



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATIONS NUMBER 399 OF 2016

NDUMO LUGUA. 1ST APPLICANT

AFRICAN LINE TRANSPORT COMPANY LIMITED. 2ND APPLICANT

VERSUS

CATHERINE W. KANGETHE. 1ST RESPONDENT

CLEMENT IKUNGU. 2ND RESPONDENT

R U L I N G

The applicants have moved this court by way of a Notice of Motion dated the 2nd day of August, 2016 under Section 79G, 1A, 1B and 3A of the Civil Procedure Act and orders 50 Rule 6 and 42 Rule 6 of the Civil Procedure Rules and have sought the following orders: -

1. Spent
2. Spent
3. That pending the hearing and determination of this application, this honourable court be pleased in the interim, to issue a stay of execution of or against the judgment of the Honourable I. Orange (Mr.) Senior Resident Magistrate delivered on and dated 30th May, 2016 in Milimani CMCC No. 4709 of 2008 Nairobi.
4. That this honourable court be pleased to extend or enlarge the time within which the applicants may file an appeal out of time challenging the said judgment of Honourable I. Orange (Mr.) Senior Resident Magistrate delivered on and dated 30th May, 2016 in Milimani CMCC No. 4709 of 2008 Nairobi.
5. That consequently, this Honourable Court be pleased to issue a stay of execution of or against the said Judgment of the Honourable I. Orange (Mr.), Senior Resident Magistrate delivered on and dated 30th May, 2016 in Milimani CMCC No. 4709 of 2008 Nairobi until the hearing and determination of the intended appeal.
6. That the costs of this application be in the cause.

The application is supported by the affidavit of Janerose Gitonga and its premised on the grounds set out on the body of the same.

The facts in support of the application are that by a judgment delivered on the 30th May, 2016, the 1st Respondent was awarded a sum of Ksh.180,000/- in general damages plus costs and interests with the 2nd Respondent bearing no liability and the applicant bearing 100%.

The applicant wishes to file an appeal against the said judgment but time within which to file the appeal has already expired hence the prayer for enlargement of time within which to do so. That failure to file the appeal within time, occurred as a result of an inadvertent and unintentional mix up in the applicant's insurer's office which occurred when the office was being restructured and in the process, the relevant file got misplaced immediately upon the delivery of the judgment. That the file was traced late July, 2016 when the insurer instructed an advocate to file an appeal. They aver that they are ready and willing to comply with conditions which the court may impose including depositing of security or lodging a bank guarantee.

That the intended appeal shall be rendered nugatory if the stay is not granted since inter alia, it is doubtful whether the Respondent shall be able to refund the decretal sum in the event that the said appeal succeeds.

The Respondents have opposed the application vide a replying affidavit sworn by Nderitu F. Kimathi on the 20th September, 2016. He avers that the application is frivolous, vexatious and an abuse of the court process and only meant to deny the Respondents from enjoying and reaping the fruits of their judgment. That the application is an afterthought and the Respondents stand to suffer prejudice if the application is granted.

The Respondents contends that contrary to the assertions made by the applicants in paragraph 5 of the supporting affidavit, there was no inadvertent and unintentional mix up in the Applicants insurer's offices as parties were in constant communication all through after the delivery of the judgment, as evidenced by several correspondences annexed to the replying affidavit and marked as annexures NFK 1, 2 3 and 4 particularly referred to annexure 2 which is a letter dated 7th July, 2016 in which the applicant's advocates wrote to the Respondent's Advocates seeking the account details in order to settle the matter.

That the Applicants application has no merits as the affidavit in support is made without full, frank and material disclosure of facts and having failed to disclose material facts militates against getting equity from a court. That the delay in filing the appeal is inordinate and the reasons given for the delay are unacceptable. They have urged the court to dismiss the application.

