



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPLICATION NO. 91 OF 2020

TRANSTRADE SERVICES LIMITED.....APPLICANT

VERSUS

SUDI SALIM SAID & SALIM SAID (Suing as the Administrators ad litem

of the estate of SAID SALIM SAID.....RESPONDENT

(Application for leave to file an appeal out of time against the judgment and decree of Hon E. Muchoki, Resident Magistrate, in Mombasa Chief Magistrate's Court Civil Suit No 2131 of 2018 delivered on 28th of January, 2020 and stay of execution of the said decree/judgment).

RULING

1. The application before me is a Notice of Motion dated 28th May, 2020 brought under the provisions of Order 22 Rule 22, Order 42 Rule 6, Order 43, Order 50 Rule 5, Order 51 Rules 1 & 3 of the Civil Procedure Rules, 2010, Sections 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law. The applicant seeks the following orders-

(i) Spent;

(ii) That the applicant be granted leave to file a memorandum of appeal out of time and/or the time for filing a memorandum of appeal be extended to allow the applicant to file a memorandum of appeal against the judgment and decree of the Honorable Trial Court in Mombasa Chief Magistrate's Civil Case No. 2131 of 2018 [SUDI SALIM SAID & SALIM SAID (Suing as the Administrators ad litem of the estate of SAID SALIM SAID (Deceased) –vs- TRANSTRADE SERVICES LIMITED)] that was entered against the applicant herein on the 28th day of January, 2020;

(iii) That the Honourable Court be pleased to order a stay of execution of the decree from the judgment entered against the applicant by the Honourable Trial Court on the 28th day of January, 2020 pending the hearing and determination of this application as well as the intended appeal;

(iv) That consequent to the grant of prayer 2 above by this Honourable Court, the annexed draft memorandum of appeal be deemed as duly filed; and

(v) That the costs of this application be in the cause.

2. The application has been brought on the grounds on the face of it and is supported by an affidavit sworn on 28th May, 2020 by Paul Ngethe, a Legal Officer at Trident Insurance Company. The respondents on 1st July, 2020 filed grounds of opposition dated 18th June, 2020 and a replying affidavit sworn on the same day by the 2nd respondent herein.

3. The application was canvassed by way of written submissions. The applicant's submissions were filed on 7th October, 2020 by the firm of Urbanus K. & Associates Advocates while the respondents' submissions were filed on 24th November, 2020, by the firm of Khatib & Company Advocates.

4. Mr. Kioko, learned Counsel for the applicant submitted that the present application meets the threshold for grant of leave to appeal out of time as provided under Section 79G of the Civil Procedure Act. He placed reliance on the Supreme Court of India's decision in the case of **Parimal v Veena** [2011] 3 SCC 545, which was cited with approval by the Court of Appeal in the case of **Wilson Cheboi Yego v Samuel Kipsang Cheboi** [2019] eKLR, where the Court defined sufficient cause to mean adequate or enough reasons.

5. He also relied on the case of **First American Bank of Kenya Ltd v Gulab P. Shah & 2 others** [2002] 1 EA 65 where the principles to be considered by the Court when exercising its discretion of whether or not to enlarge time were laid down as follows-

i The explanation if any for the delay;

ii The merits of the contemplated action, whether the matter is an 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; and

iii Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favor of the applicant.

6. The applicant's Counsel stated that the decision to grant leave to appeal out of time is purely discretionary. He submitted that one of the factors to be considered in such an application is the chances of success of the intended appeal. He submitted that in the event that the applicant successfully demonstrates that his/her intended appeal has high chances of success and that the period for the delay is not inordinate, then leave should be granted. He indicated that the applicant in its supporting affidavit had averred that the main reason for the delay in filing of the appeal was that the Counsel who was previously on record did not take action and file the appeal even after being duly instructed by the applicant to do so.

7. Mr. Kioko submitted that the mistakes of Counsel should not be visited upon the applicant since by the time the applicant realized that the appeal had not been filed, the thirty days required for the filing of the appeal had lapsed. He relied on the case of **Belinda Murai & others v Amos Wainaina [1978] eKLR** which was authoritatively cited in the case of **Wilson Cheboi v Samuel Kipsang Cheboi** (supra), where the Court held that a mistake is a mistake and that the Court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.

8. He further submitted that the applicant's intended appeal raises arguable grounds of appeal for it elicits critical errors of commission and omission by the Trial Court that led to the Court awarding the respondent extremely high damages in the circumstances. He further submitted that the applicant stands to suffer great prejudice if the intended appeal was not allowed and judgment of the Trial Court substituted with a legally sound decision of this Court.

9. On the issue of stay of execution pending appeal, Mr. Kioko relied on the provisions under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 and the Court of Appeal decision in the case of **Kenya Shell Limited v Benjamin Karuga Kibiru & another** [1986] eKLR, where in dealing with a similar application, the Court held that substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay thus, without evidence of substantial loss, it is difficult to see why the respondents should be kept out of their money.

