



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. APPLICATION NO. 627 OF 2016

FLORENCE MUKONYO MAINGI PLAINTIFF

VERSUS

RAPHAEL MUTUMA MWITI DEFENDANT

RULING

1. Before this court is the defendant's application dated 6th December, 2016. He seeks leave to file appeal out of time and that the said leave operates as stay of proceedings. He also seeks stay of execution. The motion is supported by the affidavit of Lydia Mwangi who is the claims Manager of CIC Insurance Company Limited which is the defendant's insurer.

2. She averred that the defendant was given 30 days stay of execution on 10th October, 2016 when the judgment was delivered and that at the time the judgment was delivered, she was on leave and only got hold of the same on 17th November, 2016 after the 30 days' stay had expired. That the time within which to appeal having lapsed, it was necessary to file this motion.

3. The motion is opposed vide the plaintiff's replying affidavit sworn on 27th January, 2017. She contended that the defendant has not satisfied the conditions for granting the orders sought. That the said insurance company does not hold its operations once the manager proceeds on leave rather those in acting capacity are supposed to address the day to day issues that come up. That the decree sought to be appealed against is a money decree and the company has not demonstrated how it will suffer loss if it settles the decree.

4. I have considered the motion herein. In determining whether the applicant has satisfied the conditions for leave to file an appeal out of time, I am guided by the principles laid down in **THUITA MWANGI V KENYA AIRWAYS LTD, (2003) eKLR** thus:

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

5. The deponent in the supporting affidavit has explained that the delay was occasioned by her being away on leave. I am however in agreement with the plaintiff's position that her being away should not have stopped the office from running. I find the reason not satisfactory. However, I am minded of the overriding objective under **sections 1A & 1B of the Civil Procedure Act** and **Article 159 (2) (d) of the**

Constitution of Kenya that the overall duty of this court is to ensure that justice is attained. The court therefore needs to be keen on substantive justice rather than dwell on technicalities. This was well put by Judge Aburili in **TIMWOOD PRODUCTS LIMITED V KARA CHIWALLA (NAIROBI) LTD, [2016] eKLR** as follows:

“...I reiterate my findings and holding in Edward Kamau & Another v Hannah Mukui Gichuki & Another [2015] eKLR wherein I cited with approval Banco Arabe Espanol v Bank of Uganda [1999] 2 EA 22 where it was held; ‘The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered...”

6. It is well settled that the issue of whether or not to grant order of stay of proceedings is discretionary. See the holding of Ringera, J in **GLOBAL TOURS & TRAVELS LIMITED; Nairobi HC Winding Up Cause No. 43 of 2000**. He stated:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

7. To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles:

- a) *Whether the applicant has established that he/she has a prima facie arguable appeal.*
- b) *Whether the application was filed expeditiously and*
- c) *Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.*

On the other hand, the substantive law on stay of execution is provided for under **Order 42 rule 6 of the Civil Procedure Rules**. This rule was discussed in **PETER ONDANDE T/A SPREAWETTCHMIS V JOSEPHINE WANGARI KARANJA, [2006] eKLR** where it was held as follows:

“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”

8. From the record, though the appellant/applicant has sought an order for stay of execution, the contents of the supporting affidavit do not support the said prayer. In fact, the applicant overlooked the said prayer and said nothing about it.

9. In the result, prayer 2 of the application is granted. The appeal to be filed within 14 days from the date of this ruling prayers 3 and 4 are disallowed. Costs of the application shall abide the outcome of the appeal.

Dated, signed and delivered at Nairobi this 27th day of April, 2017.

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L. NJUGUNA

JUDGE