



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS APPLICATION NO E093 OF 2021

THE KENYA RED CROSS HEADQUARTERS.....APPLICANT

VERSUS

JACOB OBUNGA ACHOLA (Suing as

Administrator & Personal Representative

of the Estate of IRENE PATRICIA ACHIENG-Deceased.....RESPONDENT

RULING

1. In its Notice of Motion application dated 11th June 2021 and filed on 15th June 2021, the Applicant sought orders that leave be granted to file an appeal out of time. It also sought an order for the immediate release of its Intensive Care Unit Ambulance Registration Number KCT 197W (hereinafter referred to as “the Ambulance”) attached by Eshikhoni Auctioneers (hereinafter referred to as “the Auctioneers”) on 7th June 2021 and the said Auctioneers proceed to attach the chattels proclaimed on 27th May 2021(KCF 703Z & KTC 448W).
2. It further prayed for an order for stay execution of attachment and sale of proclaimed assets and any other asset of the Applicant pending hearing and determination of the intended appeal. The prayers for orders it had sought pending the hearing and determination of the present application were spent.
3. On 11th June 2021, Edwine Okuta, a Group Legal Officer at the Kenya Red Cross Headquarters, swore an affidavit on behalf of the Applicant herein in support of the present application. He also swore a Further Affidavit on 19th July 2021. It was filed on even date.
4. The Applicant averred that it instructed the firm of M/S Obura Mbeche & Co Advocates to lodge an appeal on its behalf and that on 28th April 2021, the said advocates promptly emailed a Memorandum of Appeal to the court registry for assessment. It contended that the court registry indicated that it could not receive the said Memorandum of Appeal unless it was preceded by this application.
5. It explained that on 5th May 2021, the Trial Court delivered judgment and awarded the Respondent Kshs 6,712,160/=. It pointed out that on 27th May 2021, the Auctioneers also proclaimed several assets it had set out in its Supporting Affidavit at their Nairobi office.
6. It asserted that on 7th June 2021, the said Auctioneers without notice seized and towed away the said Ambulance which was not among the proclaimed assets. It stated that the said Ambulance, which was an intensive care unit lay in the yard of the Auctioneers after being attached while on duty.
7. It was categorical that on 22nd April 2021, its insurance company paid Kshs 3,000,000/= via bank transfer to the Respondent, which is the maximum amount it could cover over the said claim, leaving a deficit of Kshs 3,712,160/=-.
8. It was apprehensive that being aggrieved with the Trial Court Judgment and intending to appeal, it stood to suffer substantial loss if stay of execution was not granted as it may not recover the decretal sum from the Respondent who it averred had no known source of income.
9. It averred further that it was aware of the suit filed against it, **Maseno Civil Suit No 116 of 2019** which was ably defended by their Advocate appointed by their insurer. It denied having entered consent on liability with the Respondent. It added that it became aware of the impugned judgment delivered on 5th March 2021 on 20th March 2021. It blamed its previous advocates who acted for it through its insurers for failing to inform them of the Judgment.
10. In opposition to the said application, on 29th June 2021, the Respondent swore a Replying Affidavit. It was filed on even date. He averred a consent on liability was entered at 80%:20% in his favour and that the Applicant did not call upon any witness to challenge his evidence on

quantum.

11. He added that when the judgment was delivered, the Applicant did not express any intention to appeal. He pointed out that the Bill of Costs was subsequently drawn and assessed. He stated that the Applicant had only settled half of the decretal sum and since the stay period lapsed his Advocates instructed the said Auctioneers to levy execution.

12. He asserted that the Applicant knew that the period of lodging the appeal had lapsed and had filed an application in Maseno Law Courts similar to the present application but he never prosecuted it. He added that there was no justification on the Applicant's failure to file the Appeal on time and that the same had absolutely no merit. He termed the same to be a scheme to delay and prevent him from enjoying the fruits of his Judgment.

13. He was categorical that the said Auctioneers obtained lawful warrants of attachment and Sale of the Applicants Moveable Property which it had proclaimed. He was emphatic that the said Ambulance was also lawfully and procedurally attached and a report filed in court by the said Auctioneers.

14. It was his contention that the Applicant had not met the threshold required in law for grant of the orders sought in that, the Applicant had not demonstrated the chances of success of the intended appeal and how it would be rendered nugatory in the event that the entire decretal sum was paid to him.

15. He was apprehensive that the Applicant had failed to demonstrate the substantial loss it was likely to suffer. He averred that the Applicant was inviting the court to make orders for stay pending appeal in vacuum as there was yet no competent appeal filed by the Applicant before this court.

16. The Applicant's Written Submissions were dated 13th September 2021 and filed on 14th September 2021 while those of the Respondent were dated 30th August 2021 and filed on 6th September 2021. This Ruling is therefore based on the said Written Submissions that the parties relied upon in their entirety.

