



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC CIVIL MISCELLANEOUS APPLICATION NO. 99A OF 2019

LUNGA LUNGA TRANSPORTERS LTD.....1ST APPLICANT

AHMED ABDI RAHAMAN.....2ND APPLICANT

VERSUS

RICHARD KIMULI MUTUA.....RESPONDENT

RULING

1. The Applicant is before this court by way of a Notice of Motion dated 4th April 2019 and filed on 11th April 2019. The application is brought under Order 50 Rule 6, Order 42 Rule 6(2) CPR, Sections 64, 79G and 3A CPA and Rules 3(1) and (2) of the High Court Practice and Procedure Rules.

2. The Applicant seeks the following orders among others;

i. Leave to file appeal out of time.

ii. The appeal to be deemed as properly on record.

iii. There be stay of execution of the lower court Judgment in Makindu PMCC No. 42 of 2017 pending the hearing and determination of the intended appeal.

3. The matter was placed before the vacation judge Justice Kimei on 12th April 2019 and a temporary order of stay of execution of the lower court judgment was granted pending the hearing and determination of this application.

4. The application is premised on the grounds on the face of the application and the supporting affidavit of Jackline Ndirangu a Senior Legal counsel at Fidelity Shield Company the insurers of the Applicants motor vehicle at the time of accident.

5. The main ground is that the Applicant intends to file an appeal against the lower court judgment. That there has been delay in filing the appeal due to a mix up of some documents and in particular communiqués between the Applicants insurer and its advocates on record. The delay is not inordinate. It is feared that if stay is not granted the Applicant's property may be attached.

6. M/s Mungania for the Applicant in her written submissions relies on Order 50 Rule 6 CPR in seeking extension of time. She relied on the case of **Gikara Kiriamburi –Vs- Wahome Githinji [1986] eKLR** where Justice Hancox (Rtd) set down 3 prerequisites which the court must consider while exercising its discretion in granting the order extending time to file appeal. These are;

i. Reasonable cause for delay.

ii. Whether the appeal has merit.

iii. Prejudice of extension of time to either party.

7. She submitted that this application was filed only 14 days outside the appeal time.

The reason for delay has been stated in the Applicant's supporting affidavit. Further that failure to file an appeal in good time was an

oversight and mistake by the insurers. In support of this she cited the case of **Nicholas Kiptoo Arap Korir Salat -Vs- IEBC & 6 Others eKLR** in which Justice Mohamed relied on **Githere –Vs- Kimungu (1976 – 1985) EA 101** where Justice Hancox had stated;

“The relation of the rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case.”

8. On whether the appeal has merit she relied on the grounds raised and argued that the award made was way above other decided cases in similar circumstances. That wrong principles were applied in making the award. She submitted that the appeal raised weighty issues.

9. On prejudice she submitted that if the amount is paid and the appeal succeeds they are not sure of the Respondent’s ability to pay back. That it is in the interest of justice that the Applicant be allowed to appeal.

10. In respect to stay of execution she submitted that the application had been filed without undue delay. On this she relied on two cases;

i. Habib Bank A. G. Zurich –Vs- Rajnikant Khetshi Shah [2016] eKLR.

ii. Kenya Hotel Properties Ltd –Vs- Willesden Properties Ltd Civil Application Nairobi No. 322 of 2006 (UR 178/06)

11. She submitted that the Applicant would abide by the orders of the court on the issue of security. She requested for a bank guarantee as was held in **Firoze Nurali Hirji (suing through his duly authorized Attorney Sharok Kher Mohammed Ali Hirji) –Vs- Housing Finance Company of Kenya & Anor [2015] eKLR.**

12. On the replying affidavit she contends that the Respondent has failed to show how he is able to refund the decretal sum in the event of a successful appeal.

13. The Respondent filed a replying affidavit sworn on 13th May 2019. He has deponed that the delay in filing an appeal by the Applicant is deliberate, because Judgment was delivered on 28/02/2019 in the presence of all parties. That the Applicant had all along shown that it was going to pay the decretal amount. (RKM 1-2). They did not pay forcing his advocate to apply for execution (RKM - 3).

14. He avers that there is no reason advanced for failure to file the appeal within the required time. A period of 2 months delay for him is inordinate. He asked for dismissal of the application.

15. M/s Muli & Co. Advocates for the Respondent opposed the application citing undue delay by the Applicant. He referred to their communication with the Applicant’s advocates (JN-1, RKM -3). He submitted that there was no good reason advanced for the failure to file the appeal within the required time.

16. He referred to the case of **County Executive of Kisumu –Vs- County Government of Kisumu & 8 Others Supreme court of Kenya Civil Application No. 3 of 2016** where principles to be considered in exercise of jurisdiction were set namely;

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

17. It was his submission that the application lacks merit is frivolous, malicious and an afterthought.

18. I have considered the application, affidavits and annexures plus the rival submissions. The judgment being challenged was delivered on 28/02/2019. Both parties were aware of the judgment. Any appeal ought to have been filed on or before 28/03/2019. This was not done. It is on 11th April 2019 that this application was filed i.e. about 14 days outside the 30 days allowed by the law.

19. I have read the decree (JN-3) and the Memorandum of Appeal (JN2). The Applicant is mainly challenging the award by the lower court. The Respondent is not happy because of the way the Applicant had conducted itself as if it was going to settle the claim just to change tune at the last minute.

20. A delay of two weeks is a delay but not inordinate. All said and considered I think a party can’t be shut from appealing for such a short delay. What the court should consider are the terms of the grant of the leave to appeal out of time and the stay of execution. It would otherwise be an injustice to prevent a party from exercising his/her right of appeal especially when the delay is not inordinate.

21. I find merit in this application dated 4th April 2019 and grant the Applicant leave to file appeal out of time.

a. Let the Memorandum of Appeal annexed to this application be deemed as properly on record.

b. There shall be stay of execution of the lower court judgment on condition that;

i. Kshs. 200,000/= is paid to the Respondent through his advocate within 30 days from today.

ii. The balance of the decretal sum to be secured through a bank guarantee within the same period of 30 days.

iii. Failure to comply will automatically result in the order of stay of execution being vacated.

iv. A copy of this Ruling to be placed in the Appeal.

v. Costs in cause.

Orders accordingly.

DELIVERED, SIGNED & DATED THIS 24TH DAY OF JULY, 2019 AT MAKUENI IN OPEN COURT.

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HON. H. I. ONG'UDI

JUDGE