



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 14 OF 2015

PANIJ AUTOMOBILES LTD.....1ST APPELLANT/APPLICANT
TIMOTHY KIMANTHI NYAMU.....2ND APPELLANT/APPLICANT

V E R S U S

PATRICK MBOGO MBUI (Suing as the legal representative of the
Estate of MADRINE MAKENA MBOGO.....RESPONDENT

R U L I N G

1. The applicants/appellants in their application dated 4/10/2017 seeks for orders that:-

(a) That the period of fifteen (15) days fixed and/or provided for filing the Notice of Appeal be and is hereby enlarged and/or extended.

(b) That pending the hearing and determination of the Applicants' intended Appeal to the Court of Appeal, there be an order of stay of execution of the Judgment and/or Decree of the Honourable Lady Justice Muchemi delivered/issued on 1st August 2017 and any other incidental and consequential proceedings thereto.

2. In response the applicants notice of motion dated 4/10/2017, the respondents filed a notice of preliminary objection against the hearing of the said application based on two grounds that:-

(c) That the application is an abuse of the court process, frivolous and vexatious.

(b) That the Honourable court is *functus officio* and lacks the requisite jurisdiction to entertain an application brought under the Court of Appeal Rules and which ought to be struck out.

3. The respondent's application dated 23/10/2017 seeks for orders that:-

This honourable court be pleased to order that the sum of Kenya shillings One Million Nine Hundred Thousand (Kshs.1,900,000/=) deposited into Court on 13/09/2016 by the Appellants be released to the Respondent's Advocates through their Bank Account Number 03002061138 held at Paramount Bank Limited, Koinange Street Branch in the name GACHIE MWANZA & CO. ADVOCATES – CLIENT ACCOUNT.

4. The parties agreed that the two applications and the preliminary objection be heard together by way of written submissions which were duly filed.

5. Messrs Kairu & McCourt advocates represented the applicant while Messrs Gachie Mwanza & Co. are on record for the respondent.
6. The preliminary objection challenges the jurisdiction of this court in hearing and determining the application dated 4/10/2018.
7. The application seeks for enlargement of time of 15 days fixed and/or provided for filing the notice of appeal. It also seeks for stay of execution of this court's judgment pending filing the intended appeal.
8. I have perused the submissions of both parties in regard to the preliminary objection.
9. The background facts are that the applicant filed this appeal on 8/04/2015 challenging the judgment of Embu Senior Principal Magistrate in Embu CMCC No. 166 of 2013 on grounds that the damages awarded to the respondent were excessive. The appeal was heard to conclusion and the damages of Kshs.2,500,000/= was reviewed downwards to Kshs.2,000,000/=.
10. Following the delivery of the judgment, the respondent avers that the parties entered into negotiations on the payment of the decretal sum. It was agreed that Kshs.1,900,000/= be deposited in court pending further agreement by the parties on the amount payable. It was further agreed that Kshs.61,317/= be paid to the respondent. The sum of Kshs.1,900,000/= was deposited in court as agreed by the parties.
11. In regard to the preliminary objection, the issues for determination is whether this court has jurisdiction to entertain the applicant's application dated 4/10/2017 seeking for enlargement of time to lodge a notice of appeal.
12. The notice of appeal is intended to be filed in the Court of Appeal to which an appeal from this court lies. The relevant section of the Appellate Jurisdiction Act states:-
13. Section 3(2) of the same act provides:-

For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.
14. In spite of the above provisions, the Court of Appeal rules were developed under Section 5 of the Act to facilitate the implementation of the provisions of the Act. The said rules were made to serve several purposes including prescribing the time within which any requirement of the rules are to be complied. The provisions of Rule 4 grants exclusive jurisdiction to the Court of Appeal to grant extension of time to file an appeal.
15. The jurisdiction of the Court of Appeal is fortified by Rule 4 which provides that the Court of Appeal may entertain an application for extension of time in the first instance.
16. The respondent relied on the case of *MARTIM VSKIBARU [2004] eKLR* in which the court dealing with a similar application held:-

The plain reading of the above quoted Sections (Section 3(2) and Section 7) of the Appellate Jurisdiction Act and the rules made thereunder clearly show that the provisions of Section 7 of the Act.... has been rendered practically useless and legally untenable.
17. The learned judge explains that the development of the law and in particular the amendment of Rule 41 has changed the rules of the game as provided by Section 7.
18. The rule was amended by Gazette Notice No. 11 of 1998 to confer exclusive jurisdiction to the Court of Appeal. It follows that all the applications for extension of time are lodged in the Court of Appeal and

not in the High Court.

19. In view of the law above stated, I find that this court has no jurisdiction to entertain the application dated 4/10/2017 and it is hereby struck out with costs.

20. For these reasons, the preliminary objection is hereby upheld.

21. The respondents application dated 23/10/2017 seeks for release of the deposit in court of Kshs.1,900,000/= made on 13/09/2016. The respondent obtained judgment in his favour in the court of first instance on the respondents appeal was allowed and the quantum of damages reviewed downwards.

22. From the correspondence annexed, the parties seemed satisfied with the appeal judgment. Negotiations started between them and the amount agreed was deposited in court and Shs.61,317/= paid to the respondent. Thereafter the applicant refused to execute the consent and filed the application for extension of time.

23. This application was not opposed by the applicant in that no replying affidavit was filed.

24. Considering that the initial judgment was delivered about three days ago in favour of the respondent, it is in the interests of justice that the respondent is allowed to enjoy the fruits of his judgment. The judgment of the appeal which was in favour of the applicant has not been honoured about six (6) months down the road.

25. Its important to note that despite failing to sign the consent, the applicant has partly satisfied the decree by depositing the decretal amount in court. The negotiations between the parties were complete when the deposit was made in court save for the execution of the consent.

26. The application for stay of execution has now collapsed with the upholding of the preliminary objection. Litigation must come to end. There is no stay of execution orders in place and this application having not been opposed, there is no legal or actual justification to continue holding the deposit made in court. It ought to be utilized to benefit the decree-holder.

27. I find that this application dated 23/10/2017 is merited and is hereby allowed with costs.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF FEBRUARY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Ithiga for Muthee for Applicant/Appellant