



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL NAIROBI)
MISC. APPL NO. 780 OF 2013

GATEWAY INSURANCE COMPANY LIMITED.....APPLICANT

VERSUS

EDWARD KINUTHIA GATONYE RESPONDENT

RULING

On the 2/8/13 the applicant filed a notice of motion dated the 2nd of August 2013 under Order 42 rule 6 (2), Order 50 rule 6, Section 3A, 79G and 95 of the Civil Procedure Rule and Sections 3A, and 63 (e) of the Civil Procedure Act Law of Kenya seeking the following orders;

1. Spent
2. That the court do issue an order staying execution of the decree and subsequent order in CMCC No. 8676 of 2002 Milimani Commercial Courts, Nairobi pending the hearing and determination of the application and the appeal.
3. That the court be pleased to enlarge time and grant leave to the applicant to file and serve a memorandum of appeal arising from the said judgment out of time in terms of the draft memorandum of appeal annexed thereto.
4. That the court do allow the defendant to provide security for due performance of the decree by way of depositing an Insurance Bond or a letter of undertaking in court.
5. That the courts do grant any other or further order as it deems necessary in the circumstances in the interest of justice.
6. That cost of this application be provided for.

The application is based on six grounds stated on the face of the application.

The application is supported by the affidavit of Lillian Munyiri a legal office of the plaintiff's company. The application was opposed a replying affidavit dated the 12/8/13 sworn by the respondent was filed in court on the 12th August, 2013

The background to this application is that the respondent sued the applicant in CMCC 8676/02. The case was heard and a judgment was delivered on the 26th June 2013. The defendant now wishes to appeal against the said judgment.

The applicant in its affidavit deponed by its legal officer avers that on being informed of the judgment they requested for a typed copy so as to make a decision as whether to give instruction to appeal; that the typed judgment was availed on the 26th July 2013 and they were able to give instructions to the advocates now acting for them on the 29/7/13; that the delay to file the appeal was not deliberate but was caused by the reasons stated; that they are willing to deposit an insurance bond on a letter of undertaking as security; that they have a good and arguable appeal and should not be stuck out on the basis of a technically.

In the respondent's replying affidavit he states that the application is bad in law, fatally defective and an abuse of the court process for failure to comply with the rules of procedure; that the applicant has never been keen in having the matter finalised; that several adjournments the applicant never brought a witness from the insurance company to support the allegations in the defence and the court had to close the case on the 26/2/13; that the typed judgment of Hon. Nditika was delivered on the 27/6/13 and on that date the applicant was given 30 days stay of execution; that a copy of the typed judgment was available on the date the judgment was delivered; that the applicant does not have an arguable appeal with any chances of success as they failed to prove on the allegations that the respondent had no insurable interest; that the respondent is a man of means and is capable of refunding the decretal amount in the event the appeal was to even succeed and that the applicant's request to offer an insurance bond should be rejected as it is attempting to ran away from its obligations under the policy of insurance; that the applicant has not show any substantial loss it stands to suffer by honouring its obligations under the policy of insurance; that the respondent has waited for 11 years to realise the benefits of the insurance policy through the court judgment and he should be allowed to enjoy the fruit of the judgment.

On the 27/11/13 when the matter was heard inter partes Mr. Itonga for the applicant reiterated what is deposed by the applicant's legal officer. He informed the court that the applicant has already deposited Kshs.2 million in court and that if the court looks at the respondent's bank statements attached to his affidavit the court will note that the Respondent will not be able to recover the said sum from him. For this argument counsel relied on the case of ***Mpaka Road Development Limited vs. Bharat Rach & Alias Sailesh Rach & another (2005) eKLR***. He submitted further that the respondent has not indicated the business he does and the bank statements attached are not certified copies from the bank; that the respondent will suffer no prejudice now that the entire decretal sum is in court.

Mr. Mwangi for the respondent reiterated what is deponed to in the respondent's affidavit. He submitted further that after the application got a 30 days stay, the application for extension of time was fixed on the 2/8/13 way after the period had lapsed and therefore the application is an afterthought; that there is no application attached to show that they are seeking typing of the proceedings to facilitate the appeal; that from the letter dated 18th September, 2013 which is in the court record it is apparent that the lower Court file could not be traced; that they have a bank statement that shows the turnover of the respondent which is not controverted, thus the respondent is capable of paying.

