



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 394 OF 2017

JOSELINE SHUTTLE SERVICES &

TRANSPORTERS.....APPLICANT/DEFENDANT

VERSUS

JULIUS MWANGI MUCHOKI.....PLANTIFF/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 and decree entered against the applicant and given on 18.10.2017 in **Machakos CMCC No. 862 of 2013** and secondly stay of execution of judgement and decree in **Machakos CMCC No. 862 of 2013** pending the hearing and determination of the 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 entered on 18.10.2017. The Application is supported by an Affidavit by Pauline Waruhiu, the General Manager, Claims Manager at Directline Assurance Co Ltd who are the insurers of motor vehicle Registration Number KBH 135T which was involved in a road traffic accident giving rise to the suit in the lower Court and Marsden Osioma, from the firm of advocates on record in this matter. The judgement was delivered on 18.10.17. The Applicant did not lodge this Application until 11.12.2017. This was more than thirty-one days after the lapse of the time allowed to lodge appeals.

3. The Applicants depose that the delay was due the fact that their advocate on record sought for a copy of the ruling and none was availed in time. The applicant annexed a Draft Memorandum of Appeal exhibiting their grounds of dissatisfaction with the Learned Trial Magistrates judgement. The applicant avers in the supporting affidavit that execution is imminent but however no annexures thereto have been included to support this averment

4. The Application is opposed. The Respondent contends that the application does not meet the threshold of the law under which it is brought. First, he points out that the application seeks to delay this matter which is a test suit staying four other matters. Secondly, delay on the part of the applicant has been deliberate

5. The Application was canvassed by way of written submissions.

6. The issue for determination is whether the Applicant is entitled to an extension of time to lodge his appeal and orders for stay of execution.

7. 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.

8. The first point taken up by the Respondent is that the Application is meant to delay this matter that is a test suit. The pleadings in the said matter are not in the material before me and thus I am unable to agree with the Respondent.

9. 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 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**

10. The Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR**, listed the factors which aid our 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.

11. The Application was brought almost 2 months after time had run out and the applicant has not explained satisfactorily the reason for the delay. Nevertheless I find this delay not to be inordinate under the circumstances.

12. Looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is in-arguable since 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.

13. The applicant and the respondent appear not averse to the furnishing of requisite security for performance of the decree. I am alive to the apprehensions that the respondent has but however in light of the fact that the applicant has indicated willingness to furnish security to satisfy the decretal sum and the applicant is not satisfied with the judgement of the trial court there is some semblance of adverse effects that refusing the order have on the applicants.

14. Consequently, I will grant prayer 2 in the Applicants Notice of Motion and direct the Applicant to file its Memorandum of Appeal within a certain time line.

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

16. 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.*

17. I have looked at the application herein, and with regard to the condition of undue delay, as analyzed above, the delay is not inordinate. With regard to the issue of substantial loss, I am unable to find the substantial loss that the applicant shall suffer save that its right to be heard on appeal will be extinguished if the order is not granted. On the issue of security for performance, the Applicant has indicated willingness to deposit security as court directs and therefore I am satisfied that the applicant has partially met the basic requirements for grant of this order.

18. In the result the Applicant's application dated 11/12/2017 is allowed in the following terms:-

- (a) The Applicant is granted leave to lodge appeal out of time by filing 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 Machakos CMCC No.862 of 2013 delivered on 18/10/2017 is granted subject to the Applicant depositing the entire decretal sums into an interest earning account in the joint names of the Advocates for the parties within thirty (30) days from the date hereof failing which the stay shall lapse.***
- (c) The costs of the application to abide in the appeal.***

It is so ordered

Dated and delivered at **Machakos** this 26th day of **April, 2019**.

D.K. KEMEI

JUDGE