



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 75 OF 2020

THE MONARCH INSURANCE CO. LIMITED.....APPLICANT

-VERSUS-

JESSE THOMAS NDEGWA WAMBUI.....RESPONDENT

RULING

1. Before this court for resolution is the Notice of Motion dated 6th February, 2020 and amended on 10th February, 2020 (“the Motion”) brought by the applicant and supported by the grounds set out on its face and the facts stated in the affidavit of *Simon Kioko*. The following are the substantive orders sought in the Motion:

(i) Spent.

(ii) Spent.

(iii) THAT this Honourable Court be pleased to grant a stay of execution of the judgment delivered in Nairobi CMCC No. 1533 of 2018 pending the hearing and determination of the intended appeal.

(iv) THAT this Honourable Court be pleased to grant the applicant leave to file an appeal out of time against the judgment of the Honourable Senior Principal Magistrate A.M. Obura (Mrs.) delivered on 2nd December, 2019 in Nairobi CMCC No. 1533 of 2018.

(v) THAT in the alternative, this Honourable Court be pleased to admit as properly on record the appeal preferred against the judgment delivered in Nairobi CMCC No. 1533 of 2018.

(vi) THAT the costs of the application be provided for.

2. The deponent who is the Deputy Manager-Legal Services of the applicant, averred that while the impugned judgment was to be delivered on 1st November, 2019 on the said date a notice was issued through the Kenya Law Reports website to the effect that the judgment would instead be delivered on 8th November, 2019.

3. The deponent averred that on the said 8th day of November, 2019 the trial court indicated to the parties that the impugned judgment was not ready and hence it would be delivered on notice to the parties. According to the deponent, no such notice was issued and it is only upon service of a notice of entry of judgment upon the applicant’s advocate that it was discovered that judgment had been delivered.

4. It was the assertion of the deponent that soon thereafter, the lower court file went missing and attempts by the applicant’s advocate to trace the same for purposes of obtaining the requisite documents to enable the filing of an appeal were futile.

5. It was also the assertion of the deponent that in the meantime, the defendant/respondent has commenced execution and unless the orders sought are granted, the applicant is likely to suffer irreparable loss; further considering that the assets of the respondent are unknown and it is possible that he will not be in a position to refund the decretal sum upon payment and in the event of a successful appeal.

6. According to the deponent, the applicant has an arguable appeal with high chances of success and there has been no inordinate delay in bringing the instant application.

7. The respondent opposed the Motion through the Grounds of Opposition dated 12th February, 2020 and amended on 9th March, 2020 and

put forward the grounds hereinbelow:

- a) THAT the Motion/amended Motion is an attempt by the applicant to put the “cart before the horse” in terms of avoiding the need to first seek leave to appeal, in the present circumstances surrounding the present Motion/amended Motion.**
- b) THAT the present Motion/amended Motion is disguised as a miscellaneous civil application whilst in real sense, it is a subtle attempt to sidetrack the mandatory provisions of the law that govern the institution and progression of an appeal.**
- c) THAT the present Motion/amended Motion is not properly before this Honourable Court.**
- d) THAT the present Motion/amended Motion is misconceived, bad in law, incompetent, incurably defective, an abuse of the court process as it violates the provisions of the Oaths and Statutory Declarations Act, Cap. 5 Laws of Kenya and hence ought to be dismissed/struck out with costs.**
- e) THAT the applicant seeks to interfere with a regular judgment and decree stemming from a suit which went through a full hearing and in which the applicant fully participated.**
- f) THAT the prayers sought therein by the applicant gravely offend the rule that underpins a fair trial in terms of Article 50 of the Constitution of Kenya, 2010.**
- g) THAT the Motion and the grounds upon which the Motion is premised are in disregard of the provisions of Order 50 of the Civil Procedure Rules, 2010 read along with the Judicature Act and the Magistrate’s Courts Act respectively.**
- h) THAT any other lawful or justiciable grounds based on points of law that may be canvassed with leave of the Honourable Judge.**

8. The respondent also swore a replying affidavit and contended *inter alia*, that contrary to the averments of the applicant, a notice of delivery of the impugned judgment was issued, to the effect that the judgment which was set for 2nd December, 2019 would be delivered on 4th December, 2019. According to the respondent, the applicant did not attend court on both instances.

9. The respondent also stated that the applicant has not shown sufficient cause to entitle it to a granting of the orders sought in the Motion.

