



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO. 164 OF 2019

KENYA POWER & LIGHTING COMPANY LIMITED.....APPLICANT

VERSUS

JULIUS WAMBALE.....1ST RESPONDENT

CHRISTINE TAABU BWIRE.....2ND RESPONDENT

RULING

1. In the Notice of Motion dated 19th February 2019, the applicant, *Kenya Power & Lighting Company Limited* seeks two substantive orders. The first prayer in the motion seeks leave of the court to allow the applicant to file an appeal against the judgment delivered by *Hon. Nyaloti (Mrs)* in Milimani CMCC No. 3836 of 2017 out of time while the 2nd prayer seeks that the memorandum of appeal annexed to the supporting affidavit be deemed as properly filed within time upon payment of requisite fees.

2. The application is premised on the grounds stated on its face and the supporting affidavit sworn by one *Erastus Mbaka*, a legal officer at CIC General Insurance Company Limited. The applicant contends that it is dissatisfied with the general and special damages awarded to the respondents and it is desirous of appealing against the said awards but is unable to do so without leave of the court since the time limited for filing appeals to this court has lapsed; that the intended appeal has high chances of success; that the failure to file the intended appeal within time was not deliberate but was caused by an excusable human error; that the application was filed timeously and if it was allowed, the respondent is not likely to suffer any prejudice as the applicant is ready and willing to deposit any security which may be ordered by the court for the due performance of the decree.

3. The motion is opposed through grounds of opposition dated 7th March 2019 and a replying affidavit sworn on 7th March 2019 by *Gilbert Ojiambo*, the respondents' learned counsel. A look at the grounds of opposition shows that they mainly target prayer 2 of the motion which sought orders of stay of execution pending the hearing and determination of the application. That prayer is now spent. The other point taken in opposition to the motion is the general assertion that the motion was incompetent; frivolous and vexatious and ought to be dismissed or struck out with costs. The respondent also claimed that the supporting affidavit was defective and ought to be struck out.

4. In the replying affidavit, besides narrating the manner in which proceedings leading to the judgment sought to be challenged on appeal were conducted, *Mr. Ojiambo* opposed the motion by contending that there was a delay of 25 days in filing the intended appeal and that the instant application was intended to deprive the respondents the fruits of their judgment.

5. The application was argued orally before me on 13th March 2019. Learned counsel *Ms Njue* appeared for the applicant while learned counsel *Mr. Ojiambo* represented the respondents. In her submissions, *Ms Njue* explained the delay in filing the intended appeal by reiterating the averments made in the supporting affidavit to the effect that though the applicants' advocates communicated the outcome of the suit to its insurers on 10th January 2019, the letter containing that information was misplaced and was only retrieved a day before the prescribed time for filing appeals expired; that the delay was caused by inadvertence and human error and ought to be excused. She urged the court to allow the application as prayed.

6. On his part, *Mr. Ojiambo* in his submissions expounded on his averment that the application and the affidavit supporting the motion were incompetent and ought to be struck out. He submitted that the applicant who was the defendant in the lower suit was not contesting the decision of the lower court; that this was evidenced by the fact that the supporting affidavit was not sworn by a representative of the applicant but by a legal officer at CIC General Insurance Company who was a stranger to the suit in the lower court and the intended appeal; that the insurer's right under the principle of subrogation had not yet accrued as it had not paid out any money on behalf of the insured; that the supporting affidavit having been sworn by a stranger was incompetent and ought to be struck out.

7. I have considered the application, the affidavits on record, the grounds of opposition, the rival submissions made by learned counsel on record and the authorities cited by the respondents. Having done so, I find that only two key issues emerge for my determination namely:

i. Whether the motion and the supporting affidavit are incompetent and ought to be struck out.

ii. If the answer to issue no [i] above is in the negative, whether the applicant has demonstrated sufficient cause to justify grant of leave to file an appeal out of time.

8. Before addressing myself to the first issue, I think it is important to set out the nature of the claim that was the subject matter of the judgment sought to be challenged on appeal. Though the pleadings and the proceedings before the lower court have not been availed to this court, it is clear from the judgment of the trial court which is annexed as EMI that the respondents' claim was for general and special damages under the *Fatal Accidents Act* and the *Law Reform Act* following a fatal accident that occurred on 18th November 2016. The deceased lost his life as a result of electrocution. The parties recorded a consent on liability and the court thereafter pronounced its judgment on quantum and special damages based on written submissions filed by the advocates on record.

9. From the foregoing, it is clear that the suit in the lower court was between the respondents and the applicant and these are the only parties who were directly affected by the outcome of the suit. The averments in the supporting affidavit leave no doubt that though the instant application was filed in the name of the applicant, the decision to file the current application was made not by the applicant but by its insurer which was aggrieved by the award of general damages made in favour of the respondents. The applicant's insurer contends that it intends to file an appeal against the trial court's decision on quantum purportedly under the doctrine of subrogation.

10. The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party. The action must however be instituted in the name of the insured with his consent and must relate to the subject of the contract of insurance.

11. The above position is reiterated in *Halsbury's Laws of England 4th Edition 2003 Reissue Volume 25 at Paragraph 490* where the learned author set out the circumstances under which the doctrine applies in the following terms :

"Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss....in so far as the assured has been indemnified by that payment for the loss."

12. The learned author while examining the extent of the right of subrogation opined as follows:

"...In short, the insurer, on payment of the loss, is entitled to the advantage of every right of the assured, whether it consists in contract or in remedy for tort, or to anything he has received or is entitled to receive in diminution of the loss. The insurer is not entitled to sue a third party in the name of the assured unless the assured has assigned to the insurer his right of action."

13. In this case, it is not disputed that the insurance company has not yet settled the decretal amount on behalf of the applicant who is its insured. It therefore follows that its right under the doctrine of subrogation has not yet crystallized and even if it had, its recourse would only lie in the filing of a suit against the third party blamed for the occurrence of the risk in question for recovery of the sums expended on its insured but it is not a right which can be exercised on appeal in the first instance.

14. In view of the foregoing, I am in full agreement with *Mr. Ojiambo's* submission that the affidavit supporting the motion was sworn by a stranger to the intended appeal considering the nature of the dispute that was before the trial court. The Court of Appeal in *Mojjo Matanya ole Keiwua V Chief Justice of Kenya & 6 Others, [2008] eKLR* held that affidavits which are sworn by persons who are not parties to the proceedings before the court are incompetent and ought to be expunged from the court record. In the premises, I find that the affidavit sworn by *Erastus Mbaka* on 19th February 2019 is incurably defective and cannot be sustained. It is consequently struck out.

15. Having struck out the only affidavit which was sworn in support of the motion, the application has been left bare with no legs to stand on. It amounts to an empty shell. Since the motion cannot stand on its own unsupported by an affidavit, I find that the same is incompetent and is a candidate for striking out. The Notice of Motion dated 19th February 2019 is accordingly struck out with costs to the respondents.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of April, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Mulupi for the applicant

Mr. Makambo holding brief for Mr. Ojiambo for the respondents

Mr. Salach: Court Assistant