



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISCELLANEOUS APP. NO.92 OF 2019**

**GATEWAY INSURANCE CO. LTD.....APPELLANT**

**-VERSUS-**

**RENNY KIMUTAI MARITI.....RESPONDENT**

(Being an appeal against the Ruling of Hon. S. Wahome

delivered on 9<sup>th</sup> October 2018 in Molo CMCC No.332 of 2015)

**RULING**

1. This is a ruling on application dated 21<sup>st</sup> February 2019. It seeks leave to file appeal out of time and to stay execution in Molo CMCC No.332 of 2015 delivered on 9<sup>th</sup> October 2018.

2. Grounds on the face of the application are as set out hereunder:-

i. That the ruling delivered on 9<sup>th</sup> October 2018 struck out the applicant's statement of defence in the impugned declaratory suit and entered judgment for the respondent for a sum of kshs 245,021.00 plus costs and interests of the suit.

ii. That applicant was not served with the notice of the ruling and hence did not know of its delivery.

iii. That the applicant being aggrieved by the impugned ruling seeks to appeal against the same and failure to lodge appeal in time was not deliberate as it was caused by failure to serve notice of the ruling by counsel for the respondent

iv. That the respondent has embarked on execution of the impugned judgment and if allowed to go on, the applicant stands to suffer huge financial loss and damage

v. That the applicant should not be shut from ventilating his appeal.

3. In grounds of opposition dated 4<sup>th</sup> March 2019, the respondent stated that the application is bad in law, made in bad faith, incompetent and an abuse of the court process; and is intended to delay and obstruct justice

4. Parties agreed to proceed by way of written submissions.

**APPLICANT'S SUBMISSIONS**

5. Appellant in submissions restated grounds of appeal and submissions. Appellant submitted that the ruling had earlier on been scheduled for 25<sup>th</sup> September 2018 when it was rescheduled; that the notice of new date was not served on the appellant. Appellant urged court to be guided by the case of **Charagua Vs Kaguru [1986] KLR 443** where despite stay of 2 months, the court still exercised its discretion in favour of the applicant.

6. The appellant further submitted that the appeal raises critical issues that raises serious questions on the decision of the trial magistrate; one being that the trial magistrate disregarded the applicant's replying affidavit that it was the insurer of the suit vehicle when she struck out the statement of defence while finding that it contained mere denial whereas it raised bonafide triable issues.

7. Appellant further submitted that the trial magistrate failed to address herself to the principle that under **Section 10** of the **Insurance** (motor vehicle third party risks) **Act Cap 405**, the applicant was only bound to satisfy judgment against an insured and judgment against third party who did not have insurable interest in the motor vehicle in question.

8. Applicant submitted that the respondent will not be prejudiced if leave to appeal out of time is granted.

9. Applicant submitted that the applicant has met all the conditions for stay of execution and if execution proceeds, the applicant stand to suffer substantial loss; that the applicant has demonstrated good faith by willing to deposit the entire decretal amount in an interest earning account in the joint names of the respective Advocates.

### **RESPONDENT'S SUBMISSIONS**

10. The respondent submitted that the court is required to consider length for delay, reason for delay and chance of appeal succeeding in deciding whether to allow filing of appeal out of time.

11. Respondent submitted that the ruling appealed against was delivered on 30<sup>th</sup> January 2019. Respondent submitted that the applicant failed to follow up the progress of this matter and excuse of not being served with notice should not arise.

12. Respondent submitted that the intended appeal has no chances of success as the issue being raised has been settled by the trial court as the policy document the applicant alleged to be forged is different from the one on police abstract and the one in the plaint.

13. On issue of prejudice to the respondent, the respondent submitted that the application is intended to delay fruits of ruling delivered on 9<sup>th</sup> October 2018, that plaintiff will be greatly prejudiced as he will not be able to continue with execution.

14. As to whether the applicant will suffer any loss, the applicant submitted that the applicant has not specified the exact loss it will suffer since the decretal amount plus costs and interest is kshs.245,021; that applicant has not proved the substantial loss it will suffer if the decretal sum is paid to the respondent or if respondent will not be in a position to refund the decretal amount if appeal is not successful.

15. On security, the respondent submitted that the applicant has not demonstrated willingness to furnish security. Respondent urged court to dismiss the application for being unmeritorious; and in the event court allow the application, he prayed that three quarter of the decretal sum be paid to the respondent.

### **ANALYSIS AND DETERMINATION**

16. On perusal of memorandum of appeal, I note that the issue raised by the applicant was that it was not the insurer of the suit vehicle. I have not had the opportunity of perusing the replying affidavit filed. If indeed the issue was raised it is an issue that should have been subjected to trial to establish the clear position. In my view that was a triable issue that should not have been brushed off.

17. On issue of delay in filing appeal, I have not seen any notice of delivery of ruling. The respondent has only filed grounds of opposition but has not filed any prove that the applicant was aware of delivery of judgment.

18. On security, the applicant has stated willingness to deposit the decretal amount in a joint interest earning account in the names of both counsels.

19. From the foregoing, I see merit in the application. I allow filing of appeal out of time. The memorandum of appeal filed to be deemed duly filed upon payment of requisite fee.

20. I also allow stay of execution on condition that decretal amount is deposited in joint interest earning account in the names of both Advocates

### **21. FINAL ORDERS**

1. Applicant allowed to file appeal out of time.
2. Memorandum of appeal filed is deemed duly filed upon payment of requisite fee within 7 days from the date of this ruling.
3. Stay of execution to issue on condition that the decretal amount is deposited in a joint interest earning account in the names of both counsels herein within 30 days from today's date.
4. Failure to comply with order 2 and 3 above execution to proceed.

**Ruling dated, signed and delivered at Nakuru this 26<sup>th</sup> day of Sep. 2019.**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Jeniffer Court Assistant

Ms. Ogame holding brief for Akongo Counsel for Applicant

Ms Ogame Counsel for Respondent