10. He submitted that granting an order for stay of execution is discretionary and that while exercising this discretion, the Court should consider whether the intended appeal is arguable and whether the applicant stands to suffer substantial loss if the application for stay is not granted, as was held by the Court of Appeal in the case of **Nairobi Women's Hospital v Purity Kemunto** [2018] eKLR. Mr. Kioko held the position that the memorandum of appeal annexed to the present application has arguable grounds since it challenges both the factual and legal basis of the Honourable Trial Magistrate's decision.

11. He argued that if stay of execution pending the hearing and determination of the intended appeal was not granted, the applicant would suffer prejudice as paying the decretal sum would lead to substantial loss which may render the intended appeal nugatory.

12. Mr. Kioko contended that there was no basis on which the applicant should be required to deposit security for costs or the decretal sum in this matter. He further submitted that Order 42 Rule 14 of the Civil Procedure Rules provides for the taking of security for costs of the appeal so as to provide protection to the plaintiff or defendant in cases where there is a likelihood that in the event of success they may have difficulty realizing the costs incurred in litigation. Counsel argued that this is a discretionary power exercised in exceptional circumstances. He expressed the view that the applicant is a multinational company of repute thus it is not possible that it would be unable to pay the respondent in the event the intended appeal is unsuccessful. He stated that in any event, the respondent had not indicated that the applicant has no financial means to settle the decretal amount in case the Court holds in their favour.

13. Mr. Khatib, learned Counsel for the respondent also relied on the case of **First American Bank v Gulab Shah** (supra) where the Court laid down the principles to be considered in an application for leave to file an appeal out of time. He submitted that the delay of six months in this case was inordinate and there was no justifiable reason for the delay. He further submitted that as much as the applicant had stated that the delay was occasioned by its former Advocate who did not institute the appeal on time upon being given instructions, there was no proof of instructions having been given for the lodging of an appeal and no affidavit had been filed from the said Advocate, confirming receipt of instructions to lodge an appeal.

14. The respondent's Counsel stated that the Trial Court delivered judgment on 28th January, 2020 and that on 3rd February, 2020, the respondent served the applicant with a notice of entry of judgment and requested for satisfaction of the judgment but their letter elicited no response. That consequently, on 12th March, 2020, the Court issued warrants of execution which led the applicant to file an application for leave to appeal.

15. On whether the intended appeal has chances of success, Mr. Khatib submitted that the memorandum of appeal challenges the finding on quantum. He indicated that the only evidence before the Trial Court was from the respondent hence the finding on quantum was made upon evaluation of the evidence on record. Mr. Khatib submitted that the appeal is devoid of merit and does not deserve a day in Court. On the degree of prejudice, he submitted that the respondent had obtained a money decree arising from a fatal accident and that the applicant chose not to enter appearance in the suit before the Trial Court with a bid to delay the conclusion of the case. He was of the view that the applicant shall not suffer any prejudice if the application is declined.

16. On the issue of stay of execution pending appeal, Mr. Khatib relied on the provisions of Order 42 Rule 6(1) & (2) of the Civil Procedure Rules, 2010 and in the case of **Butt v Rent Restriction Tribunal** [1979] eKLR, where the Court held that an applicant must prove that if stay is not granted, the appeal shall be rendered nugatory if it is successful. He argued that the respondent had already demonstrated that the intended appeal has no arguable grounds and no chances of success. He indicated that since the decree sought to be appealed from is a money decree, in the event the appeal is successful, the applicant shall demand the money back since the respondent is not a pauper and has means of raising the money. He stated that on the other hand, the applicant is a company with adequate resources and would have no difficulty in paying the decretal sum.

17. It was submitted by Mr. Khatib that since there was no substantial loss to be suffered if stay of execution was not granted, the present application is unmerited and should be dismissed with costs.

ANALYSIS AND DETERMINATION.

18. This Court has considered the issues raised in the application herein, the affidavits filed, the grounds of opposition by the respondent and the written submissions by the Advocates on record. The issues which arise for determination are-

(i) Whether the application for leave to file an appeal out of time is merited; and

(ii) Whether the applicant has satisfied the conditions set down to warrant grant of an order for stay pending appeal.

19. In the affidavit filed by the applicant, it deposed that the defendant was insured by Trident Insurance Company Limited at the time of the accident. That the Trial Magistrate delivered judgment on 28th January, 2020 against the applicant for the sum of Kshs. 1,351,324.00 and upon reading the judgment, it instructed its Advocate who were on record before the Trial Court to file an appeal against the entire judgment, as the award was excessive in the circumstances of the matter.

20. The applicant averred that when it noticed that the said Advocates had not filed the appeal, they instructed the firm of Urbanus K. Associates Advocates to take over the matter and protect its interests by filing the appeal but by then, the thirty days within which to file an appeal had already lapsed.

