



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 18 OF 2014

GEOFFE & ASSOCIATES.....PLAINTIFF/RESPONDENT

VERSUS

FRED BLACK INSURANCE BROKERS LIMITED.....DEFENDANT/APPLICANT

RULING

1. This ruling is the product of the Notice of Motion dated 5th August, 2019 brought forth by the defendant/applicant. The Motion is sustained by the grounds laid out on its body and the facts deponed to in the affidavit sworn by the applicant's Managing Director, *James Boorman*. Therein, the applicant is seeking the orders set out hereunder:

(i) *Spent.*

(ii) *Spent.*

(iii) *THAT leave be granted to the applicant to lodge and file a notice of appeal and that the notice of appeal dated 4th July, 2019 and filed out of time on 10th July, 2019 be deemed as properly filed.*

(iv) *THAT the costs of the application be provided for.*

2. The abovementioned deponent asserted in his affidavit that upon hearing the parties on the defamation claim instituted by the plaintiff/respondent in the present suit filed on 30th January, 2014, this court awarded the respondent general damages in the sum of Kshs.700,000/ plus costs of the suit and interest thereon.

3. The deponent then stated that being aggrieved with the aforesaid decision, the applicant is intent on appealing against the same to the Court of Appeal and has filed a notice of appeal in that regard, albeit outside the stipulated timelines. The deponent explained that the delay resulted from the time taken by the applicant in obtaining and reviewing a copy of the judgment before instructing its advocate to lodge an appeal against the same. It was also the deponent's averment that a draft memorandum of appeal has been annexed to his affidavit setting out the grounds of appeal.

4. The deponent was sure to convey the applicant's apprehension that the respondent is likely to soon proceed with execution, thereby putting the applicant at risk of suffering irreparable loss that will in turn render the appeal nugatory should it prove successful; adding that no prejudice will befall the respondent if the orders being sought are granted.

5. In opposing the Motion, *Geoffe Kamau* swore the replying affidavit on 4th September, 2019 in his capacity as the Managing Partner of the respondent, stating that not only has there been a delay in filing the notice of appeal, but that the same has not been sufficiently explained, further stating that the present application has not been timeously filed.

6. The deponent went ahead to aver that the applicant has not satisfied the necessary conditions to warrant the granting of a stay of execution pending appeal, adding that in any case, the respondent; being a reputable audit company; is quite capable of refunding the decretal amount.

7. In reply, *James Boorman* swore the further affidavit on 2nd October, 2019 largely reiterating that the delay in filing the notice of appeal cannot be termed inordinate and that the applicant has sufficiently demonstrated that it is deserving of being granted an order for stay of execution pending the appeal.

8. In his oral arguments, *Mr. Githui* counsel for the applicant while reiterating the averments featured in the germane affidavits, submitted

that pursuant to the provisions of Section 7 of the Appellate Jurisdiction Act, this court is permitted to exercise its discretion in extending the time required for filing the notice of appeal. The advocate also urged this court to consider the reasons set out in the affidavits filed on behalf of the applicant, citing inter alia, the Court of Appeal case of **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** as well as the Supreme Court authority of **Sundowner Lodge Limited v Kenya Tourist Development Corporation [2019] eKLR** where the respective courts, upon considering the reasons given by the applying parties in explaining the delay, were granted leave to file and serve their respective notices of appeal.

9. The advocate went a step further to argue that since the financial position of the respondent is unknown, there is a likelihood it will not be able to refund the decretal sum if the same is paid to it, quoting the case of **Nairobi Women's Hospital v Purity Kemunto [2018] eKLR** in which the court in balancing the interest of the parties, granted an order for stay of execution pending appeal.

10. Mr. Nyaburi, learned advocate for the respondent, while not disputing this court's power to extend time, quickly reaffirmed that certain factors ought to be taken into account before deciding whether to extend time as held in **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** including the length of delay, reasons thereof, chances of the appeal succeeding and degree of prejudice that will be visited upon the respondent.

