



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISC. CIVIL APPLICATION NO.21 OF 2020

PHILL LIMITED.....1ST DEFENDANT/APPLICANT

GIDEON MUGO GATWERI.....2ND DEFENDANT/APPLICANT

VERSUS

MBEKE MUISYO AND FRANCIS MUTINDA

MUISYO (Suing on behalf of the estate of

WALTER MUSYOKI MUISYO (DECEASED)....PLAINTIFF 1ST RESPONDENT

VATICAN TRADERS.....2ND RESPONDENT

RULING

1. The Application coming for consideration in this ruling is the Notice of Motion dated 28/7/2020 seeking the following orders;

i) THAT Service of this application be dispensed with in the first instance(SPENT).

ii) THAT this application be certified as urgent and be fixed for hearing on priority basis(SPENT).

iii) THAT this Court be pleased to grant leave to the Applicant to lodge an Appeal from judgment and decree of the Chief Magistrate Court in Kericho CMCC No.148 of 2018 out of time the same having been delivered by the trial court on 3rd March, 2020 without notice in absence of the Defendants and or Defendant's Advocates on record.

iv) THAT there be temporary orders of stay of execution of the judgment and Decree of the Court in Kericho CMCC No.148 of 2018 pending hearing and determination of this application generally.

v) THAT the Court be pleased to grant temporary orders of stay in terms of prayer (d) above pending hearing inter-partes and/or pending further orders of the court.

vi) Such other orders be made as are just and expedient.

vii) Costs be in the cause.

2. The Application is based on the grounds on the face of it and supported by the Affidavit of FRANKLINE NYAGA of even date.

3. The Supporting Affidavit states that the Deponent is the Senior Legal Manager of UAP Provincial Insurance Company Limited.

4. Further, that by virtue of UAP Provincial Insurance Company Limited being the insurer of the defendants in Kericho CMCC No.148 of 2018 it follows that they are responsible for giving instructions to the defence counsel.

5. That the judgment in Kericho CMCC No.148 of 2018 was delivered on 3/3/2020 in favour of the plaintiff and the Defendant/Applicant who is aggrieved by the said judgment wishes to appeal against it.

6. The Supporting Affidavit further states that the judgment was delivered without notice to the Defendant/Applicants on 3/3/2020 hence the

failure to file the appeal within time.

7. They also stated that the appeal has overwhelming chances of success and it has been lodged expeditiously.

8. The Plaintiff/Respondents opposed the Application and filed a Replying Affidavit sworn by FRANCIS MUTINDA MUISYO, the 1st Plaintiff/Respondent.

9. The Plaintiff/Respondents stated in Replying Affidavit that the Application is made in utmost bad faith and the same is wanting in merit and should be dismissed as it is misleading the court by stating that the judgment was delivered on 3/3/2020 without their knowledge.

10. It is further stated in the Replying Affidavit that initially the judgment was scheduled for deliver on 25/02/2020 and on that date, there was appearance for the Defendant/Applicants and they were told the judgment was deferred to 3/3/2020 and they cannot now say they were not served with the notice of the date of delivery of judgment.

11. It was also stated that the Defendant/Applicants have not been intentionally pursuing the appeal and further that the same is an afterthought filed after the Plaintiff/Respondents indicated that they wished to file a declaratory suit to recover the sums awarded.

12. The Plaintiff/Respondents also stated the Application is made in bad faith to defeat the Respondent's right to enjoy the fruits of the judgment and further the Applicant will not suffer any substantial loss if execution proceeds since the Respondents has sufficient means to refund any amount received if the appeal succeeds.

13. The parties were directed to file written submissions in the Application dated 28/7/2020. The Applicant submitted that the court has discretion to extend time for filing the appeal taking into account the length of delay, the reasons for the delay and the chances of the appeal succeeding.

14. The Applicant also submitted that due to covid-19 pandemic, the operations of the courts were brought to a halt and the Applicants were handicapped in their attempts to seek leave to appeal out of time and they brought the Application after 3 months.

15. It was also submitted that the intended appeal has high chances of succeeding and the same is arguable since the award did not take into account certain factors in awarding a multiplier of 25 years such as various vagaries of life ordinarily considered by other courts.

16. The Applicants also submitted that the Respondent will not suffer prejudice by the extension of time and therefore the Application should be allowed.

17. The Respondents submitted that the Applicant has not demonstrated good and sufficient cause for not filing the appeal in time and further that the extension of time is an equitable remedy that is only available to a deserving party at the discretion of the court.

18. The Respondents also submitted that the Applicant has not demonstrated that he has placed an arguable appeal before the court the principal ground forming the appeal being that the trial court erred in adopting Kshs.28,528/= as the income of the deceased which they allege was not supported by evidence yet the figure is under the Regulation of wages order 2015 and there was no dispute that the deceased was employed as a salesman.

19. The Respondents also submitted that the stay of execution can only be granted if Order 42 Rule 6 (2) as complied with.

20. Section 79G of the Civil Procedure Act provides that:

“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”.

21. The principles to be considered in exercising the discretion whether or not to enlarge time were considered in the case of **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** and the court said the following factors have to be taken into account;

(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;

(iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

22. The issues for determination in this Application are as follows;

- i) Whether the Application was made without unreasonable delay.
- ii) Whether substantial loss may result to the Applicant unless the stay is granted.
- iii) Whether the Applicant has offered security for the due performance of the decree.

23. Under **Order 42 Rule 6(2)** of the Civil Procedure Rules, an Applicant should satisfy the Court that:-

- (i) Substantial loss may result to him unless the order is made;
- (ii) That the Application has been made without unreasonable delay; and
- (iii) The Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.

24. On the issue of delay, I find that the Applicant has explained the reason for the delay.

25. I allow the Application dated 28/7/2020 on the following conditions;

- i) THAT the Applicant files the appeal within 30 days of this date.
- ii) THAT half the decretal sum be deposited in an interest earning account held jointly by the counsels for both parties to be opened within 30 days of this date.
- iii) THAT the Applicant pays the costs of this Application.

Delivered, dated and signed at Kericho this 23rd October, 2020.

A. N. ONGERI

JUDGE