REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CIVIL APPLICATION NO. 77 OF 2017

JENNIFER NJUGUNA ……...…….. 1ST APPLICANT

DENNIS MBIYU NJUGUNA ……. 2ND APPLICANT

VERSUS

ROBERT KAMITI GICHUHI …….. RESPONDENT

RULING

1. The Applicant seeks orders for enlargement of time to file Memorandum of Appeal out of time as well as a stay of execution of the judgment rendered between the parties in the lower Court. The intended appeal is from a judgment delivered in Kiambu CMCC No. 135 of 2016 on 30/03/2017. The Application is supported by a Supporting Affidavit by Caroline Kimeto, the Head of Legal Department at Britam General Insurance Company, the insurer of the Applicants' motor vehicle which was involved in a road traffic accident which was the subject of the suit in the lower Court.

2. The Application is opposed. In opposition, the Respondent's advocates filed Grounds of Opposition. It lists four grounds of opposition as follows:

a. That the Application is an abuse of the court process.

b. That the Application is an afterthought and is lacking in substance, unnecessary, vexatious and frivolous.

c. That the Application is unattainable in any circumstances.

d. That the Application is only meant to deny the Respondent the fruits of his judgment.

3. The facts are as follows. Judgment in the lower court matter was delivered on 30/03/17. The Applicants' Advocates state, and it is not denied, that judgment was originally scheduled for 23/03/2017 and that no notice was sent for the new date of delivery of the judgment. As a result, they were not present when judgment was delivered. They only got to know about the judgment on 10/04/2017 when their clerk was able to secure a copy of the judgment. Even then, the Applicants' advocates claim, there was confusion about the exact amount due leading to correspondence with the Respondent's lawyers. Consequently, the Applicants' lawyers say that it was only on 06/05/2017 that it became clear how much the decretal sum was due. By that time an appeal was already time-barred.

4. The Applicants approached this Court eleven days later with the present Application.

5. The Application was canvassed by way of written submissions.

6. The two issues for determination is whether the Applicant is entitled to an extension of time and an order for stay of execution.

7. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

> *Every appeal from a subordinate court to 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 of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.*

8. The first point taken up by the Respondent is that the Application is incompetent because the Applicants ought first to have filed a Memorandum of Appeal and then seek for its admission out of time. The claim is that the plain reading of section 79G is to that effect. Further, the Respondent relied on the interpretation to that section given by the High Court in ***Gerald M'Limbine v Joseph Kangangi [2009] eKLR*** and ***Asma Ali Mohamed v Fatime Mwinyi Juma***.

9. I will begin by dealing with this aspect of the Respondent's complaint. I am aware of this line of cases by the High Court on this question. I have, however, taken a different view of the provision. I do not take the phrase "*an appeal may be admitted out of time"* to mandatorily require that a party who is late to file an appeal must first file it and then approach the Court for the filed appeal to be admitted out of time. At best I find such a constrained reading of the statute to be an impermissible raising of a procedural technicality above substance. At worst, that reading of the statute is not in accord with our practice and may be out of place with the "mischief rule" of statutory interpretation in this case. It appears obvious that the intention of the statute was to provide a mechanism for a party who did not, for good cause, file an appeal on time, to approach the Court to be allowed to file such an appeal. To deny such a party leave to file the appeal merely because they did not, first, file the appeal which would have been, in the first place, out of time as a way of preserving their right to approach the Court seems a touch too formalistic for our jurisprudence in this day and age.

10. Having concluded that the Application is not incompetently before the Court, I will now consider the Application on its substance. Our case law has now provided guidelines on what will be considered "good cause" for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

11. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in ***Mwangi v Kenya Airways Ltd [2003] KLR***. They include the following:

a. The period of delay;

b. The reason for the delay;

c. The arguability of the appeal;

d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;

e. The importance of compliance with time limits to the particular litigation or issue; and

f. The effect if any on the administration of justice or public interest if any is involved.

12. I will now consider the Applicants' application for extension of time against these factors.

13. The Respondent complains that this Application is an abuse of the Court process and that the Application is not supported by an affidavit with annextures showing when instructions for appeal were given. He further complains that the affidavit is sworn by a legal officer of an insurance company and not by the Applicants. The Respondent says that this Application is an afterthought.

14. Looking at all the factors in totality, I am unable to agree with the Respondent that this Application is an abuse of the Court's process and has been brought as an afterthought.

First, I note that the Application was brought only seventeen (17) days after time had run out. This can hardly be said to be inordinate under the circumstances. Second, it is not denied that the Applicants were not present when the judgment was given and that it was not due to their fault. Third, there is evidence on record that the parties were corresponding with a view to either determine the exact amount due or whether there would be need for an appeal.

15. Fourth, I am unable to say that the intended appeal is in-arguable, as I will briefly analyse below. Of course, as I state below, all the Applicants have to show at this stage is arguability – not high probability of success. Fifth, I am unable to see any substantial adverse effects granting this order will have on the Respondent other than permitting the Applicants to exercise a preciously cherished right of appeal. Lastly, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in the same sense, for example, that the Constitution and the Elections Act place on the timelines for filing Elections Petitions.