10. It is noted that the respondent also filed the notice of preliminary objection dated 12th February, 2020 putting forward the following grounds:

- a) THAT this Honourable Court lacks jurisdiction under Order 43 of the Civil Procedure Rules to consider the Motion at this point in time.**
- b) THAT the Motion in question seeks to admit an appeal/memorandum of appeal that contravenes the mandatory provisions of the Civil Procedure Rules, that is to say:**
 - (i) The appeal and/or memorandum of appeal contravenes the mandatory provisions of Section 67 of the Civil Procedure Rules.**
 - (ii) The appeal and/or memorandum of appeal sought to be admitted before the superior court does not lie as of right in view of the provisions of Order 43 of the Civil Procedure Rules.**
- c) THAT the Motion and the grounds upon which the Motion is premised are in disregard of the provisions of Order 50 of the Civil Procedure Rules, 2010 read along with the Judicature Act and the Magistrate’s Courts Act respectively.**
- d) THAT any other lawful or justiciable grounds based on points of law that may be canvassed with leave of the Honourable Judge.**

11. The Motion was dispensed with through the filing of written submissions. On its part, the applicant has argued that contrary to the grounds raised in the preliminary objection, this court has jurisdiction to entertain the instant Motion and that the appeal lies as of right and there was no need for the applicant to seek and obtain leave first before choosing to lodge an appeal. Reference was made to **Section 65** of the **Civil Procedure Act** (“the Act”) which prescribes that:

“Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—

...

(b) from any original decree or part of a decree of a subordinate court, on a question of law or fact;

12. The applicant further argued that the provisions of **Section 67** of the Act would not apply to the present circumstances since the primary suit was defended to the end.

13. It was the assertion of the applicant that it has not contravened any rule under **Order 50** of the **Civil Procedure Rules** (“the Rules”) and in any event, this court has the power to enlarge the time required for filing the appeal.

14. On the substance of the Motion, the applicant restated that there is no record of issuance of the notice of delivery of the judgment as required under **Order 21, Rule 1** of the Rules which reads thus:

“In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.”

15. The applicant also referred this court to the authority of **Suleiman Sumra & another v Said Mohamed Said [2018] eKLR** where the following reasoning was taken:

“In this matter while the respondent contends that the notice of delivery of judgment was posted on the court notice board, that fact is denied by the applicant I wish to point out that mode of service as known to law is by issuance and delivery of the notice to the person to be served. That is the reason the rules governing pleadings and notice of address of service demand that parties provide their addresses for service. Postage on the court notice board without, more is not one of the modes of service of process.”

16. The applicant restated that there has been no inordinate delay in bringing the Motion further restated the arguable nature of its appeal coupled with the irreparable loss it stands to suffer should this court decline to grant the orders sought.

17. The applicant also indicated its willingness to abide by the conditions to be set by this court in respect to the provision of security.

18. In response, the respondent restated in his submissions that the reasons offered by the applicant do not constitute a good basis for the orders sought since they do not sufficiently explain the delay in lodging the appeal timeously. The respondent further submitted that the applicant’s advocate did not demonstrate the necessary steps taken to obtain copies of the judgment and decree. Reference was made to the case of **Abdul Aziz Ngoma v Mungai Mathayo & another [1976] eKLR** where the Court of Appeal of East Africa held that sufficient reasons ought to be given before a court can ascertain whether an appeal has reasonable chances of success.

19. It was the submission of the respondent that the jurisdiction of the High Court to hear appeals is created by legislation and hence the concept of inherent appellate jurisdiction does not exist. To buttress his argument, the respondent cited the following decision by the Court of Appeal in the case of **Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR**:

“The point of departure must be the recognition that the right of appeal, with or without leave, must be conferred by statute and the same is never to be implied.”

20. The respondent therefore argues that this court does not have jurisdiction to entertain the instant Motion and urges this court to allow his preliminary objection and strike out/dismiss the Motion.

21. I have considered the grounds as presented in the Motion, the facts deponed in the affidavits supporting and opposing the Motion, the Grounds of Opposition, the preliminary objection and the rival written submissions and authorities relied upon.

22. Before I delve into the merits of the Motion, I must first address the issues raised in the preliminary objection, beginning with the issue of whether the intended appeal lies as of right. The respondent was correct in stating that the right of appeal can be conferred by the law. The Supreme Court in the case of **Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR** went further on to categorically state that the right of appeal can be conferred either by the Constitution or other legislation.

23. From my study of the record, I note that though the nature of the claim made by the respondent against the applicant before the trial court has not been disclosed, it is apparent that the trial court awarded damages to the respondent. There is also nothing to indicate that the claim was undefended.

24. **Section 65** of the Act which the applicant referenced, provides that:

“Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—

...

(b) from any original decree or part of a decree of a subordinate court, on a question of law or fact

25. From my study of **Order 43** of the Rules, which the respondent cited, provides for instances where an appeal lies as of right against an order made. Section 75 of the Act also prescribes instances in which an appeal lies as of right against orders, in the manner hereunder:

“(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

- (a) *an order superseding an arbitration where the award has not been completed within the period allowed by the court;*
- (b) *an order on an award stated in the form of a special case;*
- (c) *an order modifying or correcting an award;*
- (d) *an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;*
- (e) *an order filing or refusing to file an award in an arbitration without the intervention of the court;*
- (f) *an order under section 64;*
- (g) *an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;*
- (h) *any order made under rules from which an appeal is expressly allowed by rules.”*

26. From the foregoing and from my study of the Act and Rules, it is apparent that Order 43 and Section 75(1) relate to orders of the court as opposed to judgments and decrees issued by a court, and would therefore not apply in the present instance. In the absence of any express provision pointed out by the parties indicating that leave of appeal ought to be sought before appealing against a decree issued by the subordinate court, I find that the applicant did not require leave of the court before approaching this court on appeal.

