



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL MISC. APPLICATION NO.E044 OF 2021

COAST RAHA LIMITED)

WAMBUA KITHOME MULWA).....APPLICANTS/INTENDED APPELLANTS

VERSUS

WILSON ASANGA AYANGA *alias* WILSON ANYAGA..... RESPONDENT

R U L I N G

1. The application herein is dated **9th March 2021**, and brought under the provisions of **Sections 1A, 1B, 3 and 3A, 79G and 95** all of the **Civil Procedure Act, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3** all of the **Civil Procedure Rules 2010**, and all other enabling provisions of the law.

2. The Applicants are seeking for orders as here below reproduced;

i. Spent;

ii. That the Honourable Court be pleased to grant leave to the Applicants/Intended Appellants to appeal out of time against the Judgement of the Hon. E. Muchoki, Resident Magistrate at the Chief Magistrates Court of Kenya at Mombasa in CMCC No.2561 of 2018 on the 9th December, 2020;

iii. That the Honorable Court be pleased to stay further execution and proceedings of the Judgment done vide the Decree and Certificate of costs emanating from Mombasa in CMCC No.2561 of 2018 pending the hearing and determination of the application herein;

iv. That the Honorable Court be please to stay further execution and proceedings of the Judgment done vide the Decree and Certificate of costs emanating from Mombasa in CMCC No.2561 of 2018 pending the hearing and determination of the intended appeal herein;

v. That the costs of the application abide the outcome of the intended appeal.

3. The application is supported by the grounds thereto and affidavit of **Ms. Pauline Waruhu**, legal officer of Directline Assurance Company Ltd sworn on **10th March, 2021**.

4. From the grounds as set out on the face of the application and **Supporting Affidavit**, the deponent has stated that on **9th December, 2020**, the Respondent obtained Judgment in which the Applicants/Defendants were ordered to pay to the Respondent general damages of Kshs.600,000/= and special damages of Kshs.7,550/= amounting to Kshs.607,550/= plus costs and interest of the suit.

5. According to the Applicants/Defendants, he was never served with a copy of the extracted Decree if at all any was extracted. He states that the Applicants then proceeded to file an application to appeal out of time vide **High Court Civil Misc. Application No.44 of 2021** dated **9th March, 2021** which is pending interparties hearing on **13th July, 2021**. But despite the pendency of the application, the Respondent proceeded to extract warrants of attachment and sale of moveable property in execution of a Decree for money on **21st April, 2021**.

6. In view of this, the Applicant states that the said warrants are irregular, unlawful, and unprocedurally obtained, hence should be declared null and void of any legal consequences to the Applicants.

7. In response, Respondent opposed the application vide a **Replying Affidavit** sworn by **Mr. Wilson Asanga Anganje** on **29th March, 2021** and a **Notice of Preliminary Objection** dated **18th May, 2021**.

8. In the **Replying Affidavit**, the Respondent has sought to have their application struck out for being incompetent, misconceived, bad in law and only meant to further delay him the enjoyment of the fruits of the Judgment. The Respondent has also deponed that the Applicant has filed two applications seeking similar orders before the same court which is in utter abuse of the court process as the same offends the provision of **Section 6** of the **Civil Procedure Act**.

9. Also, the Respondent has deponed that the deponent of the **Supporting Affidavit** lacks capacity and authority to swear the affidavit and seek the orders sought since neither she nor Directline Insurance company are party to the suit herein and the principle of subrogation upon which the deponent has sworn the Supporting Affidavit does not apply. That the said principle applies after the insurer has compensated or paid the insured, and since no such compensation or payment has been made, then it cannot apply. Also, it has been deponed that the deponent has referred to matters that are not within her personal knowledge contrary to the provisions of **Order 19 Rule 3** of the **Civil Procedure Rules**.

10. According to the Respondent, the Applicants have not laid reasonable grounds for the grant of orders of stay of execution of the Judgment delivered on **9th December, 2020** to issue since they chose not to attend court to take the Judgment but were still granted 30 days stay of execution which lapsed on **12th February, 2021**. He has stated that the application filed on **10th May, 2021** was filed 97 days after the lapse of the stay of execution and only when the auctioneers were to lawfully proceed to attach goods as per the Proclamation Notice.

11. As for the prayer for stay of execution, it was submitted that the Applicant has failed to meet the threshold set under the **Order 40 Rule 4(2)** of the **Civil Procedure Rules** with regard to extension of stay order. Lastly, the Respondent submitted that the application has been brought in bad faith and with unclean hands, hence should be dismissed so as to allow him enjoy the fruits of his successful litigation.

