



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO, 145 OF 2012

GRANATA ERNESTO SUING AS ATTORNEY

OF DENISE GRANATA PLAINTIFF/RESPONDENT

VERSUS

INVESCO ASSURANCE COMPANY

LIMITED..... ..DEFENDANT/APPLICANT

RULING

The applicant through its notice of motion application dated 22.9.2015, brought under Section 1 A, 3A and 63 (e) of the Civil Procedure Act and Order 22 Rule 22 (1), Order 42 rule 6 (1) and Order 51 rule (1) is seeking orders for stay of execution pending its intended appeal and enlargement of time within which to file the appeal, stay of execution pending the intended appeal, enlargement of time within which to file the appeal and leave to file the notice; of appeal out of time. The application is supported by the affidavit of Susan Kilei sworn on the same date.

The application is predicated upon grounds and supported by the affidavit of the applicant's branch manager stating as follows: That the suit was defended and heard. Subsequently, judgement was reserved but it was to be delivered on notice as the trial Judge, C. Meoli, J, had by then transferred to a different station. The applicant did not receive the said Notice and only learnt about the delivery of the judgement upon service of the decree and notice of intention to proceed with execution of the decree by the respondent. The applicant's advocates upon perusal of the court file established that judgement was delivered on 9.7.2015 and the decree was issued on 22.7.2015. There was also a notice to this effect in the court file but they were not served with it. The applicant's advocates would have, as the deponent averred, made the requisite applications had they been present at the time of delivery of the judgement.

The applicant being aggrieved by the judgement is intending to appeal against the judgement. However time in which an appeal should have been lodged has already lapsed. Furthermore, there is looming danger of execution and the decretal sum is colossal it being in tune of Kshs.4,648,024.00 plus costs and interest tipping to a figure of Kshs.7,003,926.61. Hence the prayers for stay of execution pending the intended appeal, enlargement of time within which to file the appeal and leave to file it out of time are being sought. They aver that they have an arguable appeal and it is in the interest of justice that the application be allowed. Finally the applicant states that they would be willing to abide by the conditions of this court towards "expediently concluding the matter."

The respondent in response filed a replying affidavit sworn by Mr. Kazungu Lughanje advocate on

28.10.2015. The affidavit was deposed by her advocate on record. He confirmed that the matter was defended and heard, the trial Judge went on transfer and judgement was to be on notice. That they then received the said notice of delivery of judgement dated 19.7.2015 via ordinary mail. It was his averment that the applicant's advocates must have also received the same and chose not to appear before court.

The respondent is not opposing the prayer for enlargement of time within which to file the intended appeal and leave to file out of time stating that appeal is a constitutional right. However, the stay of execution is opposed. That it would only be fair and just if the execution was to proceed; so that the respondent tastes the fruit of the judgement having instituted the suit in year 2012 and continues to suffer loss as she has not been compensated. She based the averment on the maxim justice delayed is justice denied.

Parties agreed to determine the application by way of written submissions. The applicant submitted that the respondent has acquiesced to leave to file appeal out of time being granted to the applicant. They submit that under Section 79G of the Civil Procedure Act and Order 51 Rule 6 of the Civil Procedure Rule time within which to file an appeal may be enlarged. They urged that Order 51 Rule 6 is par material with Rule 4 of the Court of appeal rules and rule 53 of the Supreme Court rules in their reliance on the Supreme Court Case of NICHOLAS KIPTOO ARAP KORIR SALAT V INDEPENDENT ELECTORAL BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR. The Supreme Court approved the Court of Appeal finding in PAUL WANJOHI MATHENGE V DUNCAN GICHANE MATHENGE [1013] eKLR where it was held that extension of time is based on principles of equity and is discretionary. That that discretion is unfettered save that it must be exercised judicially. That the factors to be considered included but are not limited to other judicial pronouncements, the period and reason for the delay, the degree of prejudice the respondent and interested parties would suffer if application is allowed, chances of the appeal succeeding if application is allowed.

The applicant submitted that they were served on 15.9.2015 with the notice of intention to proceed with the execution and moved the court on 22.9.2015 hence the delay was reasonable. They also state that the appeal is arguable and is not frivolous as it raises weight points of law.

On the issue of stay of execution pending appeal, the applicant relies on the finding of Ringera, J (as he then was) in GLOBAL TOURS AND TRAVELS LIMITED, Nairobi Winding Up Cause No. 43 of 200 (unreported) for the point that judicial discretion must be exercised in the interest of justice and it must be factored in the exercise of the same the expeditiously.