LEGAL ANALYSIS

17. The Applicant apologised to court for late filing of its submissions and argued that the prayer that leave be granted to its advocates to file appeal out of time was made in and for its best interest of the Applicant. It therefore invoked Section 100 of the Civil Procedure Act (Amended 2010) and order 8 Rule 5 and 8 of the Civil Procedure Rules 2010 and urged the court to amend the said prayer *suo moto* to be construed to mean leave be granted to it instead of it being granted to its advocates. In this regard, it placed reliance on the case of **Elizabeth N. Nyamu vs Ndaikwa Mwangiro and Another [2007] eKLR** where the court therein held that the Civil Procedure Rules empower the court to allow the amendments to the pleadings at any stage of the proceedings necessary for determining the real question in controversy between the parties.

18. It relied on the case of **Consolidated Marine vs Nampijja and Another Civil Application number 93 of 1989 Nairobi Court of Appeal** (eKLR citation not given) where the court held that the purpose of an order for stay of execution pending appeal was to preserve the subject matter in dispute to enable an appellant exercise its right of appeal so that if the appeal succeeded, it would not be rendered nugatory.

19. It submitted that its Appeal had raised triable issues and that if it paid the Respondent the outstanding sum, it stood to suffer irreparable loss as they would suffer undue hardship to recover the money.

20. It pointed out that it was ready to offer two chattels to replace the Ambulance to secure the Respondent's interests. It was emphatic that unless the said Ambulance was released, it would continue to suffer irreparable loss together with the residents of Siaya County. It added that it was ready to offer security by bank guarantee or insurance guarantee which it believed was as good as having cash at hand despite an existing proclamation.

21. In this respect, it relied on the case of **Kenya Hotel Properties Limited vs Willesden Investments Limited [2007] eKLR** where the Court of Appeal held that it took an approach that would ensure that the applicants business was not seriously affected while at the same time the respondent was also assured that its money would be there for it should the intended appeal not succeed.

22. On its part, the Respondent invoked Order 42 Rule 6 of the Civil Procedure Rules and argued that the said order presupposes that an order for stay of execution may only be considered and granted in situations where an appeal had already been filed. He submitted that the Applicant was yet to file an appeal and therefore that as it stood, there is no competent appeal before this court for which an application for stay of execution pending appeal can be premised.

23. He added that the said Order further provides that even in cases where a competent appeal has been filed, and an application for stay pending appeal preferred, such order of stay may be granted only upon sufficient cause having been demonstrated. He was categorical that the Applicant had failed to demonstrate sufficient cause to warrant the grant of the orders for stay of execution as required by the rules and the reasons advanced are not sufficient.

24. He was apprehensive that leave to appeal out of time is a remedy that this Court can only grant upon the applicant satisfying this Court that there is sufficient cause to justify and excuse the delay in instituting the appeal in time. He added that such an order is not granted as a matter of course but sufficient reasons and cause must be given. He was emphatic that it was not possible that the Applicant would consider appealing merely because its insurer failed to settle the entire decretal sum. He argued that the Applicant's quick offer of security to persuade the court to grant the orders sought was misdirected. He urged the court to dismiss the Applicant's application with costs for lack of merit.

25. He pointed out that it had abandoned its application dated 1st July 2021 as this court had clarified that the orders for stay of execution were granted pending the hearing and determination of this present application and not the appeal.

26. That being said the guiding principles to be met in an application seeking leave of the court to file an appeal out of time/extension of time were then laid out in the case of **Thuita Mwangi vs Kenya Airways Limited [2003] eKLR** and were reaffirmed in the case of **Growth Africa (K) Limited & Another vs Charles Muange Milu [2019] eKLR**.

27. In exercising its discretion to allow an application seeking extension to file an appeal out of time, a court has to be satisfied that the omission or commission was excusable. In other words, there must be a plausible explanation for the delay in doing an act.

28. Although this court found that the Applicant's advocates and their insurer did not conduct themselves diligently, such failure was not an entirely unexpected omission. It was normal occurrence. This was a plausible, excusable and satisfactory explanation for the delay in filing the appeal on time.

29. From the Record, it was apparent that the decision the Applicant intended to appeal against was delivered on 5th March 2021. The present application was filed on 15th June 2021. Three (3) months and a week had since passed. As this court had found the reason for the delay that was advanced by the Applicant to have been excusable, this court came to the firm conclusion that the length of the delay was not inordinate and/or unreasonable.

30. An applicant also has to demonstrate that it has an arguable ground of appeal. The court perused the draft memorandum of appeal that was annexed to the said Notice of Motion application and noted that the appeal essentially sought to challenge both award on liability and quantum. At this point in time, it was not the duty of this court to consider the merits or otherwise of the appeal.

31. Nonetheless, the court found and held the question as to whether or not the Trial Court appreciated the evidence applied when making the award on general damages warranting interference by the appellate court was an arguable ground of appeal, which the Applicant ought to be given an opportunity to canvass on merit.

32. In considering whether or not to grant an order for extension to do any act, the court also has to consider if the opposing side would suffer any prejudice if extension of time was granted. This court was not satisfied that the Respondent would suffer any prejudice if the Applicant exercised its constitutional right of appeal. If there was any prejudice, he did not demonstrate the same.

33. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice. Notably, while Section 75 A of the Civil Procedure Code provides for the period of thirty (30) days for an aggrieved party to lodge an appeal, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act.