16. Consequently, I will grant prayer 3 in the Applicants' Notice of Motion.

17. I will now turn to the Applicants' prayer for a stay of execution.

18. The Application for stay of judgment is primarily governed by the terms of Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an Applicant in order to be entitled to an order for stay are encapsuled in that Rule in the following terms:

> *6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*
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> *(2) No order for stay of execution shall be made under sub-rule (1) unless—*
>
> > *The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*
> >
> > *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*.

19. The law regarding the grant of stay of execution is well established in Kenya. Among the legion of authoritative cases establishing it, the judges of the Court of Appeal were both concise and emphatic in ***Rhoda Mukuma v John Abuoga***: *It was laid down in* ***M M Butt v The Rent Restriction Tribunal,***

Civil Application No Nai 6 of 1979*, (following* ***Wilson v Church (No 2) (1879) 12 Ch 454 at p 488****) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.*

Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being

> *– (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security*.

20. Hence, under our established jurisprudence, to be successful in an application for stay, Applicants have to satisfy a four-part test. They must demonstrate that:

> a. The appeal they have filed is arguable;
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> b. They are likely to suffer substantial loss unless the order is made. Differently put, they must demonstrate that the appeal will be rendered nugatory if the stay is not granted;
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> c. The application was made without unreasonable delay; and
>
> d. They have given or are willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on them.

21. As I alluded to above, I have perused the Draft Memorandum of Appeal filed in this case. I am unable to say that the grounds of appeal enumerated are in-arguable. As I stated above to earn a stay of execution, one is ***not*** required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard.

22. But what is the substantial loss that the Applicants are likely to suffer if the order is not granted? Here is all the Applicants have said in this regard – and it bears verbatim recitation:

> *"My Lord, in the event that leave to appeal is granted without the corresponding orders for stay of execution, the appeal if successful will be rendered nugatory. This was the Court's finding in* ***Civil Application No. 271 of 2008: Barclays Bank of Kenya v Evans Ondusa Onzere****."*

23. I should begin by explicitly stating that this is not at all what the ***Evans Ondusa Onzere Case*** held. Indeed, that case did not mean to torpedo the established jurisprudence on the grant of stay. It explicitly considered all the factors and came to a reasoned conclusion that in the circumstances of that case, the fear expressed by the Appellant that it will not be able to recoup the decretal amount if it is paid was reasonable.

24. Here, the Applicants have not as much as bothered to express any apprehension at all that they will not be able to recover any decretal sums paid to the Respondent. The assumption – impermissible in our law - that a right of appeal means an automatic stay is, instead, argued. The Applicants did not as much as claim that the Respondent is a man of straw in their Supporting Affidavit. They merely asserted that the appeal will be rendered nugatory. It is true that the legal position in Kenya is that once an Applicant for stay credibly raises the issue of lack of means by a Respondent (judgment-creditor) to refund decretal amounts, the evidential burden is shifted to the Respondent to demonstrate that she has the resources to repay any amounts paid to her.

25. Here, however, the Applicants did ***not*** as much as make the claim in their filed papers. It is not automatic that the Court will assume that a Judgment-Creditor is impecunious once an applicant for stay in a money decree says that his appeal will be rendered nugatory. Indeed, the opposite is the case as demonstrated in ***Kenya Hotel Properties Ltd v Willsden Properties Ltd Civil Application number NAI 322 of 2006*** (UR).

26. It follows that the Applicants have not even attempted to show what substantial loss they would suffer if stay of execution is not granted. They have, therefore, failed to satisfy this mandatory requirement for the grant of stay. Similarly, while the Application was brought without inordinate delay, the Applicants have not as much as offered to demonstrate that they are willing to furnish security for the due performance of any decree which might ultimately be binding on them.

27. It is, therefore, my conclusion that the Applicants have ***not*** demonstrated that there will be substantial loss unless stay is granted. They have also not demonstrated that they are willing to furnish security for the due performance of any decree which might ultimately be binding on them. Consequently, the Applicants have ***not*** met the conditions placed by Order 42 Rule 6.

28. The upshot is that the Application dated 17/05/2017 succeeds in part. In accordance with this ruling, it shall be disposed as follows:

> **a. The Applicants shall file and serve a Memorandum of Appeal within seven days of the date hereof.**
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> **b. The Applicants shall pay the full decretal sum due within thirty days of this ruling failure to which execution shall ensue.**
>
> **c. The Applicants shall file the Record of Appeal within sixty days from the date hereof.**
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> **d. The Applicants shall write to the Deputy Registrar requesting him to place the Appeal before the Judge for directions within fourteen days of the filing of the Record of Appeal.**

29. The costs of this Application will abide by the outcome of the Appeal.

30. Orders accordingly.

Dated and delivered at Kiambu this 20th day of December, 2017.

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JOEL NGUGI

JUDGE