In reply Mr. Itonga stated that the lower court filed can be reconstructed and on substantial loss it will not be easy for the applicant to recover the money.

I have considered what has been deponed in the affidavits together with the oral submissions in court and the cases cited. The applicant relied on 2 cases namely; ***Mpaka Road Development Limited Vs. Bharat Rach & Alias Sailesh Rach & Another (2005) eKLR*** and the case of ***Baiba Dhidha Mjidho .vs. Van Leer East Africa Limited (Greif (K) Limited (A business of Greif Bros Co-op) (2006) eKLR***. The Respondent filed a list of authorities of 3 cases namely; ***Radio Africa Limited .vs. Lingam Enterprises & Others. HCCC No. 597 of 2008 (unreported)***. ***Francis Gikonyo Mwangi vs. Peaktop Bureau De Change. HCCC No. 197 of 2009 (unreported)*** and ***Tabitha Wangeci Nderiutu .vs. Suraj Plaza Limited & Others. HCCC No. 414 of 2003 (unreported)***.

In determining this application and guided by the provisions of Order 42 rule 6 (2), Order 50 rule 6, Section 3A, 79G and 95 which I have read.

It has been deponed that the application is bad in law, I do not agree with the respondent. I do note that the applicant did not cite Order 42 rule 6 (2), that does not make the application bad in law or defective,

the applicant is cushioned by the provisions of Article 159 (2) (d) of the Constitution on this omission, further the respondent failed to show how the application is bad in law, fatally defective or an abuse of the court process.

The first issue is to determine whether the applicant has demonstrated that it deserves the order to enlarge time and be granted leave to it to file and serve the memorandum of appeal out of time. The provisions of Section 79G provide that;

“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”.

The judgment the subject of the intended appeal was delivered on the 27th of June 2013. The applicant states that they sought to have a copy of the judgment which they received on the 27th of July 2013, way after the 30 days provided in law, that instructed their lawyer on the 29th of July 2013 and the application was filed on the 2nd of August 2013. It is obvious that the applicant moved to court after the 30 days stay period. Is the reason given good or persuasive to move this court to exercise its discretion in their favour? I have not had the benefit of reading the proceedings of the lower court to establish the applicant’s conduct in the matter, that shall be determined at the hearing of the appeal if I grant the order sought. The proviso in section 79G provides 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. The applicant’s reason is that it could not get a copy of the judgment hence the delay, this could be true, and thus I will take the applicant’s word. The Respondent did not exhibit the judgment he obtained from the court on the date the judgment was read to show that the applicant was not telling the truth in the matter.

Section 95 provides that:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired”.

I recognise that the suit in the lower court is an old one of year 2002, that justice must be done to both sides, however no prejudice shall be caused to the respondent if the order is granted, I find that sufficient cause has been shown by the applicant for this court to enlarge the time to file the memorandum of appeal. I therefore grant prayer 3 as follows; that the applicant is granted leave to file and serve the memorandum of appeal arising from the judgment of 26th June 2013 within 15 days from the date of this ruling; in default the Respondent shall be at liberty to seek release of the decretal sum to him.

On the issue of stay of execution, the applicant is required to demonstrate that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay. The application was filed on the 26th of August 2013 after they got the copy of judgment, the delay was not inordinate. On substantial loss the applicant argues that it might be able to recover the decretal sum. I note that the applicant has deposited Kshs. 2 million as security. The Respondent claims that he is a man of means and that he is capable of refunding the amount. I have looked at the uncertified statements attached of the Respondent’s account at Equity Bank and note that they show transactions for the month of June 2013; I therefore cannot establish how financial stable the respondent is. There was a submission from the bar that he owns many vehicles. With what is before me I cannot say for certain that the respondent will be able to refund the amount of Kshs. 2 million if he succeeds in the appeal. I therefore find that the applicant has made out a good case for substantial loss. I therefore allow the applicant’s 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 such decree or order. The applicant to ensure

that the appeal is heard within the year 2014. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 20th day of February 2014.

R.E. OUGO

JUDGE

In the presence of:

.....For the Applicant

.....For the Respondent

.....Court Clerk