



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

MISCELLANEOUS CIVIL APPLICATION NO. 68 OF 2016

AFRICAN MERCHANT ASSURANCE CO. LIMITED.....DEFENDANT/APPLICANT

-VERSUS-

JANET NYOKABI WANJIKU.....PLAINTIFF/RESPONDENT

AND

MISCELLANEOUS CIVIL APPLICATION NO. 69 OF 2016

AFRICAN MERCHANT ASSURANCE CO. LIMITED.....DEFENDANT/APPLICANT

-VERSUS-

HERMAN KIARIE MWAURAPLAINTIFF/RESPONDENT

CONSOLIDATED RULING

1. In the year 2013, **Herman Kiarie Mwaura** and **Janet Nyokabi Wanjiku** sued **Patrick Nyaga Ndabi**, the owner of Motor Vehicle **KAU 445L** in respect of a road traffic accident that occurred on 6/3/2013 along Kenyatta Avenue Naivasha. They sought damages for injuries sustained in the accident. The suits **CMCC No. 757 and 758 of 2013** terminated in the claimants' favour.
2. Subsequently, decrees issued in the claimants' favour remained unsatisfied and the two claimants brought declaratory suits namely, **CMCC 104 of 2016** (by **Janet Nyokabi Wanjiku**) and **CMCC 105 of 2016** (by **Herman Kiarie Mwaura**) against Africa Merchant Insurance Company Limited, the alleged insurers of **Patrick Nyaga Ndabi's** vehicle.
3. The insurers who are the Applicants herein filed defences in both suits, denying liability. Apparently, the Plaintiffs in the declaratory suit successful moved the lower court to strike out the said defences vide the court's ruling of 30th September, 2016. Thereafter the Applicant herein allegedly engaged with the Plaintiffs in the declaratory suits.
4. This was abandoned, allegedly upon the discovery that an amended defence and counter claim that had been filed in the said declaratory suits was not considered in the court's ruling. The said amended defence and counter claim were based upon the alleged realization, that the Applicant was not the insurer of the accident vehicle at the time of the accident. Whereupon, the Applicant allegedly instructed its advocates to abandon efforts at settlement, and to seek leave of the court to file an appeal against the ruling of the lower court. On their part, the Plaintiffs in the declaratory suit commenced execution.

5. The Applicant's Motions filed on 8th November 2016 in High Court Civil Miscellaneous Application No. 69 of 2016 and High Court Civil Miscellaneous Application No. 68 of 2016 both seek leave to file appeal out of time and stay of execution pending appeal. This ruling, in light of the common history and pleadings in the miscellaneous applications before me will apply to the two matters.

6. Eight similar grounds are cited on the face of Motions, and are further expanded in the Supporting and Further affidavits sworn by Grace Njuguna, the Applicant's Legal Officer. The grounds are as follows:

“(a) The Defendant/Applicant’s amended defence in NAIVASHA CMCC 104 of 2016 was struck out in the lower court without its knowledge.

(b) The stipulated (14) days in law within which an appeal ought to be filed have lapsed.

(c) The Applicant has been issued with warrants and proclamation notice and execution may ensue any time now.

(d) If stay of execution is not granted and the Applicant allowed to file appeal out of time, its assets may be sold, and the Applicant is likely to suffer substantial loss.

(e) The Applicant is willing to provide security as the Court may direct.

(f) This application has been brought without any undue delay.

(g) The Respondent is in no position to refund the decretal sum

(h) The Applicant’s intended appeal has high chances of success.”

7. **Herman Kiarie Mwaura** and **Janet Nyokabi Wanjiku** the Respondents herein and successful claimants in the declaratory suits, swore affidavits in opposition to the Motions. The contents of the said Replying affidavits are similar. The gist thereof is that the Applicant was the insurer of the accident vehicle owned by **Patrick Ndabi** the Defendant in the primary suits, and that due notice of the Respondents' claim against him had been served upon it on 11th November 2013. That the Applicant had appointed counsel to represent it in the primary suits wherein a consent on liability was recorded on 9/4/2014.

8. That a subsequent appeal by the Defendant after entry of judgment following assessment of damages was withdrawn. Thereafter, payments were made by the Applicant in part settlement of the decree. The Respondents assert that after the Applicant's defence was struck out, the Applicant did not engage them in a bid to settle the matter. They depone that the Applicant has not satisfactorily explained its delay in bringing the present application, nor justified the orders sought. The Respondents accuse the Applicant of laches and ask that the Motions be dismissed.

