



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 63 OF 2018

AHMED BAKHER..... APPELLANT

VERSUS

ALI MOHAMED AWADH..... RESPONDENT

RULING

1. This is a ruling of the Notice of Motion application dated 11th April 2018 in which the appellant/applicant is seeking the following orders;

(a) Spent,

(b) spent,

(c) that the applicant be granted leave to file an appeal out of time against the judgment and decree of Honourable Ndegwa in Mombasa RMCC No. 727 of 2006 delivered on 27th November 2017.

(d) that upon granting prayer (c) above, the memorandum of Appeal dated 11th April, 2018 filed herein be deemed as duly filed and properly before court.

(e) that there be a stay of execution of the judgment and decree in Mombasa RMCC No. 727 of 2006 delivered by Honourable Ndegwa on 27th November, 2017 pending the hearing and determination of the appeal herein.

2. The application is premised on the grounds on the face of it and supporting affidavit of AHMED BAKHER, the applicant and annexures attached thereto marked "AB 1", "AB 2" (copy of the judgment), "AB 2" (being a copy of memorandum of Appeal), AB 3, a copy of warrants and AB 4, a copy of the letter requesting for a copy of certified proceedings.

3. Upon being served with the said application, the Respondent through they advocate FRIDAH NZAMSA filed a replying affidavit opposing the application.

4. There was an indication by counsel for both parties on 19th April 2018 that there were trying a settlement out of court. But on 28th May, 2018, the counsel for both parties agreed to dispose of the application via written submissions and they were given directions to that effect.

5. The application was then fixed for highlighting of submissions on 17th September, 2018 but this was adjourned to 22nd October 2018. On 22nd October, 2018 when the application came up for highlighting, both counsels for the parties elected to rely on their respective written submissions in their entirety.

6. The background facts of the applicant's case may be gathered from the grounds on the face of the Notice of Motion application dated 11th April, 2018, as well as the supporting affidavit sworn by AHMED BAKHER, on even date, a further affidavit sworn by WAMBANI ANTOINETTE, learned counsel on 13th April, 2018 and a supplementary affidavit sworn by the Applicant on 10th May, 2018.

7. Learned counsel for the Appellant in their written submissions have reiterated what is deponed to in the supporting affidavit and relied on in the face of the application. The applicant submits that the delay in lodging the appeal of five (5) months was caused by the delay in obtaining of the copy of proceedings and judgment. He however contents that the same was not inordinate.

8. The appellant also submits that the Respondent has owned a proclamation dated 6th April 2018 against his items of trade which was not

served upon him by the Advocates. He contends that this action is likely to cause him irreparable harm and loss of business. He further contends that his appeal has a likelihood of success and that he is willing to deposit security for costs for the performance of judgment. He then submits that if the execution by the respondent is not stopped, then this instant appeal would be rendered nugatory.

9. The respondent's case on the other hand may be largely retrieved (but not entirely) from the replying affidavit of FRIDA NZAMSA sworn on 18th April, 2018.

10. The Respondent has through his counsel submitted that the applicant's application is misconceived, defective, bad in law, lacking in merit with deliberate misrepresentation of facts calculated at frustrating the plaintiff recovery and full enjoyment of the benefits of its judgment.

11. The Counsel also submits that the replying affidavit sworn by FRIDA NZAMSA is properly on record since it was deponed by an advocate who was personally seized of the matter and has deponed on the law with regard to execution, a legal and lawful process and not evidentiary facts which are not within her personal knowledge.

12. The counsel further submits that the delay of five(5) months is unreasonable, inordinate and inexcusable and the issue of delayed procuring of proceedings from the subordinate court cannot form an excuse for such delay. It is also submitted that there is no evidence that the letter to the Executive Officer dated 9th December, 2017 was ever copied to their office or evidence that the appellant paid for proceedings.

13. The respondent submits that the applicant has not demonstrated to this court that he has suffered or is likely to suffer substantial loss if stay is not granted. And in conclusion, the respondent submits that the proclamation was done and served by a licenced Auctioneer. He urges the court to dismiss the application with costs.

14. Having carefully read through the Applicant/Appellant's application and the supporting affidavit sworn by AHMED BAKHER dated 11th April, 2018, a further affidavit sworn by WAMBANI ANTOINETTE advocate on 10th May, 2018, a supplementary affidavits sworn by the appellant on 10th May, 2018 and replying affidavit of FRIDAH NZAMBA sworn on 18th April, 2018 together with submissions by both sides, cited authorities and the law, I find the issues that fall for determination in this case being:-

(a) Whether the applicant has established a case for grant of leave to file the appeal out of time;

(b) Whether the replying affidavit by Fridah Nzamsa is properly on record.

