



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

MISC. CIVIL APPLICATION NO.19 OF 2018

JAMES NJENGA.....1ST DEFENDANT/APPLICANT

SONY TRADING CO. LTD.....2ND DEFENDANT/APPLICANT

VERSUS

SAMWEL NGETICH.....PLAINTIFF/RESPONDENT

RULING

1. The applicants were the defendants in Kericho CMCC No. 401 of 2014. The suit involved a claim brought against them by the respondent/plaintiff, Samuel Ngetich, in respect of personal injuries that he had sustained as a result of a road traffic accident. In the judgment of the trial court (Hon. S. Mokua (CM), the plaintiff was given an award in general damages of Kshs 600,000 and special damages of Kshs 69,450, as well as the costs of the suit and interest.

2. Dissatisfied with the judgment of the trial court, the applicants filed the application dated 21st May 2018 seeking stay of execution of the decree in favour of the respondent pending inter partes hearing of the application, leave to file their appeal out of time, as well as stay of execution pending the hearing and determination of the appeal.

3. The applicants subsequently filed an application dated 20th June 2018 seeking to vary certain orders issued by this court on 7th June 2018. They did not, however, appear in court on the date scheduled for the hearing of that application, and the application, given the passage of time and the orders that it sought, is deemed to have been abandoned. This ruling therefore relates only to the application dated 21st May 2018.

4. In an affidavit sworn on 21st May 2018 in support of the application by their Counsel, Mr. Meshack Kemboi, the applicants depose that they came to learn of the delivery of judgment late. They got instructions to file an appeal, but by then, the time for filing the appeal had expired. Mr. Kemboi avers that the delay in filing the appeal was caused by the delay in receiving notification of the judgment and transmission of instructions from their client. He further avers that the appeal has high chances of success, and if the orders of stay are not granted, the applicants' insurer and the applicants would suffer irreparable loss as the respondent has not revealed his financial status and was a man of straw.

5. In a replying affidavit sworn on 30th May 2018, the respondent terms the application premature, vexatious and a waste of the court's time. He avers that no execution has been taken out against the applicants, that the judgment in the matter was issued procedurally, and that no appeal has been filed to warrant orders of stay under Order 42(6).

6. He further avers that the applicants' intended appeal has no chance of success as the applicants had not filed their submissions before the trial court, yet they were faulting the trial court for not considering their submissions in his judgment. It is also his averment that no good reason has been given for failing to file the appeal in compliance with section 79G of the Civil Procedure Act, and the present application is meant to delay execution of the judgment in his favour. He therefore prays that the application be dismissed with costs.

7. In a further affidavit sworn by Ms. Pauline Waruhiu, the Claims Director of Direct line Insurance Company Limited, it is averred on behalf of the applicants that contrary to the averments by the respondent, the applicants had filed their submissions in the lower court in time. A copy of the submissions, which are dated 6th October 2017 and were filed in court on 10th October 2017, is annexed to her affidavit. She maintains that their intended appeal has high chances of success, and she prays that the application be allowed as prayed.

8. When the application came up under certificate of urgency on 22nd May 2018, directions were given that the application be placed before the court for hearing on a priority basis. The application came for hearing on 7th June 2018.

9. Learned Counsel for the applicants, Mr. Kemboi, submitted that the applicants were seeking leave to file an appeal out of time from the judgment and decree in **Kericho CM CC No.401 of 2014- Samuel Ngetich vs James Njenga & Another**. They were also seeking an order of stay of execution pending appeal. Mr. Kemboi reiterated the averments in the affidavits in support of the application. He submitted that the court has discretionary powers under section 79 G of the Civil Procedure Code to grant the orders of stay, and he relied for this submission on the case of **Nicholas Kiptoo Salat vs IEBC [2014] eKLR**. It was his submission that the applicants had met the conditions set out in the **Salat** case, and he urged the court to grant the order for extension of time as prayed.

10. With regard to the order for stay pending appeal, Counsel relied on order 42(6) (2) which he submitted grants the court power to issue such orders. It was his submission that the applicants have shown the reasons why the orders to file the appeal out of time were being sought.

11. With regard to the claim that the applicants would suffer substantial loss, his submission was that the money, if paid to the respondent, would be outside the applicants' reach and the appeal would have been rendered nugatory. His submission was that the respondent was a man of straw who had not provided any evidence of his means, and whose means are not known. It was his case that the respondent had the duty to prove his means, which he had not done. Counsel relied on the decision in **National Industrial Credit Bank Limited vs Aquinas Francis Wasike Civil Appeal No. 238 of 2005** to submit that the respondent had not discharged the burden of proving that he could repay the decretal sum if the appeal should succeed. On their part, the appellants were willing to deposit the decretal amount in an interest earning account or as directed by the court.

