REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 23 OF 2013

DIRECTLINE ASSURANCE COMPANY LTD.....APPLICANT

VERSUS

SALIMA SALIM HASSAN …..... RESPONDENT

RULING

The application by way of a Notice of Motion dated 25th February, 2013 brought under order 42 rules 6, order 50 rule 6 order 51 rules 1 and 3 of the Civil Procedures.

Seeks the following orders;

1. Spent
2. Spent
3. That the Court do order a stay of execution in Chief Magistrate's Civil Case number 2508 of 2011 Salima Salim Hassan –Vs- Directline Assurance Company Ltd. pending the hearing and determination of the Applicants Appeal.

Secondly, that the Court do grant leave to appeal out of time against the ruling of Honourable Ekhubi (Resident Magistrate) In Chief magistrate's Civil Case number 2508 of 2011 delivered on 11th October, 2012.

The grounds are that:-

(a) Judgment was delivered on 11th October, 2012.

(b) Fourteen (14) days within which the appeal was to be lodged lapsed.

(c) The applicants advocate in inadvertently failed to file a memorandum of appeal within fourteen (14) days which the appeal ought to have been filed.

(d) No prejudice would be suffered if the proposed appellant was granted leave to file appeal out of time as any damages or loss would be capable of compensation by way of costs.

(e) Unless the application is allowed the appeal would be rendered nugatory.

(f) That the applicant has a good and arguable appeal with high chances of success.

The application is supported by the affidavit of Stella Mbuli Counsel for the applicant.

The application is opposed on grounds to be found on the replying affidavit of Salima Salim Hassan.

The brief facts are that a ruling was delivered in Chief Magistrate's Civil Case number 2508 of 2011 striking out the appellants defence on 11th October, 2012 by Honourable Ekhubi (RM). Subsequently, the appellant filed a Miscellaneous Application number 347 of 2012 seeking to appeal the said ruling.

It is the appellants contention that they later discovered that High Court Miscellaneous Application number 347 of 2012 had a memorandum of appeal which had not been filed and that failure to file it on time was a honest mistake and an oversight on the part of the appellants Advocate and the mistake of counsel should not be visited on the client.

The appellants contention is that they have an arguable appeal with high chances of success.

Further that the first application was brought without delay in that it was filed in Court on 16th October, 2012 and ruling delivered on 11th October, 2012 a duration of four (4) days only and this was before it was withdrawn on 25th February, 2013.

In support of the application the Appellants rely on the ***Case of Lesiolo Ltd. -Vs- Samuel Ngange Civil Application number Nairobi 30 of 1991*** where the Court of Appeal proceeded to grant orders of stay pending hearing and determination of the intended appeal.

It is further contended by the appellants that if the application is not granted the appellants will suffer irreparable damage as they would not be able to recover the whole sum. The appeal would be rendered nugatory. That no prejudice would be occasioned on the Respondents as any damages or loss would be compensated by way of costs and the appeal has high chances of success.

On the issue of leave sought to extend time to file appeal, it is contended that the reason for the delay was that the Advocate failed to ensure that the memorandum of appeal had been filed. The applicants also rely on the case of ***Tobbaco (K) Ltd. -Vs- British American Tobacco (K) Ltd*** where the Court of Appeal held that,

> ***"If adequate explanation for the delay is given then a party ought not to be shut out from exercising its statutory right to appeal".***

Counsel for the Respondent in his submissions contends that the applicant was guilty of unreasonable delay in that the ruling was delivered on 11th October, 2012 and the application was filed on 25th February, 2014 which is a period of 4 ½ months.

That the Miscellaneous Application number 347 of 2012 which was filed on 16th October, 2012 sought only the order for stay and that it was mentioned for hearing severally before it was withdrawn on 25th February, 2013 and further that the Respondents reply to that application filed on 3rd December, 2012 she had indicated that no appeal had been filed by then. It is the Respondents contention that no reason has been given as to why it took 4 months to file appeal by the applicant.

The Respondent relies on the Case of ***Doctor Joseph Chege –Vs- Peter Kiarii Njuguna & another eKLR*** where the Court held that a delay of 2 months was substantial.

