



**REPUBLIC OF KENYA**

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

**MISC.APPLICATION NO.95 OF 2017**

**VETRO LIMITED.....1ST APPELLANT/APPLICANT**

**TSHUSHO CAPITAL KENYA LTD.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**CHRISTOPHER MURIITHI MWANGI.....RESPONDENT**

**RULING**

On 8<sup>th</sup> June 2017, the Hon. F.W. Macharia SPM Karatina Law Courts delivered her judgment in Karatina SPM CC No.77 of 2015.

On 16<sup>th</sup> October 2017, the applicants filed a notice of motion dated 12<sup>th</sup> October 2017 through the firm of J. K. Kibicho and Co. Advocates, seeking orders inter alia:-

- a. for temporary stay of execution of the said judgment pending the hearing and determination of the notice of motion until further orders of the court.
- b. A stay of execution of the judgment and all consequential orders pending the hearing and determination of the applicants' application for leave to file appeal out of time; and the intended appeal/or other further orders.
- c. Leave to the applicants to appeal out of time against the said judgment.
- d. Leave to secure the decretal sum amounting to Kshs.1,190,666/- by depositing the same in a joint interest earning account in the joint names of the counsel for each party as a condition for the stay and/or such orders as the Honourable court may deem fit to grant.
- e. Provision for the costs of the application.

The Notice of Motion was supported by the affidavit and the annexures thereto sworn on 12<sup>th</sup> October 2017 by Ricky Ligono, a legal officer with ICEA General Insurance Company Ltd, the insurer for the applicants.

The application was opposed by the Respondent vide his affidavit sworn on 16<sup>th</sup> November,2017.

On 17<sup>th</sup> October 2017, I granted temporary stay of execution and an order for the deposit of the entire decretal sum as prayed –pending the hearing *inter- partes* and determination of the notice of motion.

On 12<sup>th</sup> March 2018, parties agreed to proceed by way of written submissions which I have considered.

The Notice of Motion is premised on the provisions of Order 42 rule 6(1) of the CPR (2010), Sections 1A, 1B and 3A of the CPA, Article 159 of the Constitution sub rules 2 (d) and (e) all other enabling provision of the law.

The operative provision of the law is subsection 79G and 95 of the CPA which provide: -

*Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree/order appealed against excluding from such period any time which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree/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. (emphasis mine)*

Section 95 provides for the extension of time- that

*“the court may in its discretion, from time to time, enlarge such period even though the period originally fixed/granted may have expired.”*

The applicants must therefore establish: -

1) Good and sufficient cause for the delay to warrant the exercise of this court’s discretion in their favour.

From the affidavit in support of the application and the annexures, the applicant is pleading mistake of counsel and blunder as supported by the cited authorities **Banking Insurance & Finance Union -Vs- Harambee Co-op Savings and Credit Society (2015) eKLR** and others which upheld the ruling in **Belinda Murai & 9 others -Vs-Amos Wainaina CA NO.Nai 9/1978** and, **Philip Chemwolo & Another -Vs- Augustine Kibede (1982 -1988) KAR 103 at 1040.**

What are these mistakes/blunders?

According to Ricky Ligonu the applicant’s insurer was informed of the court’s judgment on 12<sup>th</sup> June 2017 and they gave instructions to appeal on 29<sup>th</sup> June 2017 but due to an error in the email address used the instructions never got to the advocates, and they had only realized this unfortunate even when time for filing the appeal had lapsed.

To support this position is a thread of emails between ICEA and the applicant’s counsel.

The respondent is of the view that the reason given is frivolous, as it is not possible that the applicants would wait for 4 months after giving instructions for an appeal to be filed, without follow up and in any event, that they were only startled out of their slumber by his application for execution.

I have carefully considered the annexed emails, the basis for this application.

A letter dated 12<sup>th</sup> June 2017 informed the applicants insurer of the outcome of the case.

The letter clearly states that counsel found the award on the higher side and sought instructions to appeal.

The date on this letter is cancelled and written in pen from ‘12’ to 22’. The next email is dated 22<sup>nd</sup> June 2017 to ICEA attaching a notification of the judgment. The addressee is one Yvonne Kae and it is copied to Ricky Ligonu.

It is noteworthy that the email giving instructions for the appeal emanates from a different person one Lydia Njuguna. It is dated 29<sup>th</sup> June 2017 and actually refers to a letter dated 12<sup>th</sup> June 2017, received on 23<sup>rd</sup> June 2018. The email indeed addressed to pngigi @kibicho.co.ke and copied to [info@kibicho.co.ke](mailto:info@kibicho.co.ke), [kibichoadv@gmail.com](mailto:kibichoadv@gmail.com) among others.