12. In response, Mr. Ngeno for the respondent opposed the application. He relied on the respondent's affidavit whose contents are summarised above. Mr. Ngeno submitted that the application is brought under 42 (6) which provide for stay pending appeal, but there was no appeal lodged in this case. His submission was that the court cannot issue a stay in contemplation of a party filing an appeal.

13. It was his submission further that while there is a provision for extension of time to file an appeal, extension of time was not a right: a party was under a duty to lay a basis for the orders. He contended that no reasons have been given in the affidavits in support of the application for the applicants failing to file their appeal in time. While the applicants were arguing that they had an arguable appeal, they had not called any witnesses during the trial, nor did they file any submissions. He submitted that they did not therefore have an arguable appeal, and their application should be dismissed.

14. In his submissions in reply, Mr. Kemboi reiterated that the court has power to grant the orders sought under section 79 G for the filing of an appeal out of time. Further, that the applicants had filed submissions as evidenced in the affidavit of Pauline Waruhiu. He therefore urged the court to grant the orders sought.

15. At the end of the hearing, the court directed that the decretal amount of Kshs.669,450/- be deposited, within 14 days from that date, in an interest earning account in the joint names of the applicants' and respondent's advocates. In the event that the amount was not so deposited within the stipulated period, the respondent would be at liberty to execute.

Analysis and Determination

16. Having considered the pleadings and submissions of the parties in this matter, I believe that two issues arise for determination.

i. Whether the court should exercise its discretion to grant the applicants/appellants leave to file their appeal out of time'

ii. Whether an order of stay of execution pending appeal should issue.

Whether leave to file the appeal out of time should be granted

17. Under section 79G of the Civil Procedure Act, a party may be granted leave to file an appeal out of time if he satisfies the court that he has good reason for not filing the appeal within the time provided by law. In the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR**, the Court of Appeal reiterated the conditions to be considered in deciding whether or not to grant extension of time to file an appeal. These are the length of the delay, the reason for the delay, possibly, the chances of success of the appeal if the application is granted, and finally, the degree of prejudice to the respondent if the application is granted.

18. In this case, the decision that the appellants seek to appeal against was delivered on 3rd April 2018. The application for leave to file the appeal out of time was filed on 21st May 2018. The applicants allege that they learnt of the delivery of the judgment on 14th April 2018, and they took time in transmission of the judgment and in receiving instructions to file the appeal, by which time the period within which the appeal should have been filed had elapsed.

19. The period between the delivery of the judgment and the filing of this application is about 45 days. This means that the appellant was about 15 days out of time for filing the appeal. I take the view that there was no unreasonable delay in filing the present application. Bearing in mind that the decision sought to be appealed from was delivered in the absence of the parties, I believe the interests of justice demand that the applicants be granted leave to appeal out of time.

20. I have reached this decision having noted also the arguments made with respect to the success of the appeal. The applicants seek to appeal against the quantum of damages awarded by the trial court. The trial court, in reaching its decision, observed that the applicants had not filed submissions in support of their case. Mr. Ngeno submitted before me that the applicants had not filed submissions, nor had they called any witness to controvert the respondent's case. While this latter aspect is true, the earlier is not.

21. It is deposed in the affidavit of Pauline Waruhiu that submissions were filed before the trial court, and a copy of the submissions is attached to the affidavit. It may well be that had the trial court considered the applicants' submissions, it may have reached a different decision on the quantum. The dictates of justice demand that they get an opportunity to ventilate their appeal, and I accordingly grant leave to file the appeal out of time as prayed. The applicants' appeal shall be filed in court within the next 30 days hereof.

Whether orders of stay of execution should issue

22. Should the applicants be granted stay pending appeal? The applicants argue that if the decretal sum is paid to the respondent, it will be out of their reach, and the appeal may be rendered nugatory as the respondent is a man of straw. He has not indicated what his resources are, which, in the view of the applicants, he has a duty to do.

23. I have considered the submissions of the parties on this issue and the authorities relied on by the applicants. The duty of the court is, as far as possible, to balance the interests of the parties. This would require, in my view, safeguarding the interests of the decree holder to the decretal sum, but also ensuring that should the appeal succeed, it will not have been rendered nugatory by earlier payment to a party who is unable to repay the decretal sum upon the success of the appeal. The applicants have relied on the decision in the case of **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another [2006] eKLR**. In that case, the Court of Appeal expressed itself as follows:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

24. I note that the respondent did not make any averments with regard to his means to repay the decretal sum should the appeal be successful. Nor did he place anything before the court that demonstrated that he could repay the decretal sum should the appeal succeed. At the same time, the respondent should be assured that the decretal sum will be easily available to him should the applicants' appeal fail.

25. In the circumstances, I am satisfied that the interests of justice in this case demand that there be a stay of execution pending appeal. However, the appeal is conditional upon the applicants having deposited in court the decretal sum as had been directed on 7th June 2018.

26. Each party shall bear its own costs of this application.

Dated Delivered and Signed at Kericho this 18th day of December 2018

MUMBI NGUGI

JUDGE