



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NUMBER 445 OF 2013

GATEWAY INSURANCE CO. LTD. APPELLANT

VERSUS

EDWARD KINUTHIA GITONYE..... RESPONDENT

R U L I N G

1. This is an application by the Respondent in this Appeal for the release to him a sum of KShs.2 million deposited in Court in H.C. Misc. Application No. 780 of 2013. The application is expressed to be brought, inter alia, under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act.
2. The grounds for the application are that the Appellant has failed to comply with the Court's ruling that this Appeal be heard in the year 2014; that the record of appeal has not been served; and that the Applicant has been kept away from the fruits of his judgment in this suit that has been pending for 13 years now.
3. In his Supporting Affidavit, the Applicant swore that final judgment in his favour was made in June, 2013; that upon proclaiming the Appellant's goods, the Appellant filed H.C. Misc. Civil Appeal No. 780 of 2013 and obtained extension of time to file an appeal against that decree; that a temporary stay of execution was granted on condition that the Appellant deposits in Court Kshs.2 million. That there was a further condition that the Appellant was to ensure that the Appeal is heard within the year 2014. That to-date, no Record of Appeal has been filed and served as ordered by the Court that granted the said stay.
4. Mr. Mwangi, Learned Counsel for the Respondent/Applicant submitted that this was a claim that was lodged in 2002; that the execution in the lower court was halted by the disappearance of the court file; that apart from a letter dated 6th March, 2014 from the lower court and advising that the lower court file was being sought, there was nothing the Appellant had produced to show that it was doing anything to comply with the order made in Misc. Application No. 780 of 2013 in February, 2014. Counsel urged that the application be allowed.
5. The application was opposed vide a Replying Affidavit of Judith Onyango sworn on 11th March, 2015; she swore that the lower court file went missing and she had been informed that efforts were being made to trace the same; that the loss of that court file had been reported to the police who were carrying out investigations; that there was hope that the file would be found and an appeal be lodged. She deponed that the Respondent/Applicant had had the lower court file reconstructed and she prayed for more time to

file the appeal.

6. Mr. Asiyo, Learned Counsel for the Appellant/Respondent reiterated his client's sentiments and submitted that by the Applicant applying for the reconstruction of the lower court file in April, 2014, it was a clear admission that there were problems in having to file and prosecute an appeal. That the mistake was not on the part of the Appellant and that the application should therefore be dismissed.

7. In its ruling of 20th February, 2014, this Court delivered itself thus:-

“I therefore allow the applicants’ application for stay of execution pending appeal. The sum of Kshs.2 million deposited in Court shall be held as security for the due performance of the decree or order. The applicant to ensure that the appeal is heard within the year 2014.”

8. In arriving at the above conclusion, the court had found that the Appellant had made out a case for substantial loss and that the Respondent would not be able to refund the decretal sum if paid over and the appeal succeeded. In giving the orders of stay, the Court attached the condition that the appeal be prosecuted within the year 2014. The court did not attach any automatic default clause to that condition. It left it to the parties to take action if the condition was not met.

9. It is not in dispute that the Appellant has failed to meet the condition set by the Court. That is why the Applicant has lodged the present application. The reason advanced by the Appellant for failure to comply is that the lower court file went missing and it has not been found. That as a result of the said loss, the Appellant could not comply with the order of prosecuting the appeal within the year 2014. The Appellant produced an application made by the Respondent to reconstruct the lower court record and a letter by the lower court confirming the unavailability of the court file.

10. I think there is an answer to these two issues. The letter by the lower court was written on 6th March, 2014. In that letter, it was indicated that the court file had not been traced but investigations were still continuing. That was approximately sixteen (16) days after the ruling of Ougo J of 20th February, 2014. Is that the position obtaining seven (7) or eight (8) months later, say in December, 2014 by which time the appeal should have been heard? There is no evidence to explain that fact.

11. As regards the Applicant's Motion dated 10th April, 2014 to reconstruct the court file, that shows that it is the Applicant who had been pro-active. This court would have expected that it is the Appellant who should have made that application. Be that as it may, it was made by the Applicant to make matters easier for the Appellant. What did the Appellant do after that?

12. In paragraph 6 of the Replying Affidavit, the Appellant admits that the application for the reconstruction of the court file was allowed. However, the deponent of that Replying Affidavit does not say when that application was allowed or after it was allowed, what steps the Appellant had taken to prepare and lodge an appeal.

13. As at now, there is nothing on record to show what efforts the Appellant has made between the 20th February, 2014 and December, 2014 or even February, 2015 to comply with the order of the Court as to the hearing of the Appeal. There is even no application to vary the orders of 20th February, 2014 to extend those orders. As it stands, the Appellant is in breach of that order. Orders are made to be complied with. Courts do not act in vain.

14. In this regard, there being no satisfactory explanation for the failure to comply with that order, I am satisfied that the application is meritorious and the same is hereby allowed as prayed.

DATED, Signed and Delivered at Nairobi this 26th day of March, 2015.

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A MABEYA

JUDGE