REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. 621 OF 2014

FACTORY GUARDS LIMITED.....APPLICANT

VERSUS

ABEL VUNDI KITUNGI.....RESPONDENT

R U L I N G

Before me a is a notice of motion application dated 16th September 2014, by Factory Guards Ltd seeking the following orders:

i) Spent

ii) Spent

iii) Leave be granted to the applicant to file an appeal out of time from the judgment and decree in Milimani CMCC No. 3931 of 2011. Abel Vundu Kitungi – Vs – Factory Guards Limited.

iv) That there be stay of execution of decree in Milimani CMCC No. 3931 of 2011 pending the hearing and determination of the intended appeal

v) ...

vi) ...

vii) ...

The application is supported by the affidavit of Paul Kamba legal officer APA Insurance Co. Ltd sworn on 16th September 2014 and on the grounds that judgment was delivered on 24th July 2014 by the subordinate court against the applicants in favour of the respondent and that the delay in filing the appeal is not inordinate, was caused by an administrative mix-up in the applicant/insurer's officers who issued instructions to the applicant's advocates to appeal after the period for filing of the appeal had lapsed.

It is further contended that the applicant is aggrieved by the said judgment and desires to appeal against the same and that regrettably the advocates on receipt of instructions to file an appeal lodged an application for extension of time for appeal in the court that issued decree which court had no jurisdiction to entertain the same and had to withdraw the said application.

Further, that the applicant will be gravely prejudiced if the application herein, which also seeks for stay of execution pending appeal is not granted and that they are willing to abide by any conditions as to security for the decretal sum. It is further deposed that if the stay is not granted, the applicant stands to suffer substantial loss as the respondent who is not gainfully employed will not be in a position to reimburse the decretal sum in the event that the appeal as intended succeeds and that it is in the interest of justice that the application be allowed.

The respondent Abel Vundu Kitungi opposes the application on both limbs. His advocate Erick John Mutemi has sworn an affidavit opposing the said on 22nd September 2014 contending that the application is an abuse of the court process and that as there is no appeal filed, the purported annexed memorandum of appeal is unfiled.

He also accuses the applicant of filing a similar application in the lower court. He also avers that stay can only be granted where there is an appeal filed and that there are no good and sufficient grounds for filing the appeal out of time.

He further deposes that this being a monetary decree, the non-existent appeal cannot be rendered nugatory by the payment of the decretal sum. He also charges that the application is frivolous, vexatious and scandalous, incompetent, bad in law and a flagrant abuse of court process and that the purported appeal lacks merit.

The parties agreed and filed and exchanged written submissions to dispose of the application. The applicant filed theirs on 8th October 2014 whereas the respondent filed his on 22nd October 2014.

Both submissions echo the rival contentions in the respective affidavits.

What is striking about this application and the submissions in support and against it is that both parties deliberately chose not to attach any pleadings of the lower court to provide a background to the cause of action giving rise to the alleged judgment that is sought to be challenged, assuming the proceedings and judgment have not been typed and certified.

That notwithstanding, both parties have heavily engaged in procedural technicalities to attack each other's pleadings/affidavits before this court, which issue I will first deal with before going into the merits or otherwise of the application herein. And the first issue is whether the respondent's replying affidavit filed on 22nd September 2014 is sustainable in law. It is contended by the applicant that the affidavit sworn by Erick J. Mutemi is in contravention of the rules of procedure and the principle that advocates should not enter into the arena by swearing affidavits on contentious matters of fact. It is further contended that the advocate has therefore made himself a viable witness for cross examination in the case which he is handling merely as an agent which is irregular, citing the case of **Simon Isaac Ngugi – Vs – Overseas Courier Services (K) Ltd (1998) eKLR** and **HCC No. 3504 of 1993 Kisya Investments Ltd & Others – Vs – Kenya Finance Corporation Ltd** where it was held that:

> ***"... it is not competent for a party's advocate to depose to evidentiary facts at any stage of the suit."***

Counsel for the applicant further referred to Rule 9 of the Advocates Practice Rules which prohibit advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. It is submitted that the subject replying affidavit creates a legal muddle with untold consequences and hence the same should be struck out in the interest of justice and equity.

In response, the respondent's advocate has dismissed the applicant's attack on his affidavit as a diversionary tactic as the said affidavit only raises issues of law and fact which were within his knowledge having been the advocate handling the suit on behalf of the respondent until judgment hence he was knowledgeable about the issues therein.