9. Parties agreed to dispose of the Motions through written submissions which are similar. Starting with the prayer for leave to appeal out of time, it is argued for the Applicant that the delay involved in this case was not inordinate, and has been adequately explained. The explanation being that the Applicants had no notice of the ruling of the lower court delivered on 30/9/2016 until mid-October, 2016. That the Applicant had engaged with the counsel for the Respondents with a view to a settlement and therefore the Applicant was not at fault and should be allowed to appeal out of time.

10. Citing its amended defences in the declaratory suits, the Applicant asserts that its appeal has high chances of success (see **Joseph Wanjohi -Vs- Benson Maina Kabau [2012] eKLR** and **Mrao Limited -Vs- First Amercan Bank of Kenya Limited & 2 Others [2003] KLR 125**). The Applicant laments that the trial court failed to consider its amended defence and counter claim which raised triable issues.

11. The Applicant contends that if the prayer for extension of time to appeal is denied, it will suffer substantial loss, yet the Respondents will not be prejudiced in any way as they have enjoyed monies

wrongly paid out to them by the Applicant.

12. With regard to the prayer for stay pending execution, the Applicant argues that it will suffer substantial loss as it may not recover the substantial monies paid over to the Respondent (See **Mubia Mathu -Vs- Ibrahim Kariuki Gichuru HCCC 60 of 2001**). That the Applicant has timeously approached the court and is willing to furnish security.

13. For their part, the Respondents counter that the Supporting affidavit is defective on account of discrepancies in the jurat. They rely on Section 5 of the Oaths and Statutory Declaration Act that requires the place and date of the oath be inserted in the jurat. (See **Kasango J in C.M.C. Motors Group Limited -Vs- Bengeria Arap Korir t/a Marben School & Another [2013] eKLR**).

14. On the prayer for leave to appeal out of time, the Respondent cites the provisions of Section 79G of the Civil Procedure Act and the principles enunciated by the Supreme Court in **Nicholas Kiptoo Arap Korir -Vs- Independent Electoral Board Commission & 7 Others [S.C. Application No. 16 of 2014]**.

15. The Respondents argue that no explanation has been given for the Applicants delay. The Respondents cite several decisions to support the proposition that, notwithstanding the merits of an intended appeal, the court may refuse to exercise its discretion in favour of an Applicant who fails to show good and sufficient cause for delay.

16. Asserting that the Applicant's submissions were focused on the merits of the appeal, the Respondents contend that the Applicant failed to demonstrate the conditions in Order 42 Rule 6 (2) of the Civil Procedure Rules in respect of a grant of stay pending appeal. The Respondent s further submit that the ultimate desire of the Applicant is to have the consent judgment in the lower court set aside. They urge that the application should be dismissed to spare them from the Applicant's game of "musical chairs".

17. I have considered the material canvassed before me. The main facts relating to the Motions before me are not in dispute. These include the existence of judgment in favour of the Respondents herein in the primary suits, sand the subsequent filing of declaratory suits against the Applicant by the Respondents as the decree holders in the primary suits. Also not disputed is the fact that the defences filed by the Applicant in the said declaratory suit were struck out, resulting in the entry of judgment against the Applicant.

18. It is evident that in part satisfaction of the decrees in primary suits, the Applicant herein had between September, 2015 and February 2016 paid over to the Respondents' advocate sums in excess of Shs 1,000,000/=, and that, an appeal by the Defendant in respect of judgment in the primary suits had been withdrawn. This was pursuant to a consent recorded by the parties in August 2015 which, *interalia* provided for payment of the decretal sum by instalments. It seems that the declaratory suits were filed in 2016 after the Applicant defaulted.

19. The key prayers in the Motion brought by the Applicant under Order 42 Rule 6 of the Civil Procedure Rules and Section 95 and 3A of the Civil Procedure Acts are:-

"1.;

2.;

3. This Honourable Court be pleased to grant the defendant/applicant unconditional leave to file an appeal out of time.

4. This Honourable Court be pleased to stay execution of the decree in NAIVASHA CMCC 104 of 2016 pending the hearing and determination of the appeal.

5."

20. In this case, the ruling intended to be challenged on appeal was delivered on 30th September 2016. It is not disputed that the Applicant had no notice of the delivery date of ruling. However, there is no evidence that subsequent to learning of the decision, the Applicants advocates engaged with the Respondents' advocates, in a bid to settle the decretal sum. No correspondence to this effect has been attached to the Applicant's affidavit. It would appear that in the said period the Applicants stumbled on the fact that the impugned ruling of the trial court allegedly ignored or overlooked the Amended Defence and Counter Claim filed by the Applicants on 8/6/2016 in the Declaratory suits. Hence ground 3 in the proposed Memorandum of appeal marked as annexure "GM3" and attached to the supporting affidavit.

