REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL MISCELLANEOUS APPLICATION NO. 74 OF 2016

BRITISH AMERICAN INSURANCE CO. LTD……..APPLICANT

VERSUS

FRANCIS MBURU GICHIMU…….……RESPONDENT

R U L I N G

1. On 7th December, 2016 this court declined to grant exparte orders sought in the Applicant's Notice of Motion primarily seeking to extend time under Section 75, 79G and 95 of the Civil Procedure Rules, to enable the Applicant file an appeal out of time. The appeal was in respect of judgment of the lower court delivered on 25th October 2016. The application was fixed for hearing on 21/2/2017, the parties resolving to file submissions, was set for ruling on 28/3/2017.

2. Meanwhile, the Applicant approached the court again on 27/2/2017 through the Notice of Motion of even date. Citing the dismissal of its application for stay of execution in the lower court, namely, **Civil Suit CMCC No. 16 of 2014,** the Applicant asserted that the Respondent had served it with a proclamation and warrants of attachment. That therefore the pending application for leave to file an appeal out of time would be rendered nugatory, and the Applicant prejudiced by the impending execution.

3. The court granted an order to maintain the *status quo,* pending the hearing of the second application on 15/3/2017. On that date, the Respondent's counsel being absent, was represented by another counsel who stated that the Respondent was relying on the Replying affidavit filed on the same date. The Applicant sought and was given time to file a further affidavit pending ruling on 28/3/2017, but did not.

4. Thus before me are two applications, the first (filed on 6/12/2016) seeking leave to file an appeal out of time; and the second seeking stay of execution pending appeal. The 2nd application can be disposed of right away. There is no appeal on record, hence the prayer for stay pending appeal is premature.

5. With regard to the said application there is considerable merit in the objections by the Respondent. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the Civil Procedure Rules. Although the provision does not expressly say so, this can be inferred from the rule. Further an analogy can be drawn from Order 42 Rule 6 (4) of the Civil Procedure Rules which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given.

6. Equally Order 42 Rule 6 (6) of the Civil Procedure Rules states:

> **"Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such**

terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

7. It would seem that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the Civil Procedure Rules). Until the Memorandum of Appeal is filed, the court may be acting in *vacuo* by granting stay of execution pending appeal.

8. I am fortified on this position by the pronouncement of the Court of Appeal in the case of **Equity Bank -Vs- Westlink MBO Limited [2013] eKLR**. Commenting on Rule 5 (2) (b) of the Court of Appeal Rules, which is substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules and on Order 42 Rule 6 (6) of Civil Procedure Rules, the Court of Appeal left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (**See also Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR**).

9. The Notice of Motion filed on 27/2/2017 is therefore incompetent and is struck out off with costs.

10. Regarding the first application, seeking leave to appeal out of time, I have considered the affidavits on record and the parties' written submissions. The Applicant's explanation for its delay is that instructions were given to counsel on 22/11/2016, just 3 days before the expiry of the 30 day period since the judgment of the lower court. And that time was consumed by the Applicant's efforts to confirm whether the judgment debtor in the primary suit in the lower court was its insured.

11. Taking up the latter issue the Respondent depones in his replying affidavit that the above issues were raised too late on the declaratory suit. Further, that the delay on the part of the Applicant in giving instructions to their advocate has not been sufficiently explained. That further, no categorical statement has been by the Applicant in respect of an insurance cover to the judgment debtor in the primary suit. That the Applicant did not bother to set aside the judgment in the lower court suit, and the present application is an afterthought.

12. The Applicant submitted, relying **Suleiman –Vs- Ambrose Resort Limited [2004] 2 KLR 589** that a greater injustice will result to the Applicant if they are not allowed to file an appeal out time. Because their appeal raises the fundamental question that they were denied the right to defend the declaratory suit, as the Applicants' defence was struck out. That sufficient reasons on delay had been given to explain the Applicant's delay. In demonstrating that they will raise serious questions on appeal, the Applicant further cite the decisions of **Patel -Vs- EA Cargo Handling Services [1974] EA 75** and **Philip Keipto Chemwolo & another -Vs- Augustine Kubende [1982 - 88] KAR 103.**

13. The Respondent's submissions stridently opposed the application, by reiterating some of the matters deponed to in the Replying Affidavit. Emphasising upon the alleged tardiness of the Applicant in the declaratory suit, the Respondent asserts that in exercise of its discretion, the court should not come to the aid of a party who is not diligent, but one who through inadvertence, accident or other excuse had defaulted in making a requisite step.