15. On the first issue of whether the applicant has established a case for grant of leave to file the appeal out of time, I wish to state that the power of the court to grant leave to file an appeal out of time as stipulated in section 79G of the Civil Procedure Act is discretionary, which discretion must nonetheless be exercised judiciously, depending on the circumstances of each case since no two cases are the same, and leave by itself is not a matter of right. And because of this, an applicant is expected to satisfy the court by placing it before it material upon which such discretion may be exercised in that favour. (See the case of NICHOLAS KIPTOO ARAP SALAT VRS. IEBC & 7 OTHERS SC application No. 16 of 2014.) Also, the Court of Appeal in THUITA MWANGI VRS. KENYA AIRWAYS LTD (2003) eKLR while replying on the decision in Leo SILA MUTISO VRS. ROSE HELLEN WANGARI MWANGI (Civil Application No. Nairobi 255 of 1997) (unreported) expressed itself as follows:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters what this court taken into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly, (possibly), the chance of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted.

16. In APA INSURANCE LIMITED VRS MICHEAL KINYANJUI MUTURI (2016) eKLR, it was stated;

“..... this court in no uncertain terms that it is good precedent and I have therefore no reason to depart from such noble principles of law established by the court over a period of time and which have withstood the test of times. I am further fortified by the decision and principles laid down in Factory Guards Limited Versus Abel Vundi Kitungi, that the right of appeal should not be impeded as it is a constitutional right and the cornerstone of the rule of law. Where there is delay which is explained and the court accepts the explanation in order to render substantive justice and to facilitate access to justice for all by ensuring that deserving litigants are not shut out of the judgment seat, such leave should be granted.

17. Having gone through the applicant's supporting affidavit and written submissions, it is averred that the five months delay in filing the appeal was as a result of a delay in obtaining certified copies of proceedings. The respondent on the other hand averred that the applicant had not presented a bona fide intention on the part of the Applicant to lodge an appeal since there is no indication of the proceedings having been received and paid for by the Applicant.

18. I have also read through the Applicant's supporting affidavit sworn on the 11th April, 2018 more specifically annexure “AB4” which is a purported letter dated 4th December, 2017 to the Executive Officer of Mombasa Law Courts requesting for certified copies of proceedings in RMCC No. 726 of 2016.

19. I have perused the said letter and observed that it does not have a court receiving stamp as an acknowledgement of receipt. In the absence of receiving stamp, the letter has no probative value at all.

20. Secondly, the applicant has not annexed proof of payment of the interim standard court fees towards the process of obtaining the typed and certified proceedings of the court record. It is my view that the applicant was prompted to file the instant appeal and application for leave and stay of execution after the Proclamation of Attachment by the respondent on 6th April, 2018.

21. In view of the foregoing, this court is left with no option but to find that the applicant has never applied for copies of typed and certified proceedings in SMRCC No. 726 of 2016 to date. Therefore, the applicant's explanation for delay in filing the appeal is unsatisfactory to warrant the grant of leave for him to file an appeal out of time.

22. The second issue is whether the replying affidavit by Fridah Nzamsa, counsel for the respondent is properly on record. A reading through the respondents replying affidavit by Fridah Nzamsa raises issues of law and fact which are within her knowledge, having been the advocate who was seized with the conduct of the suit on behalf of the party on whose behalf the affidavit has been sworn. For this reason, the said affidavit cannot be said to be defective.

23. In the case of **KAMLESH M.A PATNI VRS NASIR IBRAHIM ALI & 2 OTHERS, C.A 354 of 2004**, the Court of Appeal in dealing with a serious objection of the admissibility of an affidavit sworn by Senior counsel PAUL MUIITE, held inter-alia:-

“.. there is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state that in an affidavit on behalf of his client, so too, an advocate who cannot readily find his client but has information on the sources of which he can disclose and state the grounds for believing the information.....”

24. And in REGINA WAITHERA MWANGI GITAU VRS BONFACE NTHENGE (2015) eKLR, Aburili J. stated this :

“However, where an affidavit by an advocate raises issues of law and fact which are within his knowledge having been an advocate handling the suit on behalf of the party on whose behalf the applicant is sworn, there is absolutely no mistake or error in the affidavit that can render it defective... Furthermore, there is not law expressly prohibiting an advocate from swearing an affidavit on behalf of his client in a clients' cause, on matters which he, as an advocate has personal knowledge of whether informed by his client or arising from the proceedings in the cause.

25. In the upshot, it is the courts finding that the applicant did not take any steps towards exercising his right of appeal within reasonable time and there being an inordinate delay of nearly five months, which delay, I find has not been satisfactorily explained to this court to warrant the grant of leave to file an appeal out of time, the application is found unmerited and is dismissed with costs to the respondent.

DELIVERED, DATED and SIGNED this 20th day of December, 2018.

D. CHEPKWONY

JUDGE.