27. Having determined so and in the absence of any material or indication to the contrary, I find that this court has jurisdiction to entertain the Motion.

28. Another issue which was raised in the preliminary objection concerns whether the Motion contravenes the provisions of **Order 50** of the Rules. The said Order provides for the computation of time and further provides for the enlargement of time under Rule 5 of that Order, which is what the applicant is essentially seeking. From my perusal of the record and the Motion, I have not come across anything to indicate a contravention of Order 50. In the premises, the preliminary objection fails.

29. The Motion itself sought for twin prayers. I will first determine the prayer on extension of time and leave to file an appeal out of time.

30. Under the provisions of **Order 50, Rule 5** of the **Civil Procedure Rules**, the courts have power to enlarge the time required for the performance of any acts stipulated in the Rules notwithstanding the fact that such time has expired. It therefore follows that whether to extend time is a matter of judicial discretion.

31. Concerning appeals from the subordinate court to the High Court, the applicable provision is **Section 79G** of the **Civil Procedure Act** which expresses that appeals of such nature must be filed within a period of 30 days from the date of the decree or order from which the appeal lies.

32. The above proviso is also clear that a court of law can only grant a party leave to file an appeal out of time where sufficient cause has been shown.

33. 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 the laid out in the case of **Thuita Mwangi v Kenya Airways Limited [2003] eKLR** and were reaffirmed in the case of **Growth Africa (K) Limited & another v Charles Muange Milu [2019] eKLR**.

34. The first and second principles concern the length and reason for the delay respectively. From the record, it is apparent that the impugned judgment was delivered on 2nd December, 2019 whereas the instant Motion was originally brought on 6th February, 2020 within a span of two (2) months, prior to amendments being made. Upon considering the length of the delay, I do not find it to be inordinate or unreasonable.

35. In respect to the reasons behind the delay, I considered the explanation given by the applicant and I looked at the annexures to the Motion. It is apparent therefrom that the judgment was slated for delivery on 1st November, 2019 but that the court was not sitting on that day and hence the judgment was deferred to 8th November, 2019. It is apparent that on the said 8th of November, the judgment was not delivered and it was indicated that the same would be delivered on notice.

36. As concerns the notice, I am unable to tell from the record the mode by which it was issued. That notwithstanding, it is apparent from the record that a notice of entry of judgment was served upon the applicant's advocate by the advocate for the respondent and according to the applicant, they were unable to trace the court file thereafter and that its advocate did not inform it of the judgment.

37. I note that no evidence of the missing file has been placed before this court. However, I am alive to the principle that the omission of an advocate should not be visited upon the client and upon taking into account the brief period of time that passed from the date of judgment to the filing of the instant Motion, I find the applicant's explanation to be reasonable in the circumstances.

38. On the third principle to do with whether an arguable appeal exists, I looked at the draft memorandum of appeal annexed to the Motion and I note that the appeal essentially seeks to challenge both the finding on liability and the award of damages which the applicant believes to be excessive. At this point in time, it is not my duty to consider the merits of the appeal. Nonetheless, I am satisfied the intended appeal raises arguable grounds which the applicant ought to be given an opportunity to address on merit.

39. The fourth principle concerns itself with the prejudice which will befall the respondent should the applicant be granted leave to appeal out of time. Upon considering the averments made by the respondent, I am of the view that any prejudice he stands to suffer can reasonably be compensated by way of costs.

40. For all the foregoing reasons, I am satisfied that it would be a proper exercise of my discretion to allow the applicant the opportunity of pursuing an appeal against the lower court's decision.

41. Having determined so, I will now address the second limb of the Motion to do with the granting of an order stay of execution with reference to **Order 42, Rule 6 (2)** of the **Civil Procedure Rules** which specifies the principles for consideration in such applications.

42. The first principle on whether the application has been brought without unreasonable delay has been addressed hereinabove.

43. This brings me to the second principle touching on the substantial loss that will be suffered by the applicants. From the application, it is apparent that the applicant is anxious that the respondent will not be able to refund the decretal sum if the same is paid to him and the appeal succeeds. On his part, the respondent did not specifically address this subject.

44. The courts have time and time again discussed the question on who has the burden of proof on the issue of refund of the decretal sum. I am both guided and bound by the Court of Appeal's analysis in the case of **National Industrial Credit Bank Ltd v 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...”

45. In the absence of anything to ascertain the respondent's financial capacity, I am satisfied that the applicant has reasonably demonstrated that it stands to suffer substantial loss.

46. In respect to the third and final condition relating to the provision of security, the applicant expressed its readiness and willingness to provide security for the due performance of the decree.

47. In the end therefore, the Motion is allowed in respect to prayers (ii) and (iv) and the following orders are made consequently:

a) The applicant shall file and serve its memorandum of appeal within 14 days and shall compile, file and serve its record of appeal within 60 days from today.

b) There shall be a stay of execution of the judgment delivered on 2nd December, 2019 on the condition that the applicant deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within 30 days from today, failing which the order for stay shall automatically lapse.

c) Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 29th day of October, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

.....**for the Applicant**

.....**for the Respondent**