



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISC. CIVIL APPLICATION NO. 546 OF 2019**

**CATHERINE NDUKU (Suing as Legal Representative of the estate of**

**KELVIN MAINGI..... PLAINTIFF/RESPONDENT**

**VERSUS**

**TRINITY TRANSPORT SERVICES.....DEFENDANT/APPLICANT**

**PANIJ AUTOMOBILE K LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. What remains for determination in the application dated 25.11.2019 are prayers for an order for extension of time within which to file an appeal and leave to file the memorandum of appeal out of time as well as stay of execution pending the hearing and determination of the appeal. The application is brought under Section 3A, 79G and 95 of the Civil Procedure Act and Order 22 rule 22, Order 42 Rule 6, Order 50 Rule 6, Order 51 Rule 1 and 3 of the Civil Procedure Rules. It is supported by the affidavit of Isabella Nyambura the senior claims manager of the applicants' insurer.

2. The background to the application as gleaned from the pleadings and the annexures thereto, relates to a **Civil Suit 462 of 2018** in the Chief Magistrates Court at Machakos where judgement was delivered on 20.3.2019. There is a copy of a draft memorandum of appeal as well as a decree in respect of the suit in the trial court.

3. The grounds were stated briefly in the Notice of Motion and laid out in detail in the affidavit in support of the application were that judgement in the lower court was delivered and that the applicants are dissatisfied with the same. The applicant averred that there will be prejudice suffered if the orders sought are not granted.

4. In opposition to the application, is a replying affidavit dated 2.12.2019 that was deponed by Catherine Nduku Munguti. The deponent averred that no reason has been given why the appeal was not lodged within time and that the applicants have not shown the loss that they will suffer if the application is not allowed. It was averred that the deponent has no fear of refunding the decretal amount and attached a copy of her pay-slip and urged the court to direct that half the decretal amount be deposited if the court is inclined to grant the order for stay.

5. The court directed that the matter be canvassed vide written submissions that have been duly filed. Vide submissions filed on 4.12.19, learned counsel for the respondent submitted that the applicant has not satisfied the conditions for grant of stay of execution and reiterated the prayer that half the decretal amount be deposited. Counsel added that the prayer for leave to file the appeal out of time came as an afterthought.

6. Learned counsel for the applicant in addressing the prayer for enlargement of time placed reliance on Section 95 of the Civil Procedure Act and submitted that the court is empowered to make such order. According to counsel, the appellants are willing to deposit security for hearing of the appeal and that the applicants had an arguable appeal and thus urged the court to allow the application.

7. The issues for determination in this application are firstly **whether the applicants have established sufficient reasons for the court to extend the time in which to lodge the appeal; Secondly whether the applicants should be granted leave to file the appeal out of time and finally whether the applicants have met the conditions for grant of stay of execution pending appeal.**

8. This Court has the discretion, for sufficient cause, to extend time under Section 79G of the Civil Procedure Act. Sufficient cause should relate to the inability to do a particular act.

Section 79G provides as follows:-

**“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. ”**

9. The above principles were earlier considered by Duffus P in the case of **Mugo & Others v Wanjiru & Another [1970] EA 481** at p.484 where he stated thus;

***“Each application must be decided in the particular circumstances of each case but as a general rule the applicant must satisfactorily explain the reason for the delay and should also satisfy the court as to whether or not there will be a denial of justice by the refusal or granting of the application.”***

10. The Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] eKLR** listed the factors which aid our courts in exercising the discretion whether to extend time to file an appeal out of time, they include the following:

- a. The period of delay;***
- b. The reason for the delay;***
- c. The arguability of the appeal;***
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;***
- e. The importance of compliance with time limits to the particular litigation or issue; and***
- f. The effect if any on the administration of justice or public interest if any is involved.***

11. I will have the above principles in mind as I proceed to determine this application. It is therefore not in dispute that the applicant is aggrieved with the decision of the trial court and has a draft memorandum of appeal annexed to the application. A careful perusal of the replying affidavit does not inform the court the specific reasons why the respondent is opposed to the application save that she is apprehensive that the fruits of her judgement are at risk. She has indicated that she is not averse to the deposit of half the decretal amount.