Further that in the Case of ***Gichana Gahuku –Vs- David Komu & 3 Others 2007 eKLR*** it was held,

> ***"that the period of delay and the reason for the delay were grounds to be considered …. inaction by Counsel does not qualify as an excusable mistake of Counsel which would normally be visited upon a client. As there is no explanation therefore, there is no basis for exercise of discretion".***

It is submitted that the legal position that a client should not be penalized for mistake of Counsel no longer holds. Counsel relies on the Case of ***Rajesh Rughani –Vs- Fifty Investments Ltd. & Another (2005) eKLR*** where the Court of Appeal held,

> ***"It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not an excusable mistake which the Court may consider with some sympathy".***

He also relies on the Case of ***Bains Construction Co. Ltd. -Vs- Jogn Mzare Ogowe 2011 eKLR*** where the Court had this to observe,

> ***"It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is visited with authority to perform some duties and does not perform as principal and does not perform it, surely such principal should bear the consequences".***

The prayers sought in this application as earlier argued are two.

(a) Leave to file appeal out of time

(b) A stay pending appeal.

On the issue of leave to file appeal out of time it is noted that the ruling subject of the intended appeal was delivered on 11th October, 2012. The application seeking leave to file the appeal out of time was filed on 25th February, 2013. Simple calculation will show that this was a span of 4 months and a half.

The reason given by the applicant is that it had filed an earlier application Misc. Application number 347 of 2012 on 16th October, 2012. A perusal of the same shows that orders sought were for a stay but not for leave to file appeal out of time.

At paragraph 9 of the affidavit in support of the application which was sworn on 25th February, 2013 it deponed,

> ***"On 25th February, 2013, it is deponed "on 15th October, 2012 we prepared an application and annexed a draft of the memorandum of appeal and had it fixed vide High Court Misc. number 347 of 2012 only for us to later discover that the memo of appeal had not been filed when time had already lapsed".***

An attempt has not been properly made to explain why there was a lapse of 4½ months and what were the circumstance occasioning the lapse. Whose mistake was it and when was it discovered.

At paragraph 11 of the same supporting affidavit of the applicant it is deponed that the inadvertent delay in filing the memorandum of appeal by the applicants Advocates was regretted and the applicant had nothing to do with it and the applicant should not be penalized for the mistake of Counsel.

I am in agreement with the submission by Counsel for the Respondent that the legal position on the above has been discounted by the Court of appeal and no longer holds.

In the Case of ***Rajesh Rughani –Vs- Fifty Investment Ltd. & Another (2005) eKLR*** the Court of Appeal held,

> ***"It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy".***

The applicant cannot hide behind the inaction of its Advocate . I find that the delay of 4 ½ months

was inordinate and it has not been sufficiently explained.

Order 42 rule 6 (1) provides,

> ***"No appeal or second appeal shall operate as a stay of a decree of execution or proceedings under a decree or order appealed from ……..***
>
> ***(2) No order for stay of execution shall be made under subrule (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".***

In the Court of Appeal Case of ***Kenya Shell Ltd. -Vs- Kibiru & Karuge 1988 /KAR 1018*** it was held,

> ***" .. 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 cornerstone of both jurisdictions for granting stay … That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the Judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right".***
>
> ***In the same case substantial loss was said to be one … either in the mater of paying damages awarded which would cause difficulty to the applicant itself or because it would lose its money if payment was made since the Respondents would be unable to repay the decretal sum plus costs".***

In the present case it has not been established or argued that the Respondent is a woman or man of straw who will not be able to refund the decretal amount to the applicants in the event the appeal if any succeeds. The Decretal sum in question is the amount of Ks. 235,220/= which amount is not astronomical and hence being not repayable by the Respondent.

Judgment in this matter was entered on 21st October, 2011. It remains valid as it has not been set aside or settled.

The Court has already found that there was inordinate delay in filing this application. It would not be justifiable to deny the Respondent the fruits of her Judgment for no fault of her own.

The application has no merit and its dismissed with costs.

Ruling delivered dated and signed in open Court this **19th** day of **June, 2014.**

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M. MUYA

JUDGE

19 TH JUNE, 2014

In the presence of:-

Mrs. Mwaserwa holding brief Oloo for the applicant

Kanyi J for Respondent Absent

M. MUYA

JUDGE

Court: Furnish copies of the Judgment to the parties.

….....

M. MUYA

JUDGE

19TH JUNE, 2014