21. The applicant deposed that the application herein had been made without any unreasonable delay thus the same would not occasion any prejudice to the respondent and that unless stay of execution was granted, the respondent shall proceed to execute the decree of the Trial Court against the applicant thereby occasioning it great loss and rendering the intended appeal nugatory.

22. The 2nd respondent in his replying affidavit deposed that the applicant had not demonstrated why they did not act in time so as not to occasion the delay in filing the appeal as every party has a duty to act with vigilance contrary to which, one cannot seek equity in the circumstances. He further deposed that the delay by the applicant was inordinate as it was seeking leave six months down the line without a justifiable reason.

23. The respondent averred that the applicant's indolence could not be overlooked by shifting blame to the Advocates since the applicant had a duty to follow up on its matter and give proper instructions or change Advocates in proper time. The respondent further averred that he stands to suffer an injustice in the event the orders sought are granted.

24. It was deposed by the respondent that the orders sought are incapable of being granted since no appeal exists and if there is any, it was not arguable. He also averred that no security had been offered by the applicant in the event of an unsuccessful appeal.

Whether the application for leave to file an appeal out of time is merited.

25. Section 79G of the Civil Procedure Act provides as hereunder: -

“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.”

26. The Court of Appeal in **Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited** [2020] eKLR outlined the guiding principles that a Court should consider when it comes to extension of time, being the same conditions which were restated in **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others** [2014] eKLR as follow-

“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...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. *[where] there is a reasonable [cause] 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.”*

27. In the present case, the Trial Magistrate delivered judgment on 28th January, 2020. Pursuant to the provisions of Section 79G of the Civil Procedure Act, the applicant ought to have filed a memorandum of appeal within 30 days from 28th January, 2020 for its appeal to be deemed as being properly filed. In the event the memorandum of appeal was not lodged within 30 days as prescribed, this Court may admit it out of time if the applicant satisfies the Court that there were sufficient reasons for not filing the appeal in time.

28. Section 79G of the Civil Procedure Act gives this Court discretionary powers in consideration of applications for extension of time within which to lodge an appeal. The material that has been placed before this Court is not sufficient for ascertainment of whether the applicant has sought to extract a decree upon which the intended appeal shall lie and/or whether or not the applicant has applied for and paid the requisite fees for supply of certified typed proceedings from the lower Court. The applicant submitted that upon reading the Trial Court’s judgment, it instructed its Advocates who were on record before the Trial Court to lodge an appeal against the said judgment on grounds that the award was excessive in the circumstances. They submitted that by the time they realized the appeal had not been filed, the 30 days within which they were required to file an appeal had lapsed, thus necessitating the present application.

29. This Court notes with concern that as much as the applicant submitted that mistakes of Counsel should not be visited upon it, it failed to demonstrate the veracity of its claim that its former Advocates failed to act on instructions and file the appeal in good time. The applicant has not disclosed to this Court the name of the Advocates who appeared on its behalf before the Trial Court. It did not file an affidavit sworn by Counsel from its former Advocates, deposing to the claim of failing to file an appeal as requested by the applicant within 30 days as prescribed by law and/or in the very least correspondence between the applicant and its former Advocates on record on instruction to appeal or a letter inquiring on the progress made in the filing of the appeal.

30. It is also noteworthy that the applicant has not disclosed when it instructed its current Advocates to file the instant application so that the Court can have an opportunity to establish the duration of time taken between the receipt of instructions and the actual filing of the application herein so as to determine at what point in time the delay was occasioned in bringing this application before Court.

31. It is this Court’s finding that the applicant has not even in the least attempted to explain the three months’ delay in the filing of the present application. In the said circumstances, this Court concludes that the delay is inordinate, thus inexcusable. In the case of **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others (supra)**, the Supreme Court held that-

““Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it”

32. The rules of equity dictate that equity only aids the vigilant and not the indolent. In the absence of evidence as to the steps and/or efforts undertaken towards successfully lodging an appeal within the given time prescribed by law, this Court is not persuaded by the applicant’s explanation that its former Advocates on record failed to act on its instructions to file the appeal in good time and that it should not be punished for its Counsel’s mistake. That in itself does not qualify as a satisfactory explanation or otherwise as to what occasioned the delay in lodging an appeal in good time.

33. This Court therefore finds that the applicant is guilty of laches and that the unexplained three months is inordinate, thus inexcusable.

Whether the applicant has satisfied the conditions set down to warrant grant of an order for stay pending appeal.

34. In light of the fact that the application for extension of time to file an appeal out of time is found to be devoid of merit, addressing the issue of stay pending appeal would be an academic exercise

35. The upshot is that the application dated 28th May, 2020 is dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 19th day of November, 2021. In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through the Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of-

No appearance for the parties

Mr. Oliver Musundi- Court Assistant