



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISC. CIVIL APPLICATION NO. 329 OF 2018**

**DAMA TOURS & SAFARIS COMPANY LIMITED.....APPLICANT**

**VERSUS**

**TIMOTHY WAMBUA MAKAU (Suing as Legal representative of the estate of**

**PATRICK KYENGO WAMBUA-Deceased.....RESPONDENT**

**RULING**

1. This is an application by the Applicant seeking two main prayers, firstly leave to enlarge time within which to file an appeal from a judgement delivered on 9.8.2018 in **Kithimani RMCC No. 157 of 2017** and secondly stay of execution of judgement delivered on 9.8.2018 and decree issued on 27.9.2018 in **Kithimani RMCC No. 157 of 2017** pending the hearing and determination of the applicant's intended appeal.
2. The Applicant seeks orders for enlargement of time to file Memorandum of Appeal out of time. The intended appeal is from a judgement delivered on 9.8.2018 in **Kithimani RMCC No. 157 of 2017**. The Application is supported by a Supporting Affidavit by Peter Kaeka Mutie and a supplementary affidavit deposed by him to the effect that he is the managing director of the defendant company in the suit before the lower Court. That the judgement was delivered on 9.8.18 and the Applicant did not lodge this Application until 6.10.2018 which was more than thirty-one days after the lapse of the time allowed to lodge appeals.
3. The Applicant's managing director deposes in the supporting affidavit that the delay was inadvertent and not willful due to the fact that their advocate on record in the trial court did not attend court and thus the applicant was only made aware that judgement had been entered when the auctioneers proclaimed its motor vehicles on 2<sup>nd</sup> October, 2018. They annexed a Draft Memorandum of Appeal exhibiting their grounds of dissatisfaction with the Learned Trial Magistrates judgement.
4. The applicant deposes that they have not delayed to file the application which has been made 6 days after they learnt of the entry of judgement against them. The explanation for the delay as indicated in the affidavit in support of the application was that the applicant only came to learn that judgement had been entered against them when the auctioneers proclaimed its motor vehicles on 2<sup>nd</sup> October, 2018.
5. The Application is opposed. The Respondent finds this application to be frivolous, vexatious, and an abuse of the court process and ought to be dismissed. First, he points out that the advocate who was instructed by the applicant's insurer was aware of the judgement vide letter dated 14.8.2018 that was received by them and they never settled the decretal sum. Secondly, under the principle of subrogation, the insurer is liable to settle the claim. Third, the applicant has not satisfied the requirements for grant of stay and therefore does not deserve discretion to be exercised in his favour. Reliance was placed on the case of **Haywood v Cope (1858) 25 BEAV 140**.
6. The Application was canvassed by way of written submissions which I have carefully considered.
7. The issue for determination is whether the Applicant is entitled to an extension of time to lodge its appeal and orders for stay of execution.
8. Section 79G of the Civil Procedure Act is the law applicable in deciding whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

**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.**

9. The first point taken up by the Respondent is that the Application is an abuse of the court process and ought not to be allowed. This claim has not been demonstrated. I am unable to agree with the Respondents that the Application is an abuse of the court process and ought to be dismissed as it is no a frivolous application.

10. Having concluded that the Application is not an abuse of the court process, I will now consider the Application on its substance. Case law has provided guidelines on what will be considered “good cause” for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour. This was stated in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC and 7 Others (2015) eKLR**

11. The Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR** listed the factors which aid the Courts in exercising the discretion whether to extend time to file an appeal out of time. They include the following:

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the appeal;
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved.

I will now consider the Applicants’ application for extension of time against these factors.

12. The Application was brought almost two months after time had run out and the applicant has explained satisfactorily the reason for the delay. Further I find this delay not to be inordinate under the circumstances.

13. Looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is in-arguable for all that one is required to demonstrate is the arguability of the appeal. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.

14. The respondent in their replying affidavit has stated that the applicant’s financial status is not known and or demonstrated in the application but however they are not averse to the deposit of half of the decretal sum in court. I am alive to the apprehensions that they have but however in light of the fact that the applicants have indicated willingness to furnish security to satisfy the decretal sum and the execution is imminent yet the applicant is not satisfied with the judgement of the trial court there is some semblance of adverse effects that refusing the order will have on the applicants.

15. Consequently, I will grant prayer 3 in the Applicants Notice of Motion and give the Applicant some timeline which to file the memorandum of Appeal.

16. Next I will address the issue of stay of execution and note that Order 42 Rule 6 of the Civil Procedure Rules is the law applicable in deciding whether the prayer is merited.

17. The case of **Antoine Ndiaye v African Virtual University [2015] eKLR** gave the guiding principles for stay orders, in semblance with Order 42 Rule 6 of the Civil Procedure Rules; to wit;

- a. The Application was brought without undue delay***
- b. Substantial loss occasioned to the applicant if the order is not granted.***
- c. Security for performance of the decree.***

18. I have looked at the application herein, and with regard to the condition of undue delay, as analyzed above, the delay is not inordinate and has been satisfactorily explained. With regard to the issue of substantial loss, I find the substantial loss that the applicant shall suffer is that of being condemned to pay a colossal sum and execution is hovering over them due to the fact that they have been served with a proclamation. In addition their right to be heard on appeal will be extinguished if the order is not granted. On the issue of security, the applicants have indicated willingness to deposit security as court directs. Therefore I am satisfied that the Applicant has met the basic requirements for grant of this order and to this end I grant prayer (4) of the Applicant’s application. A reasonable order on security will be made which takes care of the concerns of both parties herein.

19. In the result the Applicants' application dated 8/10/2018 is allowed in the following terms:-

*(a) The Applicant is granted leave to file and serve its Memorandum of Appeal within the next fourteen (14) days from the date hereof.*

*(b) An order of stay of execution of the judgement and decree in Kithimani PMCC No. 157 of 2017 delivered on 9/8/2018 and decree issued on 27/09/2018 is granted subject to the Applicant paying half of the decretal sums to the Respondent while the other half to be deposited into an interest earning account in the joint names of the Advocates for the parties herein within the next thirty (30) days from the date hereof failing which the stay shall lapse.*

*(c) The costs of the Application are awarded to the Respondent.*

It is so ordered

**Dated and delivered at Machakos this 26<sup>th</sup> day of April,2019.**

**D.K. KEMEI**

**JUDGE**