11. The advocate ensured to communicate his client's position that in view of the judgment entered in its favour, it will be prejudiced should the application be allowed.

12. As concerns the prayer seeking a stay of execution, counsel was clear that the same is now spent, contending that even if this court were to consider the same, it ought to find that the conditions for stay of execution have not been met by the applicant.

13. In rejoinder, Mr. Githui simply urged this court to exercise its discretion in granting the orders sought, further mentioning that the applicant is ready and willing to abide by any conditions that will be set down by this court.

14. I have considered the grounds set out on the face of the Motion and the facts presented in the affidavits supporting and resisting it. I have also considered the rival oral arguments together with the cited authorities. On this note, I deem it necessary to point out that the judicial authorities cited by the parties by and large entailed applications filed before the Court of Appeal governed by the Court of Appeal Rules which uniquely apply to that court.

15. That said, the substantive order being sought in the Motion is that of leave to lodge the notice of appeal out of time. **Order 50, Rule 5** of the **Civil Procedure Rules** which is the relevant provision, empowers the High Court to enlarge or otherwise extend the time required to perform any act under the Rules even after such time has expired.

16. Having settled the above, I take the view that the enlargement of time does not exist as an automatic right but depends on the circumstances of the case and in addressing its mind to the same, courts are required to exercise their discretion judicially. That being the position, the courts have previously come up with certain guiding principles in determining whether or not to enlarge time. I have already set out such factors in the cases earlier mentioned and reaffirmed in the Supreme Court case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**.

17. I will begin with the condition relating to the length of delay. Given that the intended appeal lies with the Court of Appeal, **Rule 75(2)** of the **Court of Appeal Rules** dictates that the notice of appeal should be filed within 14 days of the judgment to be appealed against. In the present instance, this court entered judgment in favour of the respondent as abovementioned on 20th June, 2019 whereas the notice of appeal was filed on 10th July, 2019, slightly over the 14- day window period. In any case, it is not disputed that the notice of appeal was filed out of time.

18. As concerns the application, the same was brought close to one (1) month following the filing of the notice of appeal. In my view, though there has obviously been a delay, the same is not inordinate.

19. The second condition has to do with the reason behind the delay in filing the notice of appeal. This was explained by the applicant in the sense that time was taken in obtaining and reviewing the judgment, and further time was taken in giving instructions to the advocate to lodge the notice of appeal. In the premises, I am satisfied that the explanation given is reasonable in the circumstances.

20. The third condition concerns itself with the prejudice that will befall the respondent should this court deem it fit to allow the application. It is clear that the respondent has in place a judgment in its favour of which it is entitled to enjoy the fruits. Nevertheless, the respondent would reasonably be expected to go a step further in demonstrating any other specific manner in which it will be prejudiced; this has not been done. In the premises, I have no basis on which to conclude that the respondent will be prejudiced if an order for extension is granted.

21. There also exists a fourth condition relating to whether the appeal is arguable. In discussing this condition. I take the following view. Since the judgment to be appealed against is derived from this court, it would not be quite possible for me to address this condition. If this court were to attempt to do so, it would amount to sitting on Appeal and/or reviewing its own judgment. Infact, my considered view is that an application for stay pending Appeal from a judgment of the High Court to the Court of Appeal should be properly entertained by the court of Appeal and not the High Court. However, I note that the applicant annexed a draft memorandum of appeal to its application, laying out the grounds of appeal.

22. In view of the foregoing, I am convinced that my discretion will be properly exercised in enlarging the time required for filing the notice of appeal.

23. In regards to the order for stay of execution, it is noted in the application that the applicant only sought the same pending the hearing and determination of the application herein, which means that the order is spent. I am therefore unable to deliberate on an order for stay pending

appeal, the same not having been sought.

24. Accordingly, the Motion is allowed as prayed and the following orders are made:

a) The notice of appeal dated 4th July, 2019 and filed on 10th July, 2019 is deemed as properly filed.

b) The costs of the application shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 21st day of November, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

.....for the Plaintiff/Respondent

..... for the Defendant/Applicant