



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS APPL. NO. 230 OF 2018**

**AFRICAN ATTRACTIONS SAFARIS LIMITED.....1<sup>ST</sup> APPLICANT**

**JITECH LAKHANI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**SARAH NJERI NGANGA.....RESPONDENT**

**RULING**

What is before the court for determination, is the application dated the 15<sup>th</sup> day of March 2018 brought under the provisions of Section 79G, Order 42 Rule 6, Order 22 Rule 22, Order 50 of the Civil Procedure Act and Rules Cap 21 Laws of Kenya.

The main orders sought are that the applicant be granted leave to file Appeal against the Lower Court judgment in CMCC No. 3900/2014 at Nairobi out of time. The applicant has also sought an order for stay of execution of the decree, pending the hearing and determination of the intended appeal.

The application is made on the grounds that the intended appellant has a good and sufficient cause for not filing the Appeal on time that the Respondent may execute the decree if a stay is not granted, the intended Appeal will be rendered nugatory and that the applicant will suffer substantial loss and injustice, if the orders sought are not granted.

In the supporting affidavit sworn by Joseph Mwai, it is deponed that UAP Old Mutual Insurance Company Ltd. had insured the applicant against the claim, the subject matter of the suit and it has been handling the claim on his behalf. That, the said insurance company was advised about the judgment entered in the Lower court on 24<sup>th</sup> November, 2017 and the fact that the plaintiff/respondent was demanding payment of the judgment sum of Kshs.1,074, 645/- plus costs and interest. That it took long for the Insurance Company to trace their office file and after the file was traced, the company felt they needed to appeal against the judgment and by the time they instructed their Advocate to appeal, time within which to do so had lapsed.

It is averred that, the appeal raises arguable issues and has high chances of success as shown in the annexed Memorandum of appeal marked "SM4". That the applicant is apprehensive that the Respondent may execute the decree against their insured before the appeal is heard and determined in which case, the intended Appeal shall be rendered nugatory.

The applicant contends that upon execution and payment of the decretal sum, the Respondent is not likely to refund the same should the appeal succeed as he is not financially stable. The applicant further depones that the insurance company is ready and willing to offer security for the decretal sum by issuing a reputable bank guarantee or performance bond from a reputable insurance company and its ready to abide by any condition set by the court.

The application was canvassed by way of oral submissions. Counsel for the applicant relied on the supporting affidavit and urged the court to grant the orders as prayed.

In a replying affidavit sworn by the Respondent on 24<sup>th</sup> May 2018, she depones that judgment in the Lower court was delivered in the presence of both parties and the applicant sought and was granted a stay of execution for 30 days within which time he failed to prefer an Appeal against the judgment and the decree.

The Respondent avers that Section 79G of the Civil Procedure Act requires that an applicant who wishes to appeal out of time must show and prove good and sufficient reasons for the court to exercise discretion in his favour. That the reason given by the applicant for the delay in filing the Appeal is not satisfactory and the same is inordinate, intentional and that the intended Appeal is an afterthought and aimed at denying the Respondent the fruits of her judgment.

It is averred that the intended appeal is frivolous, vexatious and an abuse of the court process as the same is on quantum as liability had been

agreed upon by the parties and a consent judgment recorded at 70:30 in favour of the Respondent. Further, the Respondent contended that the applicant has not satisfied the mandatory provisions of Order 42 rule 6 of the Civil Procedure Rules. She has urged the court to dismiss the application but without prejudice to the foregoing, should the court be inclined to grant a stay of execution she has prayed that the applicant be ordered to pay the whole decretal sum to her.

The court has considered the application and the submissions by the parties. The reason given for the delay in filing the Appeal has also been noted. Judgment in this matter was delivered way back on 24<sup>th</sup> November 2017 when the applicant was granted stay of execution for 30 days. The application herein was filed almost four months thereafter. The insurance company delayed in giving instructions to their Advocate for purposes of appeal. It is noted that the insurance company has not disclosed the date when they were notified about the judgment by their Advocates. The delay of four (4) months has not been sufficiently explained. However, the applicant has offered security and has deposed that they are ready to abide by any conditions that the court may impose.

On substantial loss, the applicant has expressed fear that the Respondent may not be able to refund the decretal sum if the same is paid to her and in the event that the Appeal succeeds. Though the Respondent has stated that she is in a position to refund, no evidence has been shown to the court to support that contention. However, as deposed by the Respondent, the Appeal is on quantum only as judgment on liability was entered by consent. All considered, and in the interest of justice and doing the best I can to balance the interest of both parties to this application, I hereby grant a stay of execution and order that the applicant to pay half of the decretal sum to the Respondent and the other half be deposited in an interest earning account to be opened in joint names of the Advocates. This order to be complied with, within 30 days from the date of this ruling failing which the stay order shall automatically lapse.

On leave to file Appeal out of time, the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat Vs. I.E.B.C. & 7 others, SC App 16/2014** laid down the principles to be considered when dealing with an application for leave which are:

- (1) Extension of time is not the right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
- (2) The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
- (3) As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case basis.
- (4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
- (5) Whether there will be any prejudice to be suffered by the respondents if the extension is granted.

The court has considered these guiding principles and has applied them to the case at hand.

Though the delay is not sufficiently explained, in the interest of justice, the court will grant leave to the applicant to file the appeal out of time. No prejudice shall be occasioned to the respondent as half of the decretal sum will be paid to her and the balance will be secured in an interest earning account.

The Memorandum of Appeal shall be deemed as filed upon the payment of the court fees.

For avoidance of doubt, the application is allowed as prayed.

Cost are awarded to the respondent.

**Dated, Signed and Delivered at Nairobi this 27th day of September, 2018**

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**L. NJUGUNA**

**JUDGE**

**In the presence of:**

.....**For the Applicants**

.....**For the Respondent**