12. On **19th May, 2021**, the Respondent filed a **Notice of Preliminary Objection** in which he objected to the application being heard on the ground that it is an abuse of the court process and that it offends the provision of **Section 6** of the **Civil Procedure Act** as there is a similar application pending before the High Court.

13. On **3rd June, 2021**, the parties agreed and directions issued that the application and **Notice of Preliminary Objection** be disposed of by way of written submissions. Subsequently, the Applicant filed their written submissions and list of authorities on **5th July, 2021** while the Respondent filed his on **2nd August, 2021**. Save for citing the statute and case law, the submissions have reiterated the issues raised in the respective affidavits sworn by the parties and **Notice of Preliminary Objection**.

14. In response to the **Notice of Preliminary Objection**, the Applicant submitted that the same has misconstrued the application dated **10th May, 2021** and **9th March, 2021** respectively. It is submitted that the main prayer in the application dated **10th May, 2021**, was to facilitate and or certify the urgent hearing of the application dated **9th March, 2021** which did not have any interim orders and yet there was imminent threat of execution by the Respondent, warrants of execution having issued.

Analysis and Determination

15. Having considered the pleadings and submissions by the parties in this matter in line with the cited statute and case law, I believe that three issues arise for determination.

i. Whether the supporting affidavit is defective and incompetent for want of capacity and authority by the deponent;

ii. Whether an order of stay of execution pending appeal should issue;

iii. Whether the court should exercise its discretion to grant

16. With regard to the **Preliminary Objection**, it is trite that whenever a **Preliminary Objection** is raised by a party, the same should be considered first before other issues that may arise in an application or suit since the same is usually based on a point of law and may result in disposing of the application or suit.

17. In the instant application, the Respondent has raised an objection to the application for the reason that there is a similar application pending before the court which offends the provisions of **Section 6** of the **Civil Procedure Rules**, hence an abuse of the court process. **Section 6** of the **Civil Procedure Act** provides that:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

18. I have perused the court record and confirm that indeed the Applicant filed an application dated **9th March, 2021** and another dated **10th May, 2021**. As pointed out by the Applicant in their submissions, they had among other prayers, sought for the court to stay further execution and proceedings of the Judgment due vide the Decree and Certificate of cost emanating from **Mombasa CMCC No.2561 of 2018** pending the hearing and determination of the application dated **9th March, 2021**, but the court declined to grant the said order as no imminent danger of execution had been exhibited. The application was then fixed for interparties hearing on **13th July, 2021**.

19. And in the application dated **10th May, 2021**, the Applicant sought for an order to stay any further execution and or purported attachment by **Crater View Auctioneers** or any auctioneer, warrants of attachment and or any consequent proclamation pending the hearing of the application dated **9th March, 2021**. The Applicant was directed to serve the application for interparties hearing on **20th May, 2021**. On this day, the Respondent's counsel failed to attend court despite indication by the Applicant's counsel that they had been served with the application dated **10th May, 2021**. The court then granted prayer No.(2) of the said application whereby further execution and or purported attachment by **Crater View Auctioneers** or any auctioneer agent and employees of the Respondent was stayed and parties agreed and took directions with regard to disposing of the two applications. This was because the Applicant had exhibited warrant of attachment and proclamation for attachment of moveable property dated **21st April, 2021** and **5th May, 2021** respectively, to demonstrate that there was danger of execution before the application dated **9th March, 2021**, can be heard and determined. So clearly, it can be seen that the two applications though related, are not seeking similar orders. The application dated **10th May, 2021** is seeking to safeguard the interests and rights of the Applicant in the one dated **9th March, 2021**.

20. In view of this, I find the **Notice of Preliminary Objection** not merited, no wonder the Respondent did not address the same in his submissions. I dismiss the same.

21. I now proceed to determine the issues singled out in the pleadings filed by the parties. On the issue of the **Supporting Affidavit** being defective and competent, the Respondent has argued that **Pauline Waruhui** is a stranger to the proceedings and did not have the capacity to swear the affidavit since the Insurance Company was not a party in the primary suit and the appeal. He has also argued that the affidavit contravenes **Order 19 Rule 3** of the **Civil Procedure Rules** as it contain facts which could not have been in the deponent's personal knowledge. The Applicants did not file a further affidavit to respond to the averments in the **Replying Affidavit** but they responded to the same in their submissions. It is the court's duty to interrogate the issues raised by the Respondent so as to establish whether or not they are factual and whether the said affidavit is incurably defective.

