



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISC. CIVIL APPLICATION NO.63 OF 2018

PAULINE CHEBET RUTO.....PLAINTIFF/APPLICANT

VERSUS

SCARCE COMMODITIES LTD

& ANOTHER.....DEFENDANT/RESPONDENT

RULING

1. The applicant was the plaintiff in Kericho CM CC No. 468 of 2014. She filed the present application, which is dated 12th October 2018, in which she seeks the following orders:

1. This application be certified as urgent and service of the same be dispensed with in the first instance.

2. This honourable court be pleased to grant leave to the applicant to lodge an appeal against the whole of the judgment and decree in Kericho CMCC No.438 of 2014 delivered on 8/8/2018, out of time.

3. This honourable court be pleased to grant a temporary order of stay of execution of the judgment/decree in Kericho CMCC No.438 of 2014 delivered on 8/8/2018 pending the hearing and determination of the intended appeal.

4. Costs of this application be provided for in the cause.

2. The grounds on which she seeks the orders are that on 8th August 2018, the court delivered judgment on the matter without having issued notice of judgment and in the absence of the parties. The judgment had been scheduled for delivery on 15th May 2018 as the court had indicated on 18th April 2018. The court had rescheduled the judgment to 25th May 2018, then 30th May 2018, 13th July 2018, 25th July 2018 and finally indicated that judgment would be on notice. Notice, however was not issued. Upon perusal of the court file, the plaintiff/applicant discovered that judgment was delivered on 8th August 2018 without notice.

3. The applicant states that she intends to file an appeal against the entire judgment, but that the time for filing the appeal had lapsed. She argues that the application has been made in good faith and without delay, that she stands to suffer irreparable loss if the orders sought are not granted, and the respondents will not be prejudiced in any way if the orders sought are granted.

4. The application is supported by an affidavit sworn by the applicant's Advocate, Beatrice Toroitich. She avers that the applicant had filed a material damage claim arising from a road traffic accident on 1st November 2011 along the Kericho/Kisumu highway involving motor vehicle registration number KAZ 871Q/ZC 6841 and 'my' motor vehicle reg. KBN 884, which seems to suggest that the vehicle belonged to the deponent, Beatrice Toroitich and not to the applicant.

5. Be that as it may, Ms Toroitich narrates the history of the matter and the deferment of judgment in the matter until it was delivered without notice to the parties on 8th August 2018. She avers that the appellant came to learn of the decision of the lower court later, after the time for filing an appeal had lapsed. She annexes a copy of the draft Memorandum of Appeal and deposes that the applicant has an arguable appeal with high chances of success. She also deposes that the applicant is willing to offer security and if the orders sought are not granted, her appeal will be rendered nugatory.

6. In her supplementary affidavit, the plaintiff/applicant, again through her Counsel, Beatrice Toroitich, annexed a copy of the judgment. The court ruled in the judgment that the applicant's claim offended the principle of subrogation in insurance law as the applicant's insurer had paid the expenses of repairing the applicant's motor vehicle following the accident, and dismissed the suit. The court did not make any orders with respect to costs.

7. The respondents filed an affidavit in response sworn by Anne Halwenge Odira, Counsel for the respondents. She terms the present application an afterthought which ought to be dismissed.

8. While conceding that the judgment was delivered without notice, she argues that as it was the applicant who brought the claim to court, she should have followed up the judgment. No reason has been shown for the delay in lodging the application, and she deposes that the applicant was aware of the judgment but failed to lodge the appeal in time.

9. The respondents further aver that there is nothing to stay as the judgment in Kericho CM CC No. 438 of 2014 was in the negative.

10. At the hearing of the application, Learned Counsel, Mr. Koko, appeared for the applicant while the respondents were represented by Mr. Wahome. They both made oral submissions which reiterated the respective averments of the parties to this matter.

11. I have considered the submissions and averments of the parties. Two issues arise for determination:

i. Whether the court should grant the applicant leave to appeal out of time

ii. Whether the court should grant orders of stay of execution

12. Under section 79 G of the Civil Procedure Act, a party may be granted leave to file an appeal out of time if he satisfies the court that he has good reason for not filing the appeal within the time provided by law. In the case of **Thuita Mwangi vs Kenya Airways Ltd [2003] eKLR**, the Court of Appeal reiterated the conditions to be considered in deciding whether or not to grant extension of time to file an appeal. These are the length of the delay, the reason for the delay, possibly, the chances of success of the appeal if the application is granted, and finally, the degree of prejudice to the respondent if the application is granted.

13. In this case, the decision that the appellant seeks to appeal against was delivered on 8th August 2018, admittedly without notice to the parties. This application which seeks leave to file an appeal out of time was filed on 12th October 2018, two months after the delivery of the judgment. The applicant does not indicate when she learnt that judgment had been delivered, arguing only that the time for filing the appeal had expired.

14. There was a gap of about 64 days between the date of the judgment and the filing of this application. The applicant is therefore about 34 days out of the time allowed for filing her appeal. The delay was lengthy, and the applicant has not explained at what point she learnt that the judgment had been delivered, which would assist in determining whether the time taken before filing this application was reasonable.

15. I bear in mind that the decision sought to be appealed against was delivered in the absence of the parties, and I would have taken the view that the interests of justice demand that the applicant should be granted leave to appeal out of time.

16. However, I note that the applicant did not present to the court any arguments with respect to the success of the appeal. Rather, Counsel for the applicant, Mr. Koko, emphasised the right of appeal granted to a party under section 79G of the Civil Procedure Act. The applicant seeks to appeal against the dismissal of her suit by the trial court. In its judgment, the trial court had found that the applicant's suit offended the principle of subrogation: her claim was based on a road traffic accident in which she incurred material damage.

17. The court found that the applicant's insurer had paid the expenses incurred in repairing the vehicle. Nothing has been placed before me to suggest that the trial court erred in reaching this conclusion, and that the applicant's appeal had high chances of success. I am therefore not satisfied that the applicant should be granted leave to appeal out of time.

18. The second issue relates to the application for stay of execution pending appeal. Even had the court found that the applicant should be granted leave to file her appeal out of time, it would have been hard pressed to find what it was required to stay execution of pending appeal. As submitted by the respondents, the judgment of the trial court was a negative judgment- it dismissed the applicant's case.

19. The court did not make any positive orders capable of execution. From the copy of the judgment attached to Ms. Toroitich's supplementary affidavit, the court did not even make an order with respect to the costs of the suit. There was nothing that the respondents could execute against the applicant, and nothing therefore for this court to issue orders of stay in respect of.

20. In the circumstances, I find no merit in this application, and it is hereby dismissed with costs to the respondents.

Dated Delivered and Signed at Kericho this 21st day of February 2019

MUMBI NGUGI

JUDGE