14. In his view no explanation has been made to bring the Applicant's Notice of Motion within this principle, as espoused in **Shah –Vs- Mbogo & Another [1967] EA116 and Kenya Commercial Bank Limited –Vs- Nyataige & Another [1990] KLR 443**. The Respondent views the application for extension of time as an attempt to obstruct and delay the Respondent in his quest after the fruits of his judgment.

15. I have considered the material canvassed in respect of the application filed on 6/12/2016. The background to the application appears to be as follows. The Applicant was the Defendant in **Naivasha CMCC 16 of 2014 Francis Mburu Gichimu –Vs- British American Insurance Company Limited.** It was a declaratory suit to enforce a decree in the Plaintiff's favour, issued in the sum of Shs 124, 242/= in

the primary suit, namely, **Naivasha CMCC No. 689 of 2011** (**Francis Mburu Gichimu –Vs- Fredrick Ouma Akhudu & Another**).

16. The Defendant filed its defence after an application for exparte judgment had been duly lodged by the Plaintiff in the declaratory suit. Subsequently, the Respondent successfully applied to have the defence struck out, as a consequence of which judgment was entered against the Applicant on 25th October, 2016.

17. The Applicant was dissatisfied with the outcome. However, it was not until 6th December 2016 that the Applicant moved this court to extend time to file an appeal – after a delay of about 36 days, or ten days since the lapse of the 30 day appeal period.

18. Section 79 G of the Civil Procedure Act states:

> **"Every appeal from a subordinate court of the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**
>
> **Provided that an appeal may be admitted out time <u>if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time</u>."** *(Underlining supplied)*

19. The court's discretion though unfettered must be exercised judicially considering the length of delay, the explanation for it, and possibly the chances of the proposed appeal succeeding, and the degree of prejudice to the Respondent, if any (**See Niazsons (K) Ltd -Vs- China Road and Bridge Corporation (Kenya) Ltd [2000] eKLR; Wasike -Vs- Swala [1984] KLR 591** and **Kimani –Vs- Rukungu [1984] KLR 393.**

20. The decisions in **Wasike –Vs- Swala, Kimaru -Vs- Rukungu [1984] KLR 393** above were concerned with the application of Rule 4 of the Court of Appeal Rules which has been amended over time. The current rule is almost in similar terms as Section 95 of Civil Procedures Act. The authorities therefore provide useful guiding principles for the consideration of an application brought under Section 79G and 95 of the Civil Procedure Act. These principles include the consideration whether delay has been inordinate and whether the extension of time will occasion prejudice upon the Respondent, and possibly whether the intended appeal is arguable.

21. The above principles were reiterated in **Mwangi –Vs- Kenya Airways Ltd [2003] KLR 486** where the Court of Appeal held:-

> **"Matters which the Court takes into account in deciding whether or not to grant extension of time are:-**
>
> **(a) the length of delay**
>
> **(b) the reason for the delay**
>
> **(c) possibly, the chances of the appeal succeeding if the application is granted; and**
>
> **(d) the degree of prejudice to the respondent if the application is granted."**

22. Under the proviso to Section 79G of the Civil Procedure Act, applicant seeking extension of time must satisfy the court *"that he had good and sufficient cause for not filing the appeal in time."* The delay by the Applicant in respect of the application before me cannot be said to be inordinate *per se*. However the Respondent is aggrieved that cumulatively, the Applicant has been guilty of delay at every stage, including the declaratory proceedings in the lower court. While this court should frown at a litigant's dilatory conduct, I think what is material for the purpose of this application is the delay by the Applicant since the impugned ruling in the declaratory suit, and whether sufficient explanation – "**good and**

sufficient cause" per Section 79G – has been demonstrated by the Applicant.