12. In this case, the application was filed on 26.11.2019 that is about one month and four days after the judgement was delivered. I find the delay not to be inordinate and though the explanation is not satisfactory, I am unable to see the prejudice that the Respondent will suffer if the application is allowed. I find the applicant has easily met the test for grant of order for extension of time within which to file the appeal.

13. Consequently, I will grant prayer 2 in the Applicants Notice of Motion as well as the requisite leave in terms of the same prayer in the application.

14. With regard to prayer 4, Order 42 Rule 6 provides for stay of execution pending appeal. The conditions to be met by an Applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

***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.***

***(2) No order for stay of execution shall be made under sub-rule (1) unless—***

***The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.***

15. The applicants have to satisfy a four-part test as was highlighted in the case of **UAP Provincial Insurance Company Limited v Michael John Beckett, Civil Application Number 204 of 2004**. They must demonstrate that:

- a. The appeal they have filed is arguable;***
- b. They are likely to suffer substantial loss unless the order is made. Differently put, they must demonstrate that the appeal will be rendered nugatory if the stay is not granted;***
- c. The application was made without unreasonable delay; and***
- d. They have given or are willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on them.***

16. I have perused the filed Memorandum of Appeal in this case as annexed to the application. I am unable to say that the grounds of appeal

enumerated are not arguable and therefore I find that the applicants have easily met that standard.

17. But what is the substantial loss that the Applicants are likely to suffer if the order is not granted? The affidavit in support of the application is silent on the same.

18. I am not convinced that there may be loss occasioned to the applicant if the orders sought are not granted save for the right to be heard on appeal. The applicant has indicated willingness to deposit security and this will take care of the concerns of the respondent. The respondent seeks that half of the decretal sum be paid pending determination of the appeal. The respondent has averred that she is able to refund the decretal sum in the event of success of the appeal and went ahead to furnish a copy of her pay-slip. The applicant did not rebut those averments and hence the respondent's claim that she has the means to refund the decretal sums must be accepted. The applicant's claim that substantial loss will occur if the decretal sum is paid is therefore not convincing. In any case the applicant's underwriter is a giant company carrying out its operations across the country and with a huge financial portfolio and therefore an order for deposit of the decretal sums is not likely to cause a dent on its finances. Looking at all the circumstances I find and order for payment of half the decretal sums to the respondent by the applicant and an order that the balance be deposited into a joint interest earning account in names of both parties will be appropriate as the concerns of both parties will have been taken into account. A perusal of the judgement of the trial court and the draft memorandum of appeal indicates that a large percentage of liability had been placed on the applicant and hence even upon determination of the appeal the respondent is not likely to come out empty handed. The order for payment of half the decretal amount to the respondent is therefore merited.

19. On the issue of whether the application was brought without inordinate delay, I note that the same was brought within 34 days from the date of delivery of the judgement and which period I find not inordinate as it is only four days shy of the stipulated period. Hence I find that the Applicants have met the conditions placed by Order 42 Rule 6.

20. In the result the application dated 25.11.2019 succeeds and is allowed in the following terms:

*a. The Applicants are granted leave to file their appeal out of time.*

*b. The applicants to file and serve their Memorandum of Appeal within the next ten (10) days from the date hereof.*

*c. An order of stay of execution of the judgement and decree in Machakos Cmcc No. 462 of 2018 pending the hearing and determination of the appeal is hereby granted upon the applicants paying half of the decretal sums to the respondent while the balance be deposited into a joint interest earning account to be opened in the names of advocates on record for the parties within 30 days of this ruling failing which the stay shall lapse.*

*d. The costs of the application shall abide in the appeal.*

It is so ordered.

Dated and delivered at **Machakos** this 27<sup>th</sup> day of **January, 2020**.

**D. K. Kemei**

**Judge**