21. Section 79G of the Civil Procedure Act provides that:

"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 if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. (Underlining supplied)

22. In addition Section 95 of the Civil Procedure Act grants to the court the "*discretion, from time to time, to enlarge*" any time fixed for the doing of any act under the Act. Ditto Order 50 Rule 6 of the Civil Procedure Rules.

23. Thus, as argued by the Respondents, it was incumbent upon the Applicant to satisfy the court that he had good and sufficient cause for not filing the appeal in time, and is deserving of the court's discretion. The explanation given by the Applicant herein was not supported by evidence. Nonetheless having undisputedly learned of the ruling in mid-October, 2016 the Applicants approached this court on 8th November, 2016.

24. Although the Draft Memorandum of appeal is dated 7th November 2016, it may well be that the Applicants snapped into action upon the service of the Notice of Proclamation on 3/11/2016 ["GN4"] in respect of a sum of Shs 2,299, 393.00.

25. I am willing to accept that because the Applicants did not receive notice of the delivery of the ruling on 30th September, 2016 they were disadvantaged. Further that though the delay between mid-October, 2016 and the present application has not been convincingly explained, the delay is not altogether inordinate, in the circumstances of this case. It is true however that, from the previous history of the suits in the lower court as recited by the Respondents, the Applicant has acted in a tardy manner.

26. The Respondents did not attach the **Salat** decision for perusal by this court. The summarized principles stated in submissions are however relevant even though the matter related to an election petition. In **Niazsons (K) Limited -Vs- China Road and Bridge Corporation (Kenya) [2002] eKLR**, the Court of Appeal stated that the court's discretion under Section 79G of the Civil Procedure Act though unfettered, must be exercised judicially considering the length of delay, the explanation for it, and possibly the chances of the appeal succeeding, and the degree of prejudice to the Respondent. (See also **Mwangi -Vs- Kenya Airways Limited [2003] KLR 486.**)

27. As always, the court in exercising its discretion to extend time must bear in mind that "*the primary concern should be to do justice to the parties*" (See **Bagajo -Vs- Christian Children Fund Inc. [2004] 2 KLR 73**). While it would be premature to make a determination on the eventual success of the appeal, on the face of it, the Draft Memorandum of appeal raises several arguable matters. These include the matter raised in ground 3 of the Memorandum which is in the following terms:

"3. The learned magistrate erred in law and fact by failing to consider the amended defence on record in arriving at his decision to strike out, and which raises a triable issue of the fact

that the alleged insured was not under police cover from the Appellant at the time of accident therein.”

28. The Respondents have decrees issued in their favour in 2015 and have also received part payment thereon. I do not believe that they stand to be unduly prejudiced on account of the delay that may result from the appeal. All in all, I am persuaded to exercise my discretion in favour of the Applicant and to grant prayer 3 of the Notice of Motion. The Appellants are to file their appeal within 7 days of today's date.

29. Finally, on the question of the regularity of the affidavits sworn by the Applicant's representative, I agree with submissions of the Respondents, based on a reading of Section 5 of the Oaths and Statutory Declarations Act. However, without evidence being adduced on the question, the impugned jurat is liable to more than one interpretation and conclusion.

30. As **Kasango J** held in **C.M.C. Motors** case, it is possible that the deponent did not take oath before the commissioner of oath stated. Based on the same jurat, it is also possible that in this case, the commissioner, whose stamp shows he is based in Nairobi, administered the oath to the deponent and affixed his stamp at Nakuru. This is not a light matter and the court would be wary of striking out the affidavit of the Applicant based on surmises, therefore. Nothing turns on that matter.

31. Regarding prayer 4, it is my view that 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 court which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given.

32. 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.”

33. 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 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.

34. 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**).

35. I therefore reject prayer 4 of the Notice of Motion as being prematurely brought, and for the avoidance of doubt, that part of the Notice of Motion is deemed as struck out. In the interest of justice however I order that the status quo be maintained during the seven days allowed for the filing of the appeal. All the costs occasioned by the application are awarded to the Respondents in any event.

Delivered and signed at Naivasha this 24th day of May, 2017.

In the presence of:-

Miss Kithinji holding brief for Mr. Karanja for the Applicant

Mr. Obino holding brief for Miss Amboko for the Respondents

Court Assistant - Quinter

C. MEOLI

JUDGE