



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. 132 OF 2017

BON TON LIMITED.....APPLICANT/APPELLANT

VERSUS

BEATRICE KANAGA KERADA *suing as the guardian ad litem*

in the estate of Richard Alembi Ochenga.....RESPONDENT

RULING

By a notice of motion dated 21.6.17 brought under Order 46 rule 6 and Order 50 rule 6 of the Civil Procedure Rules and Section 3A and 79G of the Civil Procedure Act Cap 21 Laws of, the applicant/appellant prays for orders that

- a. That the Honourable Court be pleased to grant a stay of execution of decree in **Kisumu CMCC Case No. 321 Of 2013 Beatrice Kanaga Kerada v Bon Ton Limited** pending the hearing and determination of this application
- b. THAT the Honourable Court be pleased to grant leave to the applicant to file appeal out of time from the judgment and decree in **Kisumu CMCC Case No. 321 Of 2013 Beatrice Kanaga Kerada v Bon Ton Limited**
- c. That the Honourable Court be pleased to grant a stay of execution of decree in **Kisumu CMCC Case No. 321 Of 2013 Beatrice Kanaga Kerada v Bon Ton Limited** pending the lodgment, hearing and determination of the appeal to be filed in the High Court at Kisumu
- d. THAT the Memorandum of Appeal dated 20th March 2017 and filed on 21st March 2017 be deemed as filed and served upon the respondent within the prescribed time
- e. Costs of the application be provided for

The application is based on the grounds among others that:

- a) The applicant intends to lodge an appeal against the judgment delivered on 27.3.17
- b) The delay was due to the fact that the judgment advice letter was not received by the insurer
- c) The applicant is willing to furnish security as the Honourable Curt may order

The application is supported by the affidavit of **M.J.B.Menezes**, advocate for the appellant, sworn on 21st June 2017 in which he reiterates the grounds on the face of the application. Annexed to the

supporting affidavit is a judgment notice dated 28.3.17 marked **MJBM 1** and a draft memorandum of appeal marked **MJBM 1**.

The application is opposed on the basis of grounds of opposition filed on 11.7.17. When the application came up for hearing on 25.7.17; Mr. Mushindi, advocate for the applicant reiterated the grounds on the face of the application and the averments in the supporting affidavit. To this end; he cited **High Court Misc 78/15 Edward Kamau & Anor V Hannah Mukui Gichuki & Anor.**

On the other hand, Mr. Owino, advocate for the respondent submitted that the applicant has not established that it will suffer substantial loss if the orders are not granted and that application has been brought with unreasonable delay. He further submitted that the appeal does not raise triable issues and that it is meant to delay the realization by the respondent of the fruits of her judgment.

I have considered **Mwangi v Kenya Airways Ltd [2003] KLR** where the Court of Appeal cited **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)**, with approval and expressed itself thus:-

“It is now well settled that the decision whether or not to extend the 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; 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”.

Issues for determination

i. Length of delay

The appellant’s advocate states that the delay was due to the fact that the judgment advice letter was not received by the insurer. The judgment that the applicant intends to appeal agisst was delivered on the judgment delivered on 27.3.17. There is no evidence that the judgment notice dated 28.3.17 marked **MJBM 1** was served on the insurer as averred in the supporting affidavit. From the foregoing; I find that the delay has not been explained. I am content to cite the case of **CIVIL APPLICATION NO. NAI 98 OF 2013 AVIATION CARGO SUPPORT LIMITED v ST. MARK FREIGHT SERVICES LIMITED** where G.B.M. KARIUKI, J.A. held:-

“Even where an appeal is meritorious, if the delay is too inordinate and has not been explained at all, leave ought not to be granted to lodge record of appeal out of time. An aspiring appellant ought to be zealous and to take the initiative to comply with the law”.

From the foregoing; I find that the applicant filed this application 3 months after the judgment sought to be appealed against was delivered and is the delay though unexplained is not inordinate.

ii. The chances of appeal succeeding if the application is granted

This court is not in a position to determine if the appeal has chances of success and that is left to the trial court on appeal.

iii. The degree of prejudice to the respondent if the application is granted.

No evidence was presented to prove that the respondent stands to suffer any prejudice if leave to appeal out of time is granted to the appellant. The foregoing notwithstanding, no prejudice would be so great that would not be adequately compensated by an award of costs if leave to appeal out of time was granted. (See **Factory Guards Ltd V Abel Vundi Kitungi [2014]eKLR**).

The overriding objective of the court is to exercise latitude in its interpretation of the law so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring

that deserving litigants are not shut out. Section 3A of the Civil Procedure Act Cap 21 Law of Kenya provides that:

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Consequently and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the applicant.

As a result, the notice of motion dated 21.6.17 is allowed on the following terms:

a. THAT leave be and is hereby granted to appeal out of time against the judgment and decree in Kisumu CMCC Case No. 321 Of 2013 Beatrice Kanaga Kerada v Bon Ton Limited delivered on 27th March 2017

b. The appellant is granted 30 days from today's date to file its appeal

c. That there be stay of execution of judgment and decree in in Kisumu CMCC Case No. 321 Of 2013 Beatrice Kanaga Kerada v Bon Ton Limited delivered on 27th March 2017 pending the hearing and determination of this appeal

d. The applicant shall deposit the entire decretal sum in an interest earning account in the names of both advocate within 45 days from today's date

e. Applicant shall pay to the respondent thrown away costs in the sum of Kshs. 10,000/- within 30 days from today's date.

DATED AND DELIVERED THIS 27TH DAY JULY 2017

T. WANJIKU CHERERE

JUDGE

In the presence of: -

Court Assistant -Felix

For the Appellant - N/A

For the Respondent - Ong'ondi holding brief Olang'o