Both parties filed submissions in support of and against the application which reiterates the contents in their respective affidavits. In his submissions counsel for the Applicants argued that the Applicants have a right of appeal and since time within which to file the appeal has lapsed, they are seeking for more time under Section 79G of the Civil Procedure Act and he relied on the cases of **Harambee Sacco Society Limited Vs Lawrence Njagi Mbugua & 2 Others (2016) eKLR** and that of **Charles Maina Ndiritu Vs Simon Mwangi Gitau (2010) eKLR**. He admitted that both advocates for the parties herein were in constant communication but on a **"without prejudice basis"** but he did not have instructions on time as to whether to proceed to appeal or not. On this point, of **"without prejudice"** rule, he relied on the case of **Mumias Sugar Co. Ltd & another Vs Beatrice Akinyi Omondi (2016) eKLR** and submitted that the applicants should not be denied justice because of the inadmissibility of such correspondences and on the mistakes of their lawyers and/or the insurer.

On the prejudice likely to be suffered by the Respondent, counsel for the applicants submitted that the Respondent has waited since the 6th September, 2007 when the accident occurred. On the chances of success of the appeal, he argued that the judgment was unfair on liability and in his view, the 1st Respondent should bear the blame and shoulder 2nd Respondent's contributory negligence.

On his part, counsel for the Respondent submitted that the reason given for the delay in filing the appeal

is not plausible as all along the counsels were engaging each other as to ways of payment of the decretal sum. He argued that whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary and has relied on the case of **Aviation Cargo Support Limited Vs St Mark Freight Services Limited**, Civil Appeal No. 98 of 2013.

On the principles governing an application for stay pending appeal, he relied on the case of **Kenya Power and Lighting Co. Ltd Vs Esther Wanjiru Wokabi** HCCC 326 of 2013 and urged the court to dismiss the application.

The court has considered the application, the affidavits and the submissions by the counsels and the authorities in support. The application seeks two main prayers.

- a) An order for stay of execution pending the hearing and determination of the intended appeal.
- b) An order for extension or enlargement of time within which to file an appeal.

Starting with the first one, the conditions for granting a stay of execution pending appeal are now well settled. An order for stay of execution is a discretionary one but that discretion is fettered by conditions set out in order 42 Rule 6(2) of the Civil Procedure Rules which are: -

- i) The application must be made without undue delay.
- ii) The applicant must demonstrate that they will suffer substantial loss unless the order sought is granted.
- iii) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

On the first condition, on whether the application was filed without undue delay, it is noted that the judgment appealed from, was delivered on 30th May, 2016 and the application herein was filed on 2nd August, 2016. That was a period of two months. The reason given for the delay is that the file got misplaced in the Applicants insurer's office until late July, 2016 when it was found. Counsel for the Respondents submitted that the reason is not plausible as both counsels were engaging each other by way of correspondences. This fact has not been denied by the counsel for the Applicant and indeed he has confirmed that they were corresponding in which case, the explanation cannot hold water as there was no way counsel for the applicant could have been engaging the other counsel without instructions. The instructions could not have been forthcoming without the insurer having their office file. The reason for the delay is therefore not convincing.

On the issue of substantial loss, the Applicants avers that the intended appeal shall be rendered nugatory since inter alia, it is doubtful whether the Respondent shall be able to refund the decretal sum in the event that the appeal succeeds. The Respondent has not disputed this assertion. When dealing with a similar application, the Court of Appeal in Nairobi Civil Application No. 238 of 2005 **National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another (UR)** stated: -

The court has said before and it would bear repeating that while the legal duty is on the 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 lack of them. Once an applicant expresses a Respondent would be unable to pay back the decretal sum, the eventual burden must shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.

In my view, the Respondents were unable to discharge this burden. In fact the Respondents did not even address the issue at all and for that reason this court finds that the Applicants have demonstrated that they shall suffer substantial loss.

On the third condition, the court has noted the offer by the Appellants to comply with the conditions that the court may impose including depositing of security or lodging a bank guarantee.

Having considered the application and all the arguments as above, and in the interest of justice, this court shall allow the application and make the following orders.

- a) Leave is hereby granted to the applicants to file appeal out of time. The appeal to be filed within seven (7) days from the date of this ruling.

- b) There shall be a stay of execution of the judgment dated 30th May, 2016 pending the hearing and determination of the intended appeal on condition that the decretal sum is deposited in a joint interest account in the name of both advocates. The money to be deposited within 30 days from the date hereof.

- c) Costs of the application shall abide the outcome of the appeal.

Dated, signed and delivered at Nairobi this 23rd day of February, 2017.

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L. NJUGUNA

JUDGE

In the Presence

..... ***For the Applicant***

..... ***For the Defendant***