



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCC. MISC NO. 112 OF 2018

DREAMLINE EXPRESS COMPANY LIMITED..... APPLICANT

-VERSUS-

FRANCIS KARIUKI1ST RESPONDENT

MAUREEN IMALI2ND RESPONDENT

RULING

1. The Applicant was the Defendant while the Respondent was the Plaintiff in Makindu PMCC No. 508 of 2015. On 2nd August 2018, the trial court found for the Respondent and entered judgment in the sum of Kshs.2,531,100/=.

2. The Applicant filed this application seeking the following orders:

1. That this Honourable court do grant leave to file an appeal out of time based on the court's judgment in Makindu CMCC No. 508 of 2015.

2. That the Honourable Court do grant a stay of execution of the said judgment in Makindu CMCC 502 of 2015; and subsequential proclamations and warrants of attachment issued by Messrs. Mutrix Auctioneers pending the hearing and determination of the application.

3. That the costs of this suit be borne in the course.

3. The application is supported by the grounds on the face of the application and the supporting affidavit by Erick James a claims manager in the Applicant company. The main ground is that the Applicant and its former advocate disagreed over payment of legal fees. As a result, the decision by the trial court was not appealed against in good time as it had not been brought to its attention. It only became aware when proclamations and warrants of execution were served on it.

4. The Applicant annexed a draft memorandum of appeal to its application. The deponent has averred that the Applicant will suffer grave material and financial grave loss if the application is not allowed. It is challenging the computation under the Fatal Accident Act (FAA) and the Law Reform Act (LRA) by the trial court.

5. M/s Ochieng, Kokul and Velo advocates for the Applicant belatedly filed their submissions on 10th May, 2019. In spite of the late filing the submissions were all the same considered by the court. Counsel argued that the Applicant had satisfied the conditions under Order 42 Rule 6 Civil Procedure Rules. He referred to the grounds raised in the draft memorandum of appeal and contended that the appeal if allowed, was arguable and if stay of execution is not granted the appeal would be rendered nugatory.

6. Secondly, he contended that the Respondents have been offered security of Kshs.500,000/= by the Applicant's insurance company and that a further security would amount to double benefit to the Respondents.

7. Counsel submitted that Section 79G Civil Procedure Rules enunciates that an appeal may be filed out of time provided sufficient reasons were advanced. He argued that the reasons for the delay in filing the appeal were clear from the supporting affidavit of one James Eric who explained the challenges faced by the Applicant as a result of its disagreement with its lawyer.

8. Counsel argued that the Applicant was never granted an exparte order of stay of execution. That the Respondents had been duly served at their Makindu branch office.

9. The application was opposed by the Respondents who filed a replying affidavit through their advocate. He challenged the ex parte stay orders given on 24th October, 2018 which were still in force. He did not see any success in the appeal that is yet to be filed. He however suggested some conditions in the event that the court is inclined to grant orders of stay of execution. The conditions are: -

- a. Half of the decretal sum be released to the Respondent's Advocate on record.
- b. While the balance is deposited in joint names of Advocates on record in an interest earning account of a reputable bank within 30 days and in default execution to continue.
- c. Auctioneers costs be agreed or taxed by the court and be borne by the Appellant/ Applicant herein.

10. In his written submissions, Mr. Mochama argued that the ex parte orders violated Order 40 Rule 4(2) Civil Procedure Rules as they were in force for more than 14 days. Secondly, the application was filed more than two months outside the stipulated period. Further that no reasonable or sufficient cause had been given for failure to comply with the time limits. He wondered why the Applicant did not follow up to enquire on the status of the case in the lower court.

11. It was his submission that for leave to file appeal out of time to be granted, the Applicant was duty bound to clearly show and demonstrate that the said appeal has high chances of success. That this had not been demonstrated by the Applicant. He reiterated the conditions to be considered in the event that stay is granted.

Determination

12. Having considered the application, affidavits and the Respondent's submissions, I find the **issue falling for determination to be whether the Applicant has made out a case for issuance of the orders sought.**

13. The judgment complained of was delivered on 2nd August, 2018, in the absence of the Applicant and counsel. By then counsel for the Applicant was K'itonga and Co. Advocates.

The decree is for Kshs.2,531,100/=. The present application was filed on 24th October, 2018 together with a draft of the memorandum of appeal.

This application was therefore filed roughly three (3) months after delivery of the judgment. It follows that it was two (2) months outside the stipulated filing period of thirty (30) days.

14. Can this be said to be inordinate delay beyond being salvaged? Within the said period the process of execution had started. According to the applicant it's this process that woke them up, from slumber. I have looked at the annexed intended appeal and found that it challenges literally every award that was made by the trial court. It would be in the interest of justice that the Applicant be given an opportunity to argue the said appeal. The grounds raised are arguable.

15. On the other hand, the Respondents have a legitimate judgment whose fruits they would wish to enjoy. They cannot be wholly shut out of that. Counsel for the Applicant has submitted that a part payment of Kshs.500,000/= has been furnished to the Respondent. There is no indication by the Respondent to show any receipt of such sums of money. Order 22 Rule 22(3) CPR provides:

Before making an order to stay execution or for the restriction of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment – debtor as it thinks fit.

16. It is prudent that even as the Applicant gets an opportunity to file its appeal there be provisions for the Respondent to enjoy the fruits of the judgment.

Furthermore, there is no claim that the Respondents are paupers. After taking into account all these important factors, I find the ends of justice to dictate for an order of stay of execution to issue, which I hereby do on the following conditions: -

- i. Leave to file appeal out of time is granted. The intended appeal to be filed within 21 days.**
- ii. The Applicant to pay the Respondents through their advocates Kshs.800,000/= within 20 days. If Kshs.500,000/= has been paid to the Respondents, then they will receive Kshs.300,000/= only.**
- iii. The Applicant to obtain a bank guarantee for the balance of the decretal sum. This to be served on the Respondents' counsel within 20 days.**
- iv. Costs of the application to be in cause.**
- v. If any of the conditions is not complied with, the stay automatically lapses.**

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 23RD DAY OF MAY, 2019 IN OPEN COURT AT MAKUENI.

.....

H. I ONG'UDI

JUDGE