I have considered the said replying affidavit and the rival submissions on its tenability on record. I find absolutely nothing irregular with that affidavit of Erick J. Mutemi advocate that would persuade me to strike it out. The objection to the said affidavit, in my view is an uncalled for venture by the applicant's counsel and must be dismissed for the following reasons:

1) That the applicant has not pointed out which of the 13 paragraphs of the said replying affidavit offends the law or rules of procedure. An affidavit cannot be unsustainable by mere allegations. He who alleges bears the burden of proving the fact alleged as espoused in Section 107 of the Evidence Act.

2) There is no law that bars an advocate from swearing an affidavit in a client's cause, on matters which he as an advocate has personal knowledge of.

3) Order 19 rule 3 o f the Civil Procedure Rules provide that:

"3 (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. It has not been shown that the said affidavit of Erick J. Mutemi offends the best rule evidence as per Order 19 rule 3(1) above.

4) In addition, it has not been shown which of the matters contained in the said affidavit would require the deponent to be cross examined on under Order 19 rule 2 of the Civil Procedure Rules (and not Order 18 rule 2 as submitted) thereby offending Rule 9 of the Advocates (Practice Rules) and or which of the matters deposed qualify as being scandalous, irrelevant or oppressive to warrant being struck off under Order 19 rule 6 of the Civil Procedure Rules.

5) Neither has it been alleged that the affidavit contains arguments thereby being technically unsound. The mere fact that the affidavit was sworn by an advocate does not render it incurably defective.

6) This being an application in an appeal, the advocate in my view, is competent enough to swear an affidavit in support of his client's cause as matters pertaining to an application for leave to file an appeal out of time under Section 79G of the Civil Procedure Act are matters of law and supported by facts which are within the advocate's personal knowledge, to rebut the grounds or depositions contained in the applicant's propositions, having handled his client's cause from its inception to date.

7) The same applies to the prayer for stay of execution, which is governed by Order 42 rule 6 of the Civil Procedure Rules.

The applicant's advocate in his submissions relies heavily on the cases of **Simon Isaac Ngui – Vs – Overseas Courier Services Ltd [1998] eKLR** and **Kisya Investment Ltd & Others – Vs – Kenya Finance Corporation Ltd** where the court stated;-

> ***"...The applicant's counsel has deponed to contested maters of fact and said that the same are true and within his own***

knowledge, information and belief. It is not competent for a party's advocate to depone to evidentially facts at any stage of the suit."

And that,

"By deposing to such matters the advocate courts an adversarial intention to step from his priviledged position at the bar into the witness box. He is liable to be cross examined on his deposition. It is impossible and unseemingly for an advocate to discharge his duty to the court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case."

I agree with the principle espoused in the above authority which echo Rule 9 of the Advocates Practice Rules. However, as I have stated, each case has to be considered on its own circumstances and merit. And even if I was wrong in holding as above, this court is enjoined to do substantive justice for the parties and as was held in **Kenya Commercial Finance Co. Ltd – Vs – Richard Akuesera Onditi (A) 329/2009**, the Court of Appeal was emphatic that:-

"In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out. In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court provisions of Sections 3A and 3B of the Appellate Jurisdiction Act. The court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the court has wide powers and will not automatically strike out proceedings. The court, before striking out, will look at the available alternatives."

I fully associate myself with the above principles and add that the courts, now when faced with the same scenario as was in the **KCF case (Supra)**, are enjoined to give effect to the overriding objective in the exercise of powers under the Act or in the interpretation of its provisions which, under Sections 1A and 1B of the Civil Procedure Act include:

1) Just determination of the proceedings

2) Efficient disposal of the disputes before it

3) The efficient use of available judicial and administrative resources, and the timely disposal of the proceedings, and at a cost affordable to the respective parties.

Similarly, in **Stephen Boro Gitiha – Vs – Family Finance Building Society & 3 Others CA 363/2009**, the Court of Appeal held inter alia:

"The overriding objective overshadows all technicalities precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible."

I hasten to add that in this case, all the information contained in the impugned affidavit is before the court in records and it has not been demonstrated that even if the advocate was to be cross examined on it, he could not prove all facts contained in it.

