



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APPLICATION NO. E13 OF 2020

ATLANTIS KENYA LIMITED.....APPLICANT

VERSUS

CHEBUSWA LIMITED.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

John Bwire advocate for the applicant

Chepkwony advocate for the respondent

RULING

The application in a notice of motion filed in Court on 30.10.2020 expressed in terms of Section 1A, 1B, 3A, 63, 79(G) of the Civil Procedure Act and Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules seeks the following orders:

- (1). That the Honourable Court be pleased to grant the applicant leave out of time and consequently, the draft Memorandum of Appeal attached herein be deemed to have been properly filed within time.**
- (2). That leave be granted for prayer (2) to operate as a stay of execution of the Judgment delivered on 29.5.2020 in Malindi, CMCC No. 408 of 2015.**

In support of the motion is an affidavit sworn by **Simeone Saromae** on 28.10.2020 filed in Court on 30.10.2020 in which he states inter alia that:

- (1). That on 29.3.2020 the Learned trial Magistrate Hon. W. K. Chepseba pronounced Judgment in CMCC No. 408 of 2015 in absence of the parties dismissing the main suit but allowed the context claim by the respondent.**
- (2). That by the time applicant came to know of the Judgment the prescribed time of 30 days in which an appeal is statutorily provided for an appeal had lapsed.**
- (3). That on perusal of the Judgment, the applicant is aggrieved with the entire Judgment and desirous of lodging an appeal.**
- (4). That the draft memorandum of appeal sets out the grounds to demonstrate that the appeal has high chances of success.**

The respondent filed grounds of opposition as a rejoinder to the application dated 27.11.2020. Basically, the respondent argues that the application is fatally defective for inordinate delay and no sufficient cause has been shown by the applicant to justify grant of the reliefs applied for in the motion.

Determination

The Court is exercising its discretion is guided by the provisions under the proviso of Section 79 (G) of the Civil Procedure Act. In **Karny Zaharya & Another v Shalom Levi CA No. 80 of 2018 Koome JA** stated:

“In considering whether to grant leave to a litigant to file his or her appeal out of time, the Court will have regard to factors

such as: the reasons for the delay, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constituency underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal or intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity."

Similarity in **Salat v Independent Electoral & Boundaries Commission & 7 others {2014} KLR (SCK)**. In the opinion of the Court, the Judge has unfettered discretion to grant leave or refuse it altogether dependent upon the seven elements and guiding principles to ensure the interests of justice is served in the matter.

In the instant application, I have undertaken a review of the record and subsequent motion by the applicant. I would therefore apply the above principles in exercise of discretion to the prayers applied for by the applicant.

On perusal of the record, it is undisputed that the impugned Judgment was delivered on the material day without the participation of the parties. Two issues come into play first whether the applicant had sufficient notice of existence of the Judgment and the outcome of the claim. Secondly, whether, in absence of the Judgment or a copy thereof, the applicant could have appreciated the reasoning and final decree to permit him or her to take the next cause of action.

It follows from the affidavit evidence that the applicant could not proceed to file an appeal from a Judgment he was not made aware of its existence. The delay in this matter is four months between the trial Court decision and the time an application for an extension of time to apply for permission to appeal against the decree was made. In the circumstances of this case, that cannot be said to be inordinate delay as there is a good reason for not complying with procedural timelines.

On the other hand, the draft memorandum of appeal raises substantial grounds to justify good prospects of succeeding on appeal and I find no compelling reasons that the respondent will suffer prejudice or injustice in the interim period of the pendency of the appeal. In the circumstances of this case, I come to the conclusion that the notice of motion dated on 30.10.2020 as to grant of leave for an extension of time to file an appeal out of time be is meritorious.

In addition to the above aspect, there is the issue whether or not the applicant is entitled to stay of execution pending the hearing and determination of an appeal. Regarding stay of execution Order 42 Rule 6 of the Civil Procedure Rules governs the conditions to be met by a party to the proceedings seeking stay of execution of the Judgment. It provides that the application must be filed without undue delay. At the hearing of the application, it must be demonstrated that the applicant will suffer substantial loss if the order on stay is denied. That the Court considering the application does factor security for due performance of the decree.

The approach to be adopted by the Court on an application for stay of execution is outlined in several decisions of the High Court and Court of Appeal including the cases of **Reliance Bank Ltd v Nor Lake Investments Ltd {2002} 1EA 227**, **Githunguri v Jimba Credit Corporation Ltd {1988} KLR 838**, **Damji Pragji Mandavia v Sara Lee Household and Body Care Ltd CA No. 345 of 2004**, **National Bank of Kenya Ltd v Jivraj Rai Shi and Brothers Ltd Civil Application No. 153 of 2002**.

The principles enunciated in the above decisions are as follows for grant of a stay of execution pending appeal thus:

- (1). That there is sufficient cause for the grant of the order for stay of execution of the decree or order.**
- (2). That the application has been made without unreasonable delay.**
- (3). That the substantial loss may result to the applicant unless the order is made.**
- (4). That the successful party is entitled to the enjoyment of the fruits of his or her success.**

While on the other hand, the aggrieved party is entitled to exercise his or her constitutional right of appeal and the intended appeal succeeding should not be rendered nugatory.

Applying the above principles, I have perused the record and corresponding notice of motion. In my view the applicant has discharged the burden on the conditions precedent based on the affidavit evidence to support exercise of discretion in its favour under Order 42 Rule 6 of the Civil Procedure Rules. There is however need for the applicant to deposit security of the quantum in a joint earning interest account of both counsels in a reputable financial institution within 45 days from today's date.

In default of satisfying this condition, the applicant's right of appeal is liable to being non-suited. The respondent is to be at liberty to execute the Judgment of the trial Court. Further, the applicant is to be at liberty upon fulfilling the condition on deposit of security for due performance of the decree within the stipulated period to file the record of appeal and have it served upon the respondent within 30 days from the date of compliance with clause no. (2) herein above. The costs of the application to abide the intended appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF DECEMBER 2020

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R. NYAKUNDI

JUDGE

NB: This Ruling has been dispatched electronically to the respective emails of the advocates in the matter.