



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO.169 OF 2020

TOBIAS OMONDI LWANIA &

CONSLETA ADHIAMBO ONYANGO (Legal

Representatives of the Estate of MONICA

ANYANGO – Deceased).....PLAINTIFFS

VERSUS

BETHUEL MNYAKA KIMBIO.....DEFENDANT

RULING

1. The Applicant, by way of **Notice of Motion** application dated **19th August, 2020** seeks the following prayers:-

a) Spent;

b) That this Honourable Court be pleased to extend time and grant Leave to the Applicant to lodge a Memorandum of Appeal out of time against the Judgment and Decree entered against the Applicant by Honourable C. Ndegwa, Senior Principal Magistrate in Mombasa CMCC No.2351 of 2018 on 21st May, 2020;

c) That this Honourable Court be pleased to Stay Execution of the Judgment and the Decree in Mombasa Senior Principal Magistrates Court, Civil Suit No.2351 of 2018 pending hearing and determination of the Application herein;

d) That this Honourable Court be pleased to Stay Execution of the Judgment and the Decree in Mombasa Senior Principal Magistrates Court, Civil Suit No.2351 of 2018 pending hearing and determination of the intended Appeal;

e) Spent;

f) That this Honourable Court be pleased to issue any other orders that it may deem fit, just and expedient in the interest of justice.

g) That costs of this Application be in the cause.

2. The application is premised on **7 grounds** on the face of the Application and supported by an **Affidavit** sworn on the **19th August, 2020** by **Isabella Nyambura** who is described as the **Legal Manager of Directline Assurance Company Limited**, Insurers of **Motor Vehicle Registration No.KBL 987N**. She avers that they missed the deadline set to appeal since they received instructions to appeal after the lapse of **30 days** after the delivery of **Judgment**.

3. The Applicant herein depones that the Plaintiff has already extracted a Decree and has threatened to file a declaratory suit against **Directline Assurance Company Limited**, a step that will render this Application and the **Intended Appeal** nugatory.

4. The Applicant states that it will suffer prejudice and irreparable substantial loss as there is a likelihood that they may not recover the decretal sum from the Respondent. Further, the Applicant states that the Respondent will not suffer any prejudice or damages that is not capable of being compensated by way of costs.

5. The Applicant also depones that the Intended Appeal is not an afterthought since the Appeal is arguable, merited, and raises pertinent points of law. Further, the Applicant depones that he is willing and ready to furnish such reasonable security by depositing the full amount in

a joint interest earning account in the name of both parties Advocate.

6. The application is opposed by the Respondents who filed a **Replying affidavit** sworn on **31st August, 2020** by **Tobia Omondi Lwania** deposing in contention that the application is bad in law as it is sworn by the Legal Counsel of an Insurance Company which is a stranger to the suit.

7. The deponent avers that **Judgment** was entered against the Defendant/Applicant, and vide **Letter** dated **21st May, 2020**, the Defendant's/Applicant's Advocates were informed of the entry of Judgment and the same was copied to **Directline Assurance Co. Ltd** vide a **Letter** dated **30th July, 2020**. Further, the Defendant's Advocate and **Directline Assurance Co. Ltd** were sent copies of the **Decree** and **Certificate of Costs** and the decretal amount inclusive of costs and interest as at **14th July, 2020**.

8. Further the Respondent avers that on the **7th August, 2020**, they filed a declaratory suit against the Defendant's Insurer in **MSA SRMCC No. 839 of 2020, Tobias Omondi Lwania & Another (Legal Representatives of the estate of MONICA ANYANGO-deceased).. Vs... Directline Assurance Company Ltd** and on the **20th August, 2020**, **Directline** entered appearance through the **Firm of Kimondo Gachoka & Company Advocates**. However, no defence has been filed yet in the said declaratory suit.

9. It is the Respondents' case that the current Application is an afterthought since it was filed the same day as the filing of the **Memorandum of Appearance** in **MSA SRMCC No.839 of 2020**, which is at the execution stage and that **Isabella Nyambura**, the **Legal Counsel** to the Applicant is guilty of non-disclosure of material facts.

10. The deponent states that there is no good reason why the Defendant did not appeal within **30 days** from **21st May, 2020** and the delay of **over 3 months** is inexcusable and the Intended Appeal a ploy to delay the fruits of **Judgment** entered in the Respondents' favour.

11. The deponent also avers that the Applicant has not established that they would suffer substantial loss and in any event, a declaratory suit has already been filed.