The applicant submitted that Order 42 Rule 6 (2) of the Civil Procedure Rules sets out the conditions for stay of execution and buttress this point with the Court of Appeal finding in KENYA SHELL LTD V KIBIRU [1986] eKLR, 410 where it was held that the conditions were substantial loss to be suffered if stay of execution is not granted, whether or not the application was brought without unreasonable delay and furnishing of security. The applicant is apprehensive that as the decretal amount is colossal, the respondent may not refund as they have not shown their capacity to repay, the respondent is unaware of any assets she might possess. The applicant relies on the case of COAST ACCIDENT & GENERAL INVESTIGATION LTD & ANOTHER V NAZERALI HASSANALI & 7 OTHERS [2013] eKLR where it was held that the burden to prove capacity to refund lay with the decree holder. It is submitted that the applicant was willing to furnish security. The applicant filed a list of authorities which include the following that were not referred to in the submissions: EDITH GICHUGU KIONE V STEPHEN NJAGI THOITHI [2014] eKLR, HON. JOHN NJOROGE MICHUKI & ANOTHER V KENTAZUNGA HARDWARE LIMITED [1998] eKLR, ROBERT NJUGUNA KAMAU V KIRIKA KAMUGU [2015] eKLR, WAMBUGU, MOTENDE 7 CO. ADVOCATES V KAJULU HOLDINGS LIMITED K& 3 OTHERS [2015] eKLR.

On her part, the respondent submitted that the notice of delivery of judgement was sent via ordinary post which they received. She submitted that the time to file the appeal be enlarged and leave be granted to file the appeal, however, the stay ought not to be granted. She submitted that the applicant had made an offer to settle but there was no meeting of minds on the same and since judgement the respondent has not received a cent. Further, the applicant did not allude that the respondent was a lady of straw and cannot

refund the' money. She reemphasized that justice delayed is justice denied.

The issues for determination is whether the court should enlarge the time for filing of the intended appeal, and whether execution should be stayed.

Firstly, both parties have submitted on the proper position of the law that is the prayers for stay of execution pending appeal and that of enlargement of time and leave to file the intended appeal are discretionary. In exercising this unfettered discretion, the court is bound to do so judicially. On the issue of whether or not time ought to be enlarged and leave be granted for filing of the intended appeal, the respondent has no qualms with the prayer being allowed but the court is duty bound to consider the prayer all the same. The Supreme Court in the NICHOLAS KIPTOO ARAP KORIR SALAT case (supra) did find that "time is a crucial component in dispensation of justice hence the maxim: Justice delayed is justice denied. It is a litigant's legitimate expectation where they seek justice that the same will be dispensed timeously".

The Supreme Court in the afore stated case adopted the Court of Appeal finding of PAUL WANJOHI MATHENGE case (supra) where it was held that extension of time is based on principles of equity and is discretionary. That that discretion is unfettered save that it must be exercised judicially. That, that the factors to be considered included but are not limited to other judicial pronouncements on the same, the period and reason for the delay, the degree of prejudice the respondent and interested parties would suffer if application is allowed, chances of the appeal succeeding if application is allowed.

The Court of Appeal in HON. JOHN NJOROGE MICHUKI case (supra) adapted the finding in the full reference in Civil application o. NAT 356 of 1996 where it was held that discretion of the court to extend time in which to lodge an appeal was unfettered and "...was only subject to it being, granted on terms as the court may think just. Within this context, this court has on several occasions granted extension for time on the basis that the intended appeal is an arguable one and it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstance inexcusable and his opponent was prejudiced by it."

An arguable appeal is not one that must succeed. An arguable appeal can subsequently be dismissed. Since the appeal will be determined by another court, all what is required is for this court to be satisfied that at least the appeal raises some issues, either legal or factual, that needs to be dealt with by the higher court. The dispute herein involves an indemnity insurance contract. The respondent was awarded some money by the court as a result of her house having been gutted by fire on 7.10.2011.