34. Order 50 Rule 6 of Civil Procedure Rules stipulates as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.

35. Taking all the factors hereinabove into account, it was the considered view of this court that the Applicant ought to be given an opportunity to have its Appeal heard on merit as it would suffer great prejudice if it was denied an opportunity to fully present its Appeal to be heard on merit.

36. Turning to the order for stay pending appeal under Order 42, Rule 6(2) of the Civil Procedure Rules, before such an order can be granted, an applicant has to demonstrate the following:-

1. That substantial loss may result unless the order is made.

2. That the application has been made without unreasonable delay.

3. Such security as the court orders for the due performance of the decree has been given by the applicant.

37. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.

38. The decretal sum herein was Kshs 6,712,160/=. A sum of Kshs 3,000,000/= had already been settled by the insurance. The Respondent did not file an Affidavit of Means to demonstrate that he would refund the Applicant the said sum in the event it was successful in its intended appeal. The Applicant expressed reasonable fear that the Respondent would not be able to pay it back the remaining decretal sum.

39. In this regard, this court was further guided by the holding of the Court of Appeal in the case of **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another [2006] eKLR** where it held thus:-

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

40. In the absence of proof that the Respondent would be able to refund the Applicant’s insurer the entire decretal sum without any hardship, this court was satisfied that the Applicant would suffer substantial loss. The Applicant had thus satisfied the first condition of being granted an order for stay of execution pending appeal.

41. Having found that the present application had been filed without unreasonable delay, this court was satisfied that the Applicant had met the second condition of being granted an order for stay of execution pending appeal.

42. The Applicant had indicated that it was willing to provide security. It was therefore the considered opinion of this court that it had demonstrated that it had complied with the third condition of being granted an order for stay of execution pending appeal.

43. Weighing the Applicant’s right to have their dispute determined fairly in a court of law as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent’s fundamental right that justice delayed is justice denied as stipulated in Article 159(2)(b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicant if it was denied an opportunity to ventilate its Appeal on merit without an order for stay of execution pending appeal being granted herein.

44. Having said so, this court took the view that security in form of a bank guarantee and/or insurance guarantee was not suitable considering that there was a possibility of the bank and/or the insurance not honouring the bank guarantee as the bank that would issue the same as it would not be a party to the suit herein making it difficult for the Respondent to enforce any orders it would get regarding the said bank guarantee, if at all, without difficulties. This court therefore determined that the security to be furnished would be in form of money.

45. This court noted that the Respondent had already attached the Appellant’s goods worth Kshs 4,580,000/= to satisfy the balance of the decretal sum of Kshs 4,282,819/= as per the copy of the Proclamation he had attached to his Replying Affidavit. Bearing in mind that the Appellant was prepared to have two (2) of its attached motor vehicles remain under proclamation in exchange of the release of the Ambulance pending the hearing and determination of the Appeal herein, this court took the considered view that a combination of attached goods and money would be sufficient security as would be binding for the due performance of the decree herein.

46. Notably, the Respondent did not rebut the Appellant’s contention that Ambulance was the only intensive care unit ambulance available in the County of Siaya. This court was thus persuaded that it was in best interests of justice that the same be released unconditionally to avoid hardship being caused to the inhabitants of County of Siaya as the Respondent’s decretal would still be secured in other ways.

DISPOSITION

47. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Notice of Motion application dated 11th June 2021 and filed on 15th June 2021 was merited and the same be and is hereby allowed in terms of Prayer No (2), (4) and (5) therein in the following terms:-

1. The Applicant be and is hereby directed to file and serve its Memorandum of Appeal within fourteen (14) days from the date of this Ruling.

2. The Applicant be and is hereby directed to file and serve its Record of Appeal within one hundred and twenty (120) days from the date of this Ruling.

3. The Deputy Registrar High Court of Kenya Kisumu is hereby directed to facilitate the expeditious typing of the proceedings in the lower court to enable the Applicant comply with the timelines within which to file its Record of Appeal as aforesaid.

4. There shall be a stay of execution of the decree in Maseno Civil Suit No 116 of 2019 Jacob Obunga Achola (suing as the Legal representative of the Estate of Irene Patricia Achieng (deceased) vs Kenya Red Cross Headquarters on condition that the Applicant shall deposit into an interest earning account in the joint names of its counsel and counsel for the Respondent herein, the sum of Kshs 2,602,000/= within thirty (30) days from the date of this Ruling.

5. It is hereby directed that the Applicant’s goods proclaimed on 25th May 2021 as per the Proclamation of Attachment of Eshikoni Auctioneers shall remain so proclaimed.

6. An order be and is hereby issued for the immediate release to the Applicant the Intensive Care Unit Ambulance Registration Number KCT 197 W attached by Eshikhoni Auctioneers on 7th June 2021.

7. For the avoidance of doubt, in the event, the Applicant shall default on paragraph 47(4), the conditional stay of execution shall automatically lapse. The Respondent shall be at liberty to take such appropriate action in the event the Applicant shall default on Paragraph 47(1) and (2) hereinabove.

8. Either party is at liberty to apply.

9. Costs of the application will be in the cause

48. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF NOVEMBER 2021

J. KAMAU

JUDGE