



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC CIVIL APPLICATION 273 OF 2017

PATRICK O. OPETA.....APPLICANT

VERSUS

DANIEL OBIERO AGWANG (suing as the legal administrator

ad-litem of the estate of Sefis Odhiambo Anyumba).....RESPONDENT

RULING

1. By a notice of motion dated 4.12.17 brought under Section 3A, 79G and 95 of the Civil Procedure Rules and Order 42 Rule 6(1) of the Civil Procedure Rules and the applicant pray for orders that:-

1. This matter be certified urgent and service hereof be dispensed with in the first instance
2. This Honourable Court be pleased to grant stay of execution of the decree in **Kisumu CMCC No. 127 of 2015** pending the hearing and determination of this application
3. This Honourable Court be pleased to grant leave to the applicant to file appeal out of time stay of execution of the decree in **Kisumu CMCC No. 127 of 2015** and the draft Memorandum of Appeal annexed hereto be deemed as duly filed upon payment of requisite court fees
4. This Honourable Court be pleased to grant stay of execution of the decree in Kisumu CMCC No. 127 of 2015 pending the filing of the appeal hereto
5. Costs of the application be in the cause

2. The application is based on the grounds among others that:

- a) The applicant was aggrieved by the judgment delivered on 4th July 2017
- b) The applicant intends to file an appeal which is arguable and has overwhelming chances of success
- c) That the delay in filing the appeal was purely inadvertent and is excusable
- d) The applicant is ready and willing to abide by the conditions/terms that this Honourable Court may impose

3. The application is supported by an affidavit sworn on 4th December, 2017 by **Ann Wayamba**, who describes herself as a legal officer of Kenyan Alliance Insurance Company Limited in which she

reiterates the grounds on the face of the application and adds that That the delay in filing the appeal was occasioned by a breakdown of communication between the advocate acting for the applicant in **Kisumu CMCC No. 127 of 2015** and the insurance company. Annexed to the supporting affidavit is a copy of the draft Memorandum of Appeal marked **AW- 1.**

4. The application is opposed on the grounds set out in grounds of opposition filed on 6th December 2017 which state that there is inordinate delay in filing this application and that the applicant does not deserve the discretion of the Court since he has been indolent.

5. When the application came up for mention on 14.12.17; the parties' advocates agreed to argue it by way of oral submissions in which they reiterated the grounds on the application and on the grounds of opposition.

Issue for determination

6. Prayer 1 is already spent. The main issue for determination is whether the applicants ought to be granted a stay of execution of the decree in **Kisumu CMCC No. 127 of 2015** and leave to appeal out of time.

7. The powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered.

8. The parameters for exercise of court's discretion were concisely laid out in the case of **Mwangi v Kenya Airways Ltd[2003] KLR** where the Court of Appeal 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”.

9. In determining this application; I will endeavor to address each of the principles laid down in the above cited case as follows:

i. Length of delay

10. Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which states:-

“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”.

11. The impugned judgment was delivered on delivered on 4th July, 2017 and the applicant had 30 days from the date thereof to file the intended appeal. The present application was filed on 5th December, 2017 which was 4 months outside the time limited for filing an appeal.

ii. Reason for the delay

12. **Ann Wayamba** in her supporting affidavit concedes that there is a delay in filing the appeal and blames it on the breakdown of communication between the advocate acting for the applicant in **Kisumu CMCC No. 127 of 2015** and the insurance company. She does not however explain what the breakdown entailed.

13. And even if the court were to accept the fact that there was breakdown of communication between the advocate acting for the applicant in **Kisumu CMCC No. 127 of 2015** and

the insurance company, there is no explanation when the breakdown ceased and why the applicants did not move the Court soon thereafter.

14. From the foregoing; I find that the applicant has not explained the delay to the satisfaction of the court and is therefore guilty of indolence.

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

15. I have considered the issues raised in the draft memorandum of appeal and I have no doubt that they are triable.

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

16. The applicant states that he is ready and willing to abide by the conditions/terms that this Honourable Court may impose. The decree can be secured and the respondent is therefore unlikely to suffer prejudice if this application is granted.

17. Although I have found the applicant guilty of unexplained unreasonable delay; 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.

18. 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”.

19. 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 applicants.

a. ***The applicant is granted 14 days from today’s date to file the intended appeal***

b. ***The applicant is granted a stay of execution of the decree in Kisumu CMCC No. 127 of 2015 on condition that he provides an insurance guarantee or bank guarantee for the total decretal sum within 30 days from today’s date***

c. ***In the alternative to (b), the applicant is ordered to pay the total decretal sum in an interest earning account in the names of both advocates within 30 days from today’s date***

d. ***In default of (a) and (b) above, execution shall issue***

e. ***Costs shall be in the cause***

DATED AND DELIVERED THIS 19th DAY OF December, 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Applicant - N/A

Respondent

- Mr Mushindi/Ken Omollo