22. The **Supporting Affidavit** is sworn by **Pauline Waruhui** who described herself as:

“The legal officer at Directline Assurance Company limited who are the insurers of Motor Vehicle Registration Number KCK 614G (hereinafter referred to as the suit motor vehicle) and I am duly authorized and competent to swear this affidavit by dint of our rights of subrogation under the relevant policy of insurance and at common law and the right to defend, settle or prosecute any claims in the insured's name.”

23. It is not disputed that the deponent was indeed a legal officer working with the insurance company that had insured the motor vehicle which was involved in the fatal accident and was the subject matter of the primary suit.

24. Under **Section 10** of the **Insurance (Motor Vehicles Third Party Risks) Act Cap 405**, an insurance company which has issued a motor vehicle policy against 3rd party risks is under a mandatory legal duty to satisfy any Judgment entered in favour of a 3rd party against the owner of the motor vehicle in question who is its insured.

25. In the case of **Thomas Muoka Muthoka & Another –vs- Insurance Company of East Africa Limited, [2008] eKLR**, the Honorable Judge on liability held as below:-

“Section 10 in my finding clearly states that notwithstanding that the insurer may be entitled to avoid or may have avoided the policy, it/he nevertheless, shall pay to the persons, holding the Judgment, who in this case are the third parties. This requirement to pay is mandatory as it is qualified by the word “shall”. This, in my view, is the legal duty imposed upon the insurer by the Legislature. It is admitted that the duty may appear onerous, even unfair. It appears to breach the principle of privity in contract law, only to benefit a third party who has contributed nothing. Yet considered more deeply, it is an imposition of a duty to protect members of society who may not have capability even to go to hospital after an accident has occurred. Furthermore, insurers are virtually all the time big public companies often endowed with adequate funds and capable of absorbing such liabilities. In the last resort the insurers have freedom to choose to give an insurance cover or not.”

26. **Section 10(2)** of the same Act goes on to provide that the insurer will only be liable to satisfy the Judgment entered against its insured if it is notified of the proceedings in which the Judgment was delivered before or within 14 days of the commencement of the proceedings.

27. The fact that an insurer is required to be notified of the proceedings giving rise to the Judgment and to satisfy the Judgment obtained against its insured, leaves no doubt that the insurer has an interest in the proceedings leading to the Judgment and in any appeal against that Judgment. Consequently, it is my view that a legal officer or any authorized officer of the insurer would be seized of information pertaining to the proceedings in the primary suit and any appeal lodged against the decision or decree arising therefrom, thus has capacity to swear an affidavit in either the suit or the appeal.

28. In any case, there is no law that provides that only co-litigants can swear affidavits in a matter. In the interest of justice, any person with information relevant to an action and who is duly authorized can swear an affidavit in an action.

29. In his submissions, the Respondent has also alleged that **Pauline Waruhui** was not duly authorized to swear the **Supporting Affidavit**. In the **Supporting Affidavit**, **Pauline Waruhui** deponed that she was personally seized of the conduct of the matter on behalf of the insurer of the Appellants. This averment amounted to evidence on oath which could only be controverted by other evidence to the contrary. The Respondent did not provide evidence to controvert the averment by **Pauline**. I therefore find that the Respondent's claim that the **Supporting Affidavit** is incompetent for want of capacity by the deponent is not well founded and cannot be sustained.

30. Further, the Respondent has invited the court to strike out the Applicant's **Supporting Affidavit** claiming that it contravenes the

provisions of **Order 19 Rule 3** of the **Civil Procedure Rules**.

This rule provides that:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

31. A perusal of the **Supporting Affidavit** reveals that the deponent deposed to matters related to the award of damages made to the Respondent in the Judgment which is being challenged on appeal. The deponent having been confirmed to be the legal officer of the Insurance Company that had insured the Appellant’s motor vehicle, was expected to be privy to the information stated in the aforesaid affidavit. It is therefore my finding that the Respondent has not laid any good basis for striking out the Applicant’s **Supporting Affidavit**.

32. This then leads to the prayer for stay of execution which is in the province of **Order 42 Rule 6** of the **Civil Procedure Rules** that states:-

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

33. I have gone through all the documents annexed to the Affidavit in support of the Application and find that, as aforesaid, there is no evidence that an Appeal has been filed herein. In fact the Applicants’ describe themselves as **“intended Appellants”**.

