



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLN. NO. 240 OF 2019

HUSSEIN BUILDERS LIMITED.....APPLICANT

VERSUS

JOSEPHAT NZIVE KYUVA1ST RESPONDENT

JULIANA SYOMBUA NZIVE2ND RESPONDENT

(Suing as legal representatives of the estate of Hastings Muendo Nzive- deceased)

RULING

1. The application for determination before me is the Notice of Motion dated 12th March 2019 in which the applicant, *Hussein Builders Limited*, implores this court to enlarge the time in which it can file its intended appeal against the judgment delivered on 5th February 2019 in CMCC No. 4661 of 2016. The applicant also seeks orders of stay of execution of the said judgment pending the hearing and determination of the intended appeal.

2. The application is premised on the grounds stated on its face and on the depositions made in the supporting affidavit sworn on 12th March 2019 by one *Aziz Hussein*, the applicant's Claims Manager. In support of the application, the applicant contends that though judgment in the lower court was supposed to be delivered on 1st February 2019, it was delivered on 5th February 2019 without notice to the parties; that when its advocates finally perused the court file on an undisclosed date, they communicated the court's decision to the applicant's insurer who instructed them to lodge an appeal; that at the time these instructions were received, the time within which to lodge an appeal had expired; that the applicant has a good appeal with a probability of success and it is only fair and just that time be enlarged to allow it file the intended appeal and that stay of execution be granted pending the disposal of the intended appeal.

3. The application is opposed. The 1st respondent *Josephat Nzive Kyuva* opposed the motion through a replying affidavit sworn on 25th March 2019. It is the respondent's case that the delay in filing the intended appeal has not been properly explained; that the notice of deferment of the trial court's judgment from 1st February 2019 to 5th February 2019 was displayed on the door of the learned trial magistrate's chamber and both parties were therefore aware of the date of delivery of the judgment; that the decision to file an appeal is an afterthought and is aimed at delaying the respondents' realization of the fruits of their judgment. The respondents further asserted that the applicant has not satisfied the conditions precedent to grant of stay of execution and that the application should be dismissed in its entirety.

4. On the hearing date, both parties consented to having the application prosecuted by way of written submissions. The applicant filed its submissions on 6th May 2019 while those of the respondents were filed on 8th May 2019.

5. I have carefully considered the application, the affidavits on record as well as the written submissions filed by both parties and the authorities cited. The parties in their written submissions reiterated and buttressed the positions they have each taken in support and in opposition to the application.

6. From the parties' submissions, it is apparent that the intended appeal arises from a fatal accident's claim in which judgment on liability was entered in favour of the respondents against the applicant at 100%. The respondents were also awarded general and special damages in the total sum of KShs.3,346,630 together with costs of the suit and interest.

7. The applicant contends that it is dissatisfied with the trial court's decision and intends to challenge it on appeal. This court under the proviso to *Section 79 G* of the *Civil Procedure Act* has wide and unfettered discretion to extend time for filing of an intended appeal if for good and sufficient cause, the applicant was unable to file the intended appeal within the 30 days allowed by the law.

8. There are numerous authorities both in the High Court and in the Court of Appeal which enumerate the factors which should guide the court in the exercise of its discretion in deciding whether or not to enlarge time for filing of an intended appeal.

In *Thuita Mwangi V Kenya Airways Limited, [2003] eKLR* and in *Edith Gichugu Koine V Stephen Njagi Thoithi, [2014] eKLR*, the Court of Appeal held that some of the factors to be considered included, but were not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application was granted, the chances of the appeal succeeding if the application was allowed and whether the matter raises issues of public importance.

9. From the material placed before me, it is not disputed that the judgment of the lower court was delivered on 5th February 2019. The intended appeal ought to have been filed within 30 days of that date which would have been on or about 5th March 2019. The instant application was filed on 12th March 2019. The length of delay was therefore about 7 days which is not prolonged and is excusable.

10. The applicant has claimed that the reason for the delay was because judgment was delivered without notice and that by the time its advocates perused the court file, communicated the trial court's decision to its insurers and obtained instructions to file an appeal, the time limited for filing of appeals had already expired. The applicant did not however disclose the date on which its advocates perused the trial court's file. The applicant did not also controvert the respondents' claim that it knew or ought to have known the date of delivery of the trial court's judgment since the same was communicated on a notice displayed on the door of the learned trial magistrate chambers.

11. In view of the foregoing, I am not entirely satisfied that the applicant has given convincing reasons for the failure of filing the intended appeal within time. This brings me to a consideration of the other factor which courts must bear in mind when deciding applications of this nature. This is the prejudice which parties are likely to suffer if the application was allowed or dismissed. In my view, the only prejudice the respondents are likely to suffer if the application was allowed was delay in realization of the fruits of their judgment which prejudice can be compensated by an award of costs. If on the other hand the application was dismissed, the applicant will be denied an opportunity to exercise its constitutional right of appeal which in effect means that it will be denied the right to be heard on its grievances concerning the trial court's judgment.

12. Having weighted the competing interests of the parties, it is my finding that the interests of justice will be better served if the application was allowed. The applicant's prayer for enlargement of time to file an appeal is consequently allowed. The intended appeal will be filed and served within 14 days of today's date.

13. The prayer seeking stay of execution of the trial court's judgment pending disposal of the intended appeal is in my opinion misconceived. My take is that the court can only grant stay of execution of a decree or order pending determination of an appeal which has already been filed and is awaiting hearing. As matters now stand, there is no appeal pending before this court. Even if the applicant has been granted leave to file its intended appeal, there is no guarantee that the intended appeal will actually be filed within the time that has been limited by this court or at all. Courts cannot give orders based on speculation. In the circumstances, I do not find any merit in that prayer.

14. However, in the interest of dispensing substantive justice, I will exercise my discretion and grant the applicant stay of execution to last for 14 days only from today's date to protect it from execution as it prepares to file its intended appeal.

15. The respondent is awarded costs of the application.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of October, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Macharia for the applicant

Ms Nyaberi for the respondent

Mr. Salach: Court Assistant