In NICHOLAS KIPKORIR case (supra), it was held that the applicant must lay a basis to show that they were not at fault in causing the delay and in WAMBUGU case (supra) the Court of Appeal held in referring to its finding in WAWERU & ANOTHER V KIRORI [2003] eKLR that the explanation offered must be to the satisfaction of the court. I am satisfied about the explanation offered, in that the notice may not have been received as intended. It is obvious that the respondent collected a copy from court and it is therefore possible that the notice was never sent out to the applicant: an error, if on the court's part, is highly regrettable as the court has a duty as per Section 1 A and IB of the Civil Procedure Act to see to the expeditious disposed of suits and such applications are time consuming. Even if it were the error of the applicant in failing to put its house in order, the delay is only for approximately two and a half months and not unreasonable. I would allow the' prayer for extension of time and leave to file the appeal out of time. This is not say that the applicants would have gone scott-free had it been their fault, the burden for compensation of costs to the respondents would have been place on them. See HON. JOHN NOORGE MICHUKI case (supra).

It ought also to be pointed out the provision of the law relied upon by the applicant that is Section 76G of the Civil Procedure Act relates to appeals to the High Court from a subordinate court and this is not the case here. However, the provisions are relevant in such applications.

As for the issue of stay of execution pending appeal, I am guided by the findings aforementioned in GLOBAL TOURS AND TRAVELS case and KENYA SHELL LTD case where it was held that factors

to be considered were: substantial loss, the 'arguability' of the intended appeal, whether or not the application was brought expeditiously furnishing of the security and the expeditious disposal of matters. In HALAI & ANOTHER V THORNTON & TURPIN (1963) Ltd [1990] KLR 365 the Court of Appeal had this to say -

"The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay."

The law under Order 42 Rule 6 (2) of the Civil Procedure Rules provides that:

"No order for stay of execution shall be made under sub-rule (1) unless

(a) 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

(b) 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.

The intended appeal assesses the 'arguability' test and the application has been brought expeditiously under the circumstances. What of substantial loss? In KENYA SHELL LIMITED V KIBIRU [1986] KLR 410 Piatt, Ag. JA (as he then was) at page 416 expressed himself as follows:-

"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event.

Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."

The decretal amount is in the tune of over Kshs.4 million and the total figure inclusive of costs claimed by the respondent is over Kshs.7 million. Though the applicant has not expressly offered to furnish security in the application, they have averred that they would abide with any conditions given by this court. In any case the law is clear that security must be furnished. The respondent on the other hand has not demonstrated their capacity to repay the said sum of money if the appeal were to succeed.

The burden of proof of capability to repay lies on the decree-holder. Mary Kasango, J in allowing an application for stay pending appeal in KENYA ORIENT INSURANCE CO. LTD V MOHAMED 1)1 LO DIM alias MOH'D OMAR DIMA & 2 OTHERS [2013] eKLR found that the appellant may suffer substantial loss if stay is not granted as the respondents failed to state how, if the appeal was successful they would repay appellant.

The KENYA ORIENT case above is similar to this case in that the respondent though opposes this prayer has not played her part. She opposes by stating that there was an offer on the table that was unacceptable to them and has since judgement not received a cent and that the applicant had not alluded that she could not repay the sum if need arises. The settlement offer was not addressed in the replying affidavit and I would as a result have no bearing on the matter at hand. The figure is colossal and even if the respondent would be able to reimburse, she has not demonstrated her capacity to do so. See the COAST ACCIDENT & GENERAL INVESTIGATION LTD case (supra). I would on this point alone state that substantial loss is a likelihood.

The dispute involves an insurance contract of indemnity. The respondent's house was burnt way back in October 2011. In their letter dated 19.12.2011, the applicant offered to pay Kshs.2,794,111.00 as compensation to the respondent. All this time the respondent has not benefited from the policy. The

applicant is willing to provide security. I do find that it is prudent to ask the applicant to provide security while it pursues its appeal. I do find that a sum of Kenya shillings three million (Kshs.3,000,000/=) is a fair amount to be deposited in a joint account of counsels for both parties or in court.

In the end, the application dated 22.9.2015 is allowed in the following terms:-

1. Leave to file an appeal out of time is hereby granted to the applicant.
2. The applicant to file and serve the Notice of Appeal within fourteen (14) days hereof.
3. Execution of the decree of this court issued on 24.7.2015 is hereby stayed pending the filing, hearing and determination of the intended Appeal.
4. The applicant to deposit a sum of Kenya shillings three Million (Kshs.3,000,000.00) in a joint account of counsels for both parties or in court within sixty (60)days hereof.
5. Should the applicant fail to deposit the sum of Kenya shillings three million as herein ordered, execution for the entire decretal sum shall issue.
6. Costs shall follow the outcome of the Appeal

Dated and delivered in Malindi this 8th day of June, 2016.

S.J. CHITEMBWE

JUDGE