12. The Application was canvassed by way of written submissions, which the Court has now carefully read and considered. The issue for determination before this Court is whether the Applicant has achieved the threshold for grant of Leave to file Appeal out of time and whether the Applicant deserves the Orders of Stay of execution pending Appeal.

Determination

13. I have considered the application and prayers sought substantially, for **Leave to Appeal** out of the statutorily stipulated period and secondly, Stay of Execution of Decree of the lower court pending the lodging, hearing, and determination of the Intended Appeal. I have also considered the Affidavit evidence and submissions by respective friends and find that the main issue for determination therefore is whether the application has any merit.

14. This Court has jurisdiction to allow an Applicant to file an Appeal out of time but in doing so, the Court is meant to use its discretion and be satisfied that the Applicant has given sufficient reason to warrant the grant of the said Leave. The statutory provisions respecting an Appeal from the Judgment or Decree of a Subordinate Court to the High Court is laid down under **Section 75G** of the **Civil Procedure Act**, which provides that:-

“79G. 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.”

15. For an Applicant to be successful, he or she must **demonstrate “good and sufficient cause for not filing the Appeal in time”**. In the case of **Paul Musili Wambua..Vs..Attorney General & 2 Others [2015] eKLR**, the Court of Appeal in considering an application for extension of time and leave to file **Notice of Appeal** out of time stated the following;

“....it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

16. Similarly, in the case of **Thuita Mwangi...Vs...Kenya Airways [2003] eKLR**, the Court of Appeal while considering **Rule 4** of the **Court of Appeal Rules** which was *in pari materia* with **Section 79G** of the **Civil Procedure Act**, reiterated its decision in the case of **Leo Sila Mutiso... Vs...Rose Hellen Wangari Mwangi, Civil Application No. Nairobi 255 of 1997** as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.

17. While the discretion of the court is unfettered, an Applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the invocation of the court's discretion in his favor.

18. Without belabouring too much into the merits and demerits of this prayer, it is not disputed that the Judgment in the Lower Court was delivered on **21st May, 2020** and that this application was filed on **20th August, 2020** which was beyond the **30 days** stipulated in **Section 79G** of the **Civil Procedure Act**.

19. The Applicant's Counsel has given an explanation that the instructions to appeal were given after the last date of filing an Appeal. However, the said explanation has not been supported by any material which the Court can rely on to exercise its discretion.

20. Further, after going through the document annexed in the Applicant's Application, I find that there has not even been an attempt by the Applicants to request for Certified Court Proceeding to facilitate the Intended Appeal.

21. On the Respondents' part, it is averred that Judgment was entered against the Defendant/Applicant and vide **Letter** dated **21st May, 2020** the Defendant's Advocate were informed of the entry of the same. That the said Judgment was copied to **Directline Assurance Co. Ltd**, and vide **Letters** dated **21st July, 2020** and **30th July, 2020** the Defendant's Advocate and **Directline Assurance Co. Ltd** were each sent a copy of the Decree and certificate of costs and the decretal amount inclusive of costs and interest as at **14th July, 2020**.

22. Therefore, the Intended Appeal is an afterthought since the present Application was filed on the same day the **Directline Assurance Company Ltd** filed a **Memorandum of Appearance** in **MSA SRMCC No.839 of 2020** which suit is an execution process.

20. From the foregoing, this Court finds that in the circumstance of this case the length of the delay is inexcusable as the period of delay has not been explained by the Applicant to the satisfaction of this Court for it to exercise its discretion in favour of the Applicant. That it is this Court's view that the Applicant was awoken from slumber when the Respondent filed a declaratory suit against **Directline Assurance Co. Ltd** vide **MSA SRMCC No.839 of 2020**.

21. The Upshot of the foregoing is that the Applicant's **Notice of Motion** application dated **19th August, 2020** seeking Leave to lodge an Appeal out of time against the Judgment and Decree entered against the Applicant has no merit and the same is hereby dismissed entirely with costs to the Respondents.

22. For avoidance of doubt, the Application for Leave to Appeal out of time having been declined, then the issue of Stay of Execution pending the hearing and determination of the Intended Appeal is spent and the interim orders of Stay of Execution against **Judgment** and **Decree in Mombasa Senior Principal Magistrate Court, Civil suit No.2351 of 2018** issued on **26th August, 2020** are hereby vacated.

It is so ordered.

DATED, SIGNED, and DELIVERED at **MOMBASA** on this **25th** day of **November 2020**.

D. O. CHEPKWONY

JUDGE

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 **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules, which requires that all Judgments and Rulings be pronounced in open Court.