



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO. 231 OF 2018

JAMES NJOMO WAWERU APPLICANT

VERSUS

PAUL KIBERA NGAMA 1ST RESPONDENT

ROBERT TANUI 2ND RESPONDENT

RULING

1. The applicant's Notice of Motion dated 11th April, 2018, principally seeks three orders as follows:

- i. That the court be pleased to grant the applicant leave to file and serve an appeal out of time in respect of the judgment delivered in the Chief Magistrate's court at Milimani CMCC No. 4303 of 2014;*
- ii. That there be stay of execution of the judgment and/or decree in that case pending determination of the appeal; and*
- iii. That the draft memorandum of appeal attached to the application be deemed as properly filed or be filed as the court may direct.*

2. The application is expressed to be filed under sections 79G, 1A and 3A of the Civil Procedure Act; order 50 rule 6; order 51 rules 1 and 3 of the Civil Procedure Rules and other enabling provisions of the law.

It is supported by grounds stated on its face and the supporting affidavit sworn on 11th April, 2018 by Mr. Erastus Mbaka, the Legal Officer at *CIC Insurance Limited*, the insurer of the 1st defendant's motor vehicle which was involved in a road traffic accident which was the subject matter of the suit in the lower court.

3. In the supporting affidavit, it is deposed that the judgment sought to be appealed against was delivered by *Hon E K Sui* on 7th March, 2018; that the applicant is aggrieved by the trial court's decision on apportionment of liability and award of general damages in the sum of KShs.1,700,000/-; that the intended appeal has high chances of success; that the appeal was not filed on time due to delay by the trial court in supplying the applicant's advocates with a certified copy of the judgment; that the applicant's insurer is ready and willing to provide adequate security for the due performance of the decree as may be required by the court; that if stay orders are not granted, the 1st respondent will proceed with execution and this will render the intended appeal nugatory as the insurer is not likely to recover the aforesaid amount from the respondents.

4. The application is opposed through a preliminary objection dated 18th April, 2018 and a replying affidavit sworn by the 1st respondent on 8th May, 2018 (hereinafter the respondent).

In the preliminary objection, the respondent urged the court to strike out the application with costs and that the interim orders of stay issued on 13th April, 2018 be set aside or vacated on the following main grounds:

- i. That the application in so far as it relates to an application for stay of execution of the judgment and decree of the lower court is incurably defective for want of jurisdiction;*
- ii. That the application is incompetent since the applicant did not apply for typed copies of the proceedings, judgment and certified copy of the decree within the thirty days period prescribed under section 79G of the Civil Procedure Act; and*
- iii. That the judgment and decree of the lower court were available on 27th March, 2018 and were served on the applicant on 29th March, 2018.*

5. In his replying affidavit, the respondent reiterated the grounds used to oppose the motion in the preliminary objection. He further deponed that the reasons advanced in support of the prayer for enlargement of time to file the intended appeal are not satisfactory as in his view, the applicant did not need a copy of the judgment in order to file an appeal considering that the judgment was available for perusal in the court file and his advocates had been served with a copy of the decree and certificate of costs by 28th March, 2018.

6. When the application first came up for hearing on 8th May, 2018, the court by consent of the parties directed that the preliminary objection be argued in opposition to the Notice of Motion.

7. The application was canvassed by way of both written and oral submissions.

At the hearing, learned counsel *Ms Kisa* argued the application on behalf of the applicant while learned counsel *Mr K'Opere* represented the respondent.

8. I have carefully considered the application, the affidavits filed by the parties, the preliminary objection, the rival submissions as well as the authorities cited.

I wish to deal first with the issue of the court's jurisdiction in the context in which it is raised in the preliminary objection.

It was strongly argued on behalf of the respondent that the court lacks jurisdiction to grant orders of interim stay of execution in an application seeking the enlargement of time to file an intended appeal. In response, learned counsel *Ms Kisa* denied this claim and asserted that the court has jurisdiction to make such orders under *section 79G* of the *Civil Procedure Act (the Act)*.

9. With respect, I disagree with the submission by *Ms Kisa* since *section 79G* of the *Act* only prescribes the time within which appeals from the subordinate court to the High Court should be filed and circumstances under which appeals may be admitted out of time. The provision does not deal with stay of execution pending the hearing of an appeal.

It may be important to point out at this juncture that the authorities relied upon by the respondents in support of the preliminary objection did not support the proposition that the court does not have jurisdiction to grant stay orders in an application such as the one before the court.

The case of *Ndegwa Kama T/A Sideview Garage V Fredrick Isike Kahumbi, [2016] eKLR* dealt with the issue of validity of an appeal when the record of appeal filed did not include the decree and order appealed against while in *Abraham Lenaola Lenkuu V Charles Katekoyo Nkaru, [2016] eKLR*, the court was considering an application for stay of execution of a decision rendered by the lower court where no appeal had been filed and there was no prayer for extension of time to file an appeal.