23. In this regard, it is not clear to me why both counsel failed to attend the ruling in the lower court on 25/10/2016. It would seem however that by 7th November 2016, the Applicants were aware of the decision. Even so, it was not until 22/11/2016 that instructions were given to counsel to file an appeal in respect of the impugned ruling. It is stated that the delay was occasioned by time taken by the Applicant to "**establish the correct status of its contention that it did not insure**" the accident vehicle.

24. Unless the Applicants had filed a 'holding' defence in the declaratory suit, I find this explanation hard to understand, especially coming at the conclusion of the declaratory proceedings. There is no assertion on oath before this court that unequivocally states that the Applicant had not insured the accident vehicle in the primary suit.

25. If the Applicant had had no time to make full inquiries before filing defence in the declaratory suit, surely, they had time between the filing of this application on 6/12/2016 and their submissions on 3/3/2017 to complete such inquiries and to file a further affidavit in that regard. No such affidavit was filed despite leave given to file a Further affidavit, even if in respect of their second application. The Applicant may well be a large company with several offices spread out in the Republic. That notwithstanding, the Applicant needs to demonstrate to the court that the appeal proposed is not a frivolous one, merely intended to thwart or delay execution.

26. The Applicant did not deem it fit to attach to their application a copy of the defence in the declaratory suit or submissions and affidavits in opposition to the application leading to the impugned ruling. Reviewing all the available facts, it seems to me that by the instant application the Applicant is merely latching on a demurrer to delay execution.

27. In this connection, I have closely looked at the communication between the Applicant and its advocate as annexed to the application, and marked as **LWK 1** and **LWK 2.** The former states in part:

> **"Further to the telephone conversation with this writer this morning, we forward herewith the ruling delivered in the above matter……..As pointed out, the decretal sum in the primary suit is modest and we would in the circumstances recommend that you <u>do first confirm with certainty whether or not you insured Fredrick Ouma Akhudu, the owner of the motor vehicle registration number KAZ 082…..</u>**
>
> **If indeed you did insure him, you may evaluate whether it would be more cost effective to settle the claim….**
>
> **However, if you do establish that you were not on cover at the material time, then we would recommend that the ruling be appealed as the calm would be lacking in substratum. The court did not address this important ground of opposition in its ruling….."**

28. Fifteen days later, the Applicant, without addressing the entire contents of their advocate's letter, or even indicating what it had done to assure itself of its status vis-à-vis its alleged insured, instructed the advocate to appeal the decision and obtain stay. Read within the background and context of the present application, this correspondence suggests, in a word that the Applicant was merely buying time. This view is confirmed by the fact that no representative of the Applicant was able or willing to categorically state on oath before this court whether the Applicant had or had not insured the accident vehicle in the primary suit. Therefore the reason given for the alleged delay and viability of the proposed appeal have not been demonstrated.

29. In this regard, the Respondents' authorities cited herein, though related to setting aside of an exparte judgment are on point. Conversely, the Applicant's authorities (**Patel -Vs- EA Cargo Handling Services [1974] EA 75** and **Philip Chemwolo & another -Vs- Augustine Kubende [1982 - 88] KAR 103**) must be read with the provisions in Section 1A and 1B of the Civil Procedure Act in mind – the overriding objective introduced in 2009. The court today is inundated with a multiplicity of claims

competing for adjudication. A patently prevaricating and tardy litigant should not be entertained with favour by the court thereby dissipating valuable resources.

30. Thus applying the principles enunciated by the Court of Appeal in **Mwangi –Vs- Kenya Airways** I am of the view that the reasons given for the Applicant's delay appear oblique and further the chances of the appeal succeeding appear rather slim in the circumstances of this case.

31. I agree with the Applicant's advocates assertion in the letter **LWK 1** that the decretal sum herein is modest, which baring good cause should not be kept from the decree holder. The primary suit in this case was filed in 2011 while the declaratory suit was brought in 2014, and finalized in 2016. Litigation must come to an end. The Applicant

has not persuaded me that the application filed on 6/12/2016 is one made in good faith, or meritorious. The same is dismissed with costs to the Respondent.

Delivered and signed at Naivasha this **28th** day of **March**, **2017.**

In the presence of:-

Mr. Mburu for the Applicant

N/A for the Respondent

Court Assistant - Barasa

C. MEOLI

JUDGE