



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT MISC.CIVIL APPLICATION NO.171 OF 2019

SAMUEL KUNG'U WATHIKA (*Suing as the administrator of the*

Estate of JOYCE WANJIRU KUNG'U) **(DECEASED)**..... **APPLICANT**

VERSUS

BUS CAR EAST AFRICA LTD.....**RESPONDENT**

RULING

1. The Applicant filed the Notice of Motion dated 9th December, 2019 seeking the following orders: -

i. **That**, this Honourable court be pleased to extend time and grant leave to the Applicants to lodge an appeal and file a memorandum of appeal out of time against the judgment and decree of the Honorable Mayamba C.A delivered against the defendant/Applicant on 1st November 2019 in Kilungu civil suit No. 57 of 2019.

ii. **That**, this Honourable court be pleased to stay the execution of the said judgment and decree pending the hearing and determination of this application.

iii. **That**, this Honourable court be pleased to grant interim orders of stay of execution pending ruling of this application.

iv. **That**, this Honourable court be pleased to stay the execution of the said judgment and decree pending the hearing and determination of the intended appeal.

v. **That**, this court be pleased to give any other and or further orders that it may deem fit, just and expedient in the circumstances and in the interest of justice.

vi. **That**, the costs of this application be in the cause.

2. The application is premised on the grounds on its face and the supporting affidavit by Isabella Nyambura a senior claims manager at Directline assurance company limited, the insurers of the motor vehicle registration no. KCF 250Y. The said motor vehicle is at the centre of this claim.

3. The main ground is that the Applicant gave instructions to its advocates after obtaining a copy of the judgment and the period for filing appeal had lapsed. It further indicates that it is desirous of filing an appeal against the judgment which was delivered on 1st November, 2019.

4. The next ground is that the Respondent has already taken out warrants of execution and proclaimed an attachment of the Applicant's vehicle. The Applicant therefore prays for stay of execution.

5. The Applicant has deponed that if the application is not allowed its intended appeal will be rendered nugatory. Further that the appeal is arguable and has high chances of success. It has also indicated its willingness to comply with such reasonable conditions as the court may grant to enable it pursue its intended appeal.

6. In opposing the application, the Respondent filed a replying affidavit, deponing that during the trial a consent on liability had been recorded in his favour. That proclamation has already been done, and the application was an abuse of the court process.

7. He has deponed that the Applicant has not given any reason for the delay in filing appeal and this shows he is on forum shopping. He confirms that the Applicant's motor vehicle has been seized. He further depones that failure to file the appeal on time is prejudicial to the deceased's estate as there are minor children involved.

8. The application was argued orally. Mr. Munyendo for the Applicant relied on the supporting affidavit and grounds. He contends that the application is meritorious.

9. On the replying affidavit, he argues that the delay is not inordinate as the **30** days lapsed on 1st November, 2019 while the application was filed on 10th December, 2019. He asks the court to exercise its discretion in favour of the Applicant.

10. In response, Mr. Gikenye who relied on the replying affidavit submits that section 79G Civil Procedure Act provides that there must be good reasons given for the delay. In this case he submits that no good reason has been advanced. He referred to the case of **Dilpack Kenya Ltd –vs- William Muthama Kitonyi 2018 eKLR**.

11. He submitted that there has to be substantive justice to both parties and asked for dismissal of the application. He however, added that in the event that the court is inclined to allow the application, the Applicant should deposit the entire amount plus security for costs in court.

Determination

12. Having considered the application, both affidavits (*in support and against*) the submissions and authority cited, I find the main issue for determination to be whether the Applicant is entitled to an extension of time to lodge its appeal.

13. The Applicant seeks two main prayers namely: -

i. *Leave to file appeal out of time.*

ii. *There be stay of execution pending the hearing and determination of the intended appeal.*

14. Section 79G of the Civil Procedure Act provides:

“Every appeal from a subordinate court to the High court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the Appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

15. For one to be granted leave to file appeal out of time, he/she must satisfy the court that he/she has good and sufficient cause for not filing the appeal within time.

16. It has been largely acknowledged that power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. The discretion must also be exercised judiciously and only after a party seeking the exercise of the discretion places before the court sufficient material for the court to act on.

17. Discretion is exercised based on factors some of which were suggested in the case of **Mwangi –vs- Kenya Airways Ltd (2003) Eklr** and they include:

a) *The period of delay,*

b) *The reasons for the delay,*

c) *The arguability of the appeal,*

d) *The degree of prejudice which could be suffered by the Respondent if the extension is granted,*

e) *The importance of compliance with time limits to the particular litigation or issue; and,*

f) *The effect if any on the administration of justice or public interest if any is involved.*

18. I now consider this application in light of the factors stated above. In the instant case, the judgment sought to be challenged was delivered on 1st November, 2019. Any appeal ought to have been filed on or before 1st December, 2019. The application herein was filed on 10th December, 2019. It was therefore filed ten (10) days late which is barely two weeks after the expiry of the time allowed for filing an appeal. I do not find this to be inordinate delay.

19. The Respondent has submitted that the Applicant has not explained the reason for the delay. I have gone through the grounds and supporting affidavit and I do not find an express reason given for the delay. All that is stated at ground **D** is that upon obtaining a copy of the judgment, the Applicant’s advocate received instructions to file appeal against the said judgment after the period of filing an appeal had lapsed hence the delay. It is therefore the Applicant which was late in giving instructions to its advocate to file the appeal. As I have already found above, the delay was not inordinate.

20. The Respondent has referred to the case of **Dilpack Kenya Ltd (supra)**, where Justice Odunga found that failure to give good and sufficient reasons for delay deprives the Applicant of leave to file appeal out of time. I entirely agree with the Honourable Judge on that. I have gone through the said ruling but it's not indicated what the period of delay was in the said case. In the instant case I have stated that the delay was by ten (10) days which is not inordinate. The sufficiency and reasonableness may therefore vary from case to case as ten days in one case may be inordinate while in another it is not.

21. Annexed to this application is a draft memorandum of appeal. The Applicant is basically challenging the award of Kshs.2,055,000/= to the Respondent. I would not say this is not arguable. The Applicant should be given a chance to file and argue its appeal.

22. The Respondent has indicated that the deceased is survived by minor children who will suffer prejudice if leave is granted for the Applicant to file appeal. Further that in seeking the said orders, the Applicant is doing forum shopping. I find this to be a careless and unfortunate statement by the Respondent at *paragraph 10 of the replying affidavit*.

23. The Respondent must appreciate that this is a court of higher jurisdiction to the trial court. It is also the court with direct supervisory jurisdiction over the trial court and where appeals from the said court are filed. The issue of forum shopping cannot therefore arise as the two courts are not of the same status.

24. It is not disputed that execution of the lower court decree is in progress and the Applicant's motor vehicle has already been attached. The appeal if successful would be rendered nugatory if execution is allowed to continue.

25. The Applicant has further indicated its willingness and readiness to avail security for the due performance of the decree.

26. I am therefore satisfied that there is merit in this application which I allow and make the following orders:

1) Leave to file appeal out of time is granted.

2) The memorandum of appeal to be filed on or before 31st December, 2019.

3) Stay of execution of the judgment and decree is granted on condition that Kshs.500,000/= is paid to the Respondent through his advocate within 20 days.

(ii) A bank guarantee to be issued for the balance of the decretal sum and deposited in court within 30 days.

4) Mention on 13/02/2020 to confirm compliance.

5) Cost in cause.

Orders accordingly.

Delivered, signed & dated this 20th day of December 2019, in open court at Makueni.

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H. I. Ong'udi

Judge