In **Kamlesh M.A. Pattni – Vs – Nasir Ibrahim Ali & 2 Others CA 354/2004**, the Court of Appeal in dealing with a serious objection on the admissibility of an affidavit sworn by Senior Counsel P. Muite held inter alia:

"... There is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client, so too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information..."

In the foregoing premises, the objection taken on the replying affidavit sworn by the respondent's counsel in opposition to the applicant's application herein cannot be sustained and I accordingly disallow it.

I now delve into the arena of the merits and or demerits of the application before me.

The first limb raises the issue of whether the applicant has satisfied this court on the condition for granting extension of time within which the intended appeal should be filed.

The applicable law to extending time for filing of appeals is Section 79G of the Civil Procedure Act which provides:

"Every appeal from a subordinate court on the High court shall be filed within a period of 30 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 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."

The Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat – Vs – IEBC & 7 Others (2014) eKLR** laid down 7 principles for extension of time for filing an appeal, while acknowledging that the discretion to extend time is unfettered, and that it is incumbent upon the applicant to sufficiently explain the reasons for the delay if any, in making the application for extension of time, and whether are exterminating circumstances that can enable court to exercise its discretion in favour of the applicant. The principles are that:-

1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3) Whether the court should exercise the discretion to extend, is a consideration to be made on a case to case basis;

4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

5) Whether there will be any prejudice suffered by the respondent if the extension is granted;

6) Whether the application has been brought without undue delay; and

7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

Section 79G of the Civil Procedure Act no doubt contemplates a situation where a party had a right of appeal but did not exercise such right within the stipulated time and therefore must seek leave extending such period for filing of an appeal. There is not a requirement that an appeal must be filed before leave is sought to extend the time or validate it hence the respondent's submission that no appeal has been filed lacks any legal basis.

And as to whether the application was filed without unreasonable delay, I note that the judgement in the lower court was delivered on 24th July 2014 but the applicant did not file the appeal in time because instructions had to be sought from the instructing client insurer which caused the delay due to what they call *"administrative mix-up."*

When such instructions were given, the time for filing the appeal had elapsed and leave had to be sought but unfortunately, the application was filed in the lower court instead of the High Court, which application had to be withdrawn for want of jurisdiction. Finally, an appropriate application herein was lodged on 17th September 2014, a delay of 37 days.

In my view, the delay is not inordinate or unreasonable. Furthermore, the applicant has sufficiently explained the reasons for the delay which this court accepts. In **HCCA 169/2013 Esther Wanjiru – Vs – Jackline Arege** where there was a delay of 35 weeks to file an appeal challenging a ruling, the court held that that delay was not unreasonable. In addition, I see no prejudice and as none has been exhibited, that is likely to be occasioned to the respondent if leave to appeal is granted.

The policy for this court is to apply the principle of the rule of law and exercise latitude in its interpretation of the rules so as to facilitate just determination of disputes on merit and thus facilitate access to justice for all by ensuring that deserving litigants are not shut out of the judgment seat.

A party who wishes to challenge the decision of the subordinate court before this court should not be prohibited by a delay which delay is explained and is not unreasonable. For those reasons, I grant the applicant leave to file an appeal out of the stipulated period as prayed. Such appeal shall be lodged within 14 days from the date of this ruling in default, the leave so granted shall lapse without more.

I hasten to add that Order 50 rule 6 of the Civil Procedure Rules as cited does not apply in these circumstances where the period to appeal is fixed by statute. Order 50 Rule 6 only refers to situations where a limited time has been fixed for doing any act or taking any proceedings under the Rules or by summary notice or by order of the court, and not by statute and in this case, Section 79G of the Civil Procedure Act, whose proviso is relevant.

Turning to the issue of whether the applicant has satisfied the conditions for grant of stay of execution pending the filing, hearing and determination of the intended appeal, the applicable law is Order 42 Rule 6 of the Civil Procedure Rules which enact that:

"42 Rule 6 (1)

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay should have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application and to make such order thereon as it may seem just, and any person aggrieved by an order of stay made by the court from whose decision the apepal is preferred may apply to the appellate court to have such order set aside.

