



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

MISC CIVIL APPLICATION NO 41 OF 2019

MAINGO SHEM.....APPLICANT

VERSUS

JANE NYANCHAMA NYAKERI.....RESPONDENT

RULING

INTRODUCTION

1. The applicant through his notice of motion dated 13th December 2018, brought under certificate of urgency, seeks both leave to appeal out of time and an interim stay of execution pursuant to the provisions of section 79G, Order 42 rule 6, Order 22 rule 22, Order 50 rule 5 of the 2010 Civil Procedure Rules, sections 1A and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya and all enabling provisions of the law. Additionally, the applicant seeks an order of the court deeming the draft memorandum of appeal to have been duly filed upon payment of the filing fees. Finally, the applicant seeks provision to be made for costs of this application.

2. The respondent filed both a replying affidavit and grounds of opposition to the application.

The case for the applicant

3. The application was certified urgent and heard as such. The application is supported by both the twelve grounds that are set out on the face of the notice of motion and a twenty paragraphs supporting affidavit. The major grounds in support of the motion are as follows. That the applicant will suffer substantial loss and prejudice unless stay of execution and leave to appeal out of time is granted. He also intends to lodge an appeal, which will be rendered nugatory if the decree is executed. Additionally, he has stated that the intended appeal has a high chance of success. He has also stated that the delay in filing the appeal has not been inordinate and is excusable. Furthermore, the applicant has stated that he is ready to make an undertaking on security and abide by any conditions, which the court may impose, pending the hearing and determination of the intended appeal. Finally, the applicant has stated that the plaintiff/ respondent may not be able to refund the decretal sum namely Shs.616, 814/= in the likely event that the intended appeal is successful.

4. The applicant through the supporting affidavit of Anne Wayamba, has deponed that she is a legal officer who is employed by the Kenyan Alliance Insurance Company, which has insured the applicant in respect of the subject matter of this application. The insurance company instructed Wangari Muchemi Advocates to undertake the defence of the applicant. She has further deponed that judgement was entered in this matter without notice to the applicant.

5. Furthermore, the deponent has averred that their advocates were served with a copy of the decree and a demand notice dated 14th November 2018. That upon receipt of the same, their recipient person did not retrieve the file and hand it over for action to the relevant officers. That she was able to trace the file and after considering the judgement, the company became aggrieved in respect of the quantum of the damages awarded. As a result, the company decided to file an appeal. That the company was unable to file an appeal within the stipulated time due to the internal processes of consultation and deliberations.

6. In addition to the foregoing, the deponent has deponed that the insurance company is ready and willing to offer security for the decretal sum by issuing a reputable bank guarantee or performance bond from a reputable insurance company. Additionally, the company is ready to abide by any condition that the court may impose pending the hearing and determination of the intended appeal.

7. The deponent has further averred that the intended appeal has high chances of success, in respect of which she has attached the draft memorandum of appeal as annex 'AW5' to her affidavit. The other matters are a replica of the grounds that are set out in the notice of motion, which I find unnecessary to reproduce here.

8. Counsel for the applicant has also filed written submissions in support of the application, which I have perused.

The case for the respondent.

9. The respondent has filed a 17 paragraphs replying affidavit together with 8 grounds of opposition to the application. She has deponed to the following major matters. She has averred that the advocate of Kenyan Alliance Insurance Company is not the right person to swear an affidavit on behalf of the applicant. In addition she has averred that the applicant disobeyed a consent order in which the applicant was to pay the decretal sum of Shs.616,814/= as a condition of staying the execution process, which payment was to be done within 30 days. She has further averred that she suffered serious injuries and that the award of damages was inadequate. She has further averred that the application is meant to delay her from enjoying the fruits of her judgement and that the appeal lacks high chances of success. Finally, she has averred that the applicant's failure to file an appeal within the prescribed period was due to the negligence in the office of the insurance company.

10. In her grounds of opposition, she has stated that the application was brought in bad faith and has been overtaken by events. She has further stated that the affidavit in support of the applicant is fatally defective and is full of malafides. Finally, she has stated that the applicant has no *locus standi* to file the instant proceedings.

Issues for determination

1. Whether or not the applicant has made out a case for the grant of the orders sought.
2. Who bears the cost of this application?

Issue 1

11. I find that the judgement was delivered in the absence of the applicant and he came to learn of it in November 2018. As a result, counsel for the respondent served the decree and a letter of demand on 14/11/2018. Thereafter, the Insurance Company which had been served with judgement and decree deliberated as to whether there should be an appeal or not. As a result, they decided to appeal and as a result, an appeal was lodged against the judgement and decree. I find that the delay in filing the appeal has been explained adequately. In the circumstances, I find that the affidavit evidence of the legal officer of the Insurance company is properly on record. In other words, I find that the legal officer of the Insurance company had knowledge of the matters deponed to in her affidavit.

12. Furthermore, I find that unless stay of execution is granted, the intended appeal will be rendered nugatory. I also find that unless an order of stay of execution is granted, the applicant is likely to suffer substantial loss. The applicant has therefore made out a case for the grant of the orders sought.

Issue 2

13. The award of costs is in the discretion of the court. In the circumstances, I find that costs should be costs in cause.

14. The upshot of the foregoing is that the applicant's prayer numbers 2, 3, 4 and 5 of the notice of motion dated 13/12/2018 are hereby granted, on condition that they deposit in court the sum of Shs.616,814/= within 30 days of this ruling failing which this order will automatically lapse.

Ruling dated, signed and delivered at Narok in open court this 20th day of June 2019

in the presence of

Mr. Kinyanjui holding brief for Ms Muchemi and in the absence of the respondent.

J. M. Bwonwonga

Judge

20/6/2019