10. Although I agree with *Mr K'Opere's* submission that applications for stay of execution pending an appeal ought to be made under *order 42 rule 6* of the *Civil Procedure Rules*, this procedural requirement in my view does not oust the court's inherent jurisdiction under *section 3A* of the *Act* to make orders that are necessary to meet the ends of justice in any dispute before it or orders aimed at achieving the overriding objective of the *Act* which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the *Act*. In addition, the court has power and discretion under *section 63 (e)* of the *Act* to make interlocutory orders as may appear to the court to be just and convenient of course depending on the circumstances of each case.

I am therefore not persuaded that the preliminary objection on the issue of jurisdiction is merited and it is hereby rejected.

11. On the prayer for enlargement of time, *section 79G* of the *Act* provides that:

“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.”

See also *Section 95* of the *Act*.

12. The respondent has argued that the prayer for enlargement of time is incapable of being granted because the applicant failed to apply for copies of proceedings, judgment and certified copy of the decree within 30 days of delivery of the judgment sought to be challenged on appeal. This argument cannot be sustained because there is no legal obligation imposed on aggrieved parties desiring to file an appeal to apply for proceedings and judgment of the lower court within 30 days. In ideal situations, this is what a diligent party is expected to do but failure to do so does not disentitle a party its statutory right to seek for enlargement of time to file an appeal.

The proviso to *Section 79G* only requires that for such an order to be granted, an applicant must satisfy the court that he/she had good and sufficient cause for not filing the appeal in time.

13. In this case, the applicant has averred that he was late in filing the appeal owing to the delay by the trial court in furnishing his advocates with a typed copy of the judgment to enable them file the appeal on time. The respondent has contended that the applicant did not need to have a typed copy of the judgment in order to file an appeal since the handwritten judgment was in the court file and the decree was available by 27th March, 2018.

14. In my view, the availability of the decree and certificate of costs on the aforesaid date is immaterial since these are not the documents that the applicant or his advocates needed in order to decide whether or not to file an appeal. I agree with the applicant that it was necessary to understand the reasoning of the trial court to enable his advocates make an informed decision whether or not there was need for him to exercise his right of appeal.

Learned counsel for the applicant submitted that efforts were made to peruse the handwritten text of the impugned judgment but she still found it necessary to obtain a typed copy of the judgment which she had not managed to do by the time of filing the instant application.

15. The decision regarding whether or not to grant extension of time to file an appeal is discretionary. The discretion must nonetheless be exercised judiciously taking into account the facts and circumstances of each case. Some of the factors the court must bear in mind when exercising its aforesaid discretion is the length of the delay in filing the intended appeal and the explanation given for the delay. See: ***Kenya Shell Company Limited V Charles, CA No. 7 of 2000, [2003] eKLR.***

16. In this case, the judgment sought to be appealed against was delivered on 7th March, 2018. Therefore, the appeal ought to have been filed on or before 6th April, 2018. The application was filed on 11th April, 2018. There was thus a delay of only four days between the time the prescribed time for filing appeals expired and the time the application was filed. The delay of four days is clearly not inordinate and has been satisfactorily explained. Besides, if the application is allowed, the respondent is not likely to suffer any prejudice which cannot be compensated by an award of costs.

17. The applicant has also prayed that the draft memorandum of appeal attached to the supporting affidavit be deemed as properly filed. If the attached memorandum of appeal is a draft, it obviously means that it does not represent the actual memorandum the appellant wishes to present in his appeal and that the draft memorandum's sole purpose was to support the application for leave to file an appeal out of time. I therefore find no basis for granting the order sought. I may have looked at the matter differently had the applicant filed the appeal out of time and then sought its validation through an application for its admission out of time.

18. In view of the foregoing, I find merit in prayer 4 of the application and it is allowed on terms that the applicant shall file and serve the intended appeal within the next 14 days.

19. Having allowed prayer 4, the dictates of substantive justice requires that the applicant be granted stay of execution pending the filing of the appeal. I say so because if stay is not granted, the respondent will be at liberty to execute for the decretal amount and this would defeat the ends of justice as the applicant's right of appeal will be rendered meaningless. Consequently, I hereby grant stay of execution of the decree issued by the lower court to last for the time extended for the applicant to file his intended appeal.

20. The respondent is awarded costs of the application.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 14th day of June, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Miss Kisa: for the applicant

Mr K'Opere: for the 1st respondent

N/A: for the 2nd respondent

Mr Fidel Salach: Court Clerk