34. The lack of an Appeal is also reinforced by the prayer seeking for extension of the time within which to file an Appeal herein. Regardless, I have seen a document on the court file entitled: **“Draft Memo of Appeal”** but there is no evidence that it has been lodged in the High Court Registry, as the Hon. Deputy Registrar has not endorsed and/or signed it. In that case, I agree with the submissions by the Respondent that, in the absence of an Appeal, the court cannot and does not have proper Appellate jurisdiction to entertain such application, and in particular the prayer for stay of execution. The court cannot just issue an order of stay of execution without an intended purpose and/or indefinitely. Therefore, even if the court were to entertain the Application and/or the prayer of stay of execution, it will be hard pressed to issue the same, as an order for stay of execution can only be granted pending the hearing and determination of an Appeal which has been lodged.

35. Moreover, **Order 42 Rule 6** of the **Civil Procedure Rules**, sets down the principles that guide the grant of an order of stay of execution. One such principle requires the Applicant to prove that they will suffer substantial loss if the stay of execution is not granted. In that regard, the Applicant has argued that, the averment in the Respondent’s **Replying Affidavit** that they have instructed auctioneers to proclaim and attach the Applicant’s properties is an actual and ongoing risk, such that if the stay is not granted, the Appeal will be rendered nugatory.

36. As aforesaid, there is no Appeal on record. Secondly, there is no evidence that is the sum claimed if paid, it cannot be recovered. In all circumstance, where the opposing party has a valid Judgment then, that party’s interest must also be considered. Therefore unless a good cause has been shown to deny the successful litigant the fruits of a Judgment, the Court will not allow the stay of execution.

37. Be that as it may, if for whatever reason the court is inclined to consider the order of stay of execution, then the same would be granted on condition that the Applicant deposits the entire sum claimed in an interest earning account in the joint names of the lawyers representing the parties.

38. I shall now consider the last prayer for enlargement of time to file the Appeal. The provisions of **Section 79G** of the **Civil Procedure Act**, deals with the time for filing of Appeals from subordinate Courts. It states as follows:-

79G. 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.

39. The Applicant argues that the reason for failing to file the Appeal on time was lack of courtesy on the part of the Advocate for the Respondent who did not serve them with a Judgment notice. Further, that there was an ongoing restructuring from the **Firm of Kairu & McCourt** to the **Firm of M/S Kimondo Gachuka** leading to a high turnover of advocates thus limiting the work staff. To this, the Respondent responded by submitting that the reasons advanced by the applicants are unsatisfactory and the court should not excuse their conduct.

40. The grant of an order extending time to file an appeal is a discretionary power of the Court and as in all other circumstances, this discretion must be exercised judiciously and in the interest of the parties and justice. One of the most important factors a court considers in the exercise of its discretion is where the Applicant has given a reasonable and satisfactory explanation for the delay.

41. An appeal against any Judgment ought to be filed 30 days after delivery thereof. In the instant case, the Judgment is said to have been delivered on **9th December 2020**. This appeal ought to have been filed by **10th January, 2021**. This application was filed on **9th March, 2021**, which is almost four (4) months after. I find there was delay in filing the appeal though not so inordinate.

42. The right to be heard is a constitutional right provided for under **Article 48** of the **Constitution of Kenya**, hence in all circumstances it will be in the interest of all parties for a matter to be heard on merit. The pertinent consideration the court needs to take into account is to balance the rights and interest of both parties. This being that the Applicants ought to be accorded the right to have their appeal heard and determined on merit and the Respondent guaranteed the right to enjoy the fruits of his Judgment protected. The effect of this will be to grant leave to file an Appeal out of time, and so as not to render it nugatory, the subject matter of the Appeal ought to be preserved.

43. I have considered the Applicant's **Supporting Affidavit**, and under paragraph 10 thereof, the Applicants have deponed that they are ready to provide security in the form of a Bank guarantee. However, the Respondent states that the Applicants have not stated the nature of security offered. In such circumstances, this remains at the court's discretion. I find it prudent that the Applicants deposit the decretal sum within the period allowed to file the intended Appeal.

44. In the circumstances, the application dated 9th March, 2021 is allowed in the following terms:-

a. THAT the Applicants be and are hereby granted leave to file and serve their appeal out of time within 30 days.

b. THAT there be a stay of execution and proceedings of the Judgment done vide the Decree and Certificate of costs emanating from Mombasa CMCC No.256 of 2018 pending the hearing and determination of the appeal on condition that the Applicant deposit the decretal sum on a joint interest earning account within 30 days, failure to which execution to issue.

c. Costs to abide the outcome of the appeal

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED THIS 26TH DAY OF NOVEMBER, 2021

D. O. CHEPKWONY

JUDGE

In the presence of

M/S Khalifa counsel for Applicant/Appellant

No appearance for and by Respondent

Bancy - Court Assistant