



**Aloona Company Limited v Mwanza (Miscellaneous Application
333 of 2015) [2016] KEHC 8792 (KLR) (Civ) (27 April 2016) (Ruling)**

Aloona Company Limited v Musili Mwanza [2016] eKLR

Neutral citation: [2016] KEHC 8792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS APPLICATION 333 OF 2015

A MBOGHOLI-MSAGHA, J

APRIL 27, 2016

BETWEEN

ALOONA COMPANY LIMITED APPLICANT

AND

MUSILI MWANZA RESPONDENT

RULING

1. The applicant herein was the defendant in the lower court while the respondent was the plaintiff. On 30th April, 2015 the lower court gave judgment in favour of the respondent in the sum of Kshs. 350,000/= general damages, Kshs. 1,500/= special damages plus costs and interests. The applicant was aggrieved by the said judgment and in a step towards lodging an appeal, applied for a copy of the judgment on 12th June, 2015. It will be noted that as at the time of applying for a copy of the judgment, the time reserved for lodging an appeal had already expired.
2. There is now before me an application by way of Notice of Motion under Order 50 Rule 6, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Act*, for orders that time to file memorandum of appeal be enlarged and the applicant be allowed to file the appeal out of time. There is also a prayer that there be a stay of execution of the judgment of the lower court pending the hearing and determination of the appeal.
3. The application is supported by an affidavit sworn by the legal officer of the applicant to which a replying affidavit has been filed by the respondent. There is also a supplementary affidavit filed by the legal officer of the applicant aforesaid. Both counsel for the parties have filed written submissions to address the application.



4. I have considered all the material before me with a view to arriving at a just decision in this application. The orders sought are to be granted at the discretion of the court while ensuring that justice is done to both parties. The judgment of the lower court is said to have been delivered in the absence of the parties, but it has not been disputed that the parties had notice of the date of the delivery of the said judgment.
5. The applicant's position is that it shall suffer irreparable loss if the orders sought are not granted, as there is no guarantee that if the decree is executed and the appeal subsequently succeeds, the respondent will be in a position to refund the money so paid. It is also its case that the delay in lodging the appeal was occasioned by late receipt of the copy of the judgment of the lower court.
6. On the other hand the respondent submits that no prejudice has been demonstrated on the part of the applicant; on the contrary it is the respondent who will suffer prejudice if the application is allowed.
7. Under Order 42 Rule 6 (2) no order for stay of execution shall be made 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.
8. There is no evidence of intentional laxity on the part of the applicant. This is confirmed by the supporting and supplementary affidavit on record. Soon after the knowledge on its part of the delivery of the judgment of the lower court, a letter dated 12th June, 2015 was dispatched asking for a copy of the judgment.
9. The court notified the applicant's counsel that the proceedings were ready vide a letter dated 22nd July, 2015 and this application was filed on 29th July, 2015. This confirms that the application was made without unreasonable delay.
10. A party who has a judgment in his favour should not be denied the fruits of his judgment for the mere reason that he has not demonstrated capacity or the ability to refund the money if the appeal eventually succeeds. However, that is a factor that should always be considered and each case depends on its own facts. In the instant case the respondent had the opportunity to counter that allegation by showing that he is not a person of straw.
11. On the other hand, the applicant has offered to post security by depositing the entire sum in an interest earning account to protect the interest of both parties. I am inclined to allow the application to file the appeal out of time. The appeal shall be filed within 30 days of today.
12. There shall also be a stay of execution for a period of 30 days and in the meantime the applicant shall cause the decretal sum to be deposited in an interest earning account in the names of both counsel within the said period.
13. The costs of this application shall be in the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2016.

A. MBOGHOLI MSAGHA

JUDGE

