considered on merit it would still fail the test for the grant of stay since the Applicant has not shown the substantial loss he stands to suffer if the stay is not granted. In this case the applicants, through an affidavit, sworn, not by themselves but, inappropriately, by the said Claims Legal Assistant at Directline Assurance Company Limited, have only expressed apprehension that if the decretal sum is paid over to the Respondents, the Respondents are unlikely to refund the same in the event that the intended appeal succeeds. No grounds for arriving at this conclusion has been given and the source of this information has similarly not been disclosed.

29. In this case apart from a bare allegation, the Applicants have not laid any basis for believing that the Respondent will not be able to refund the decretal sum in question. Where the sum involved is colossal the Court may well take notice of the fact that the payment of such

large amount may cripple the activities of an Applicant and may well discourage it from pursuing its appeal. In this case the amount involved is not more than Kshs 300,000/-. It has not been alleged that the payment of the said sum may adversely affect the financial position of the Applicants or their insurers.

30. Suffice to say as was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991**, 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.

31. In the premises it is my view and I hold that the appellant herein has failed to prove that substantial loss may result to him unless the order sought is made. Consequently, the Motion dated 16th September, 2021 fails and is dismissed with costs to the Respondents.

32. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 30TH DAY OF NOVEMBER, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Ms Gathenya for Mr Morara the Applicant

Mr Mukula for Mr Kilonzo for the Respondent

CA Susan