It gives three instructions: -

- i. To file an appeal seeking orders of stay.
- ii. To forward copies of the plaintiff’s and defendant’s filed submissions, copy of judgment, memorandum of appeal.
- iii. To set off negotiations with the other party to reduce judgment amount to reasonable terms to save on further appeal costs.

The next email is dated 15th September 2017 from Paul Ngigi Advocate to Yvonne seeking the position of settlement of the matter.

Then on 18th September 2017, Ricky Ligonu writes at 1.18pm to the same Paul Ngigi and copies to Yvonne, and Lydia among others. -

**“Kindly see the attachment below for your perusal and urgent dealing. Please update us on the progress made as regards the negotiations”.**

At 1.54pm Paul Ngigi writes to state that the attachment was sent to the wrong email as his email is “pngige” and not “pngigi”.

Later at 4.34pm –Ricky gives instructions for the filing of an appeal out of time.

It is not lost to the court that the attachment referred to by both Ngigi and Ligonu is not provided among the annexures. Be that as it may- do these emails establish sufficient reason to warrant the orders sought?

The counsel notified the applicant’s insurer’s in good time. They received the letter. They responded not through the email in the letter they received but through other email addresses, if the email from Lydia Njuguna is to be relied upon.

There are two other email addresses on that letter from the firm of J. K. Kibicho and Co. Advocates. No one has said anything about those 2

email addresses and whether the email of 29<sup>th</sup> June 2017 was received in them or not and if it was, what happened? There is no explanation.

Several minds were on this matter.

How does one explain the passage of the months of July, August and half of September before anyone noticed that no appeal was filed?

Going by the holding in **Hilda Kaari Mwendwa –Vs- Zakayo M. Magara & 2 others (2016) eKLR** (see pg 4). It is clear that the reasons given by the applicant are not sufficient to warrant the discretion of this court in their favour. No blunder/mistake has been demonstrated as set out in the authorities set out herein above.

The Respondent raised the important issue as to whether this court should even rely on the affidavit sworn by Ricky Ligono on the ground that ICEA was not party to the suit below and hence would not just jump onto the suit at the appeal level – the respondent seeks that he be declared to be without locus and his affidavit be expunged from the record.

On this point the applicant makes no response but demonstrates in the submissions the heavy reliance on the impugned affidavit.

The respondent relies on: **-Moses Wachira –Vs- Niels Bruel & 2 others (2013) eKLR** and **Alfa Motors Limited –Vs- Toyota East Africa Limited (2007) Eklr**

It is correct that the deponent of the affidavit nor ICEA were parties to the suit in the subordinate court.

Secondly the affidavit is sworn contrary to the provisions of Order 19 rule 3 of the CPR. This is with specific reference to the crucial email alleged to have given instructions for the filing of the appeal. The same is dated 29<sup>th</sup> June 2017. It is written by Lydia Njuguna and is not even copied to Ricky Ligano. What was so hard for Lydia Njuguna who describes herself as -“Assistant Manager, Legal Section ICEA LION General Insurance” to swear the affidavit herself?

Ricky Ligono cannot of his own knowledge prove that this email was written, and it was not received in the firm of J. K. Kibicho and Co. Advocates. The only person who can prove that is Lydia Njuguna.

Hence, I agree with the submissions of counsel for the respondent and on the persuasion of the 2 authorities on this issue and expunge the offensive portion of the affidavit from the record. That leaves the application without a crucial leg to stand on.

In **Attorney General -Vs-Peter Ombuna Makori (2015) eKLR**, the Judge sets relies on the 7 principles to be considered in the exercise of discretion in the extension of time.

These are found in **Nicholas Kiptoo Arap Korir Salat –Vs-IEBC and 7 others in Supreme Court Application No.16/2014-** I find that essentially that the “*extension of time is an equitable remedy available to a deserving party at the discretion of court*”. Thus a party must lay “*a basis to the satisfaction of the court..... the delay should be explained to the satisfaction of the court.*”

In this case the applicant has fallen short of the requirements set out by Section 75 G of the CPA.

The application fails in its totality and is hereby dismissed with costs to the respondent. The money deposited vide orders made on 17<sup>th</sup> October 2017 be released to the depositor.

**Dated, delivered and signed at Nyeri this 21<sup>st</sup> day of September 2018.**

**Mumbua T. Matheka**

Judge

In the presence of:

C/ A Albert

Gichuki for Ngige for applicant

Wagiita for respondent