(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 an 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 burden of proving that substantial loss may result if the order of stay is refused lies on the party who alleges. In **Halsbury's Laws of England Vol. 17 Paragraph 14**, echoing our Section 107 of the Evidence Act, it was stated:

> ***"The incidence of the legal burden ... in respect of a particular allegation, the burden lies upon the part for whom the substantiation of the particular allegation is an essential of his case."***

Further in **Feisal Amin Jan Mohammed T/a Dunyia Forwarders – Vs – Shami Trading Co. Ltd (2014)**, it was held that a stay of execution order is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made, and that the application was made without unreasonable delay and that the applicant has offered proper security.

In this case, which is a monetary decree, the applicant deposes that it is apprehensive that if execution of decree is levied, the appeal if successful will be rendered nugatory as it will not be possible to recover the decretal sum from the respondent whose financial status is not known. It is therefore upon the applicant to prove that if paid out, the Sh. 380,641/- will not be recompensated on the appeal being successful, not merely because the respondent's financial status is unknown.

The respondent has gone through a legal process to obtain a regular judgment. It would be unfair to deny him the fruits of his lawfully obtained judgment merely because his financial status is unknown. The law contemplates equality of all persons before the law, and prohibits discrimination on any of the grounds, among others, stated in Article 27 of the Constitution. Furthermore, Article 159 of the Constitution obliges the courts in the exercise be guided by the principle that justice shall be done to all irrespective of status. It would therefore be discriminatory for this court to imagine that in the absence of proof of income by the respondent, then he should be denied the fruits of his lawfully obtained judgment.

This court will therefore employ a balancing act between the two equal rights where the applicant has a right of appeal whereas the respondent has a right to enjoy the fruits of his lawfully obtained judgment without being discriminated upon for being of unknown financial status. It is a delicate balance but this court, guided by precedents, is able to make a decision to balance out the two rights, and I will revert to it later.

The applicant has already fulfilled the condition of offering proper security by depositing in court the whole decretal sum of Sh. 380,641/-. On whether the application was made without unreasonable delay, I have already found that the delay has been sufficiently explained and to my mind, such delay of 37 days is not inordinate in the circumstances.

The respondent has attacked the delay as being unreasonable and that according to him the defendant is not the intended appellant as the instructions to appeal seem to be emanating from APA Insurance Company. With utmost respect to counsel for the respondent, he appears to capitalize on procedural technicalities to attack the opponent rather than on substantive justice. It is not disputed that APA was the defendant insurers and it cannot at this stage be construed that they have no role to play in the proceedings which is common knowledge that they would be asked to settle decree, against the defendant who took out an insurance cover for its employees against any risk of injury and loss. In any event, it is trite law that where the defendant would be unable to pay the decretal sum, the respondent would be entitled to sue the insurance company seeking for declaratory judgment to enforce the decree passed.

The respondent cannot, therefore purport to deny the role of the insurance company in these proceedings as it is an affected party with an interest and can exercise an unfettered right to challenge the decree or judgment passed against its insured. In any event, the law does not put restrictions to parties to appeals. It does not state that only parties to the original suit can lodge appeals. In my view, any party who is aggrieved by the decision of the court may lodge an appeal to challenge the decision. Consequently, the submission that the applicant's insurer's legal officer had no business to swear an affidavit explaining the delay has no legal basis as it would be expected that upon judgment being delivered against the applicant, it should timeously notify its insurance company to settle the same or advise that an appeal be lodged. Accordingly, the submission by the respondent on that issue is baseless and dismissed.

Returning back to the issue of balancing out the rights of both parties – the right to appeal and the right to enjoy the fruits of his lawfully obtained judgment unimpeded, I find that as it has not been demonstrated that substantial loss shall be suffered if the decretal sum is paid out to the respondent or that the appeal as intended if successful shall be rendered nugatory, and as there is no reason why the decree holder/respondent should be kept away from the whole judgment and decree, I order that the respondent shall be paid ½ of the decretal sum deposited in court on 18th November 2014. The balance thereof being half, to be released to both advocates for the parties on record, to be held in a joint interest earning account in a bank of their choice until the determination of the intended appeal and the court giving the green light on its disposal.

In the end, I grant the application herein in the following terms:

1) Leave to file appeal out of time within 14 days from the date of this ruling.

2) Stay of execution granted conditional upon the applicant paying half of the decretal sum to the respondent. As the said sums are held by the court, the court to effect this order as appropriate within 14 days from the date of this ruling.

3) Balance of half of the decretal sum to be deposited in a joint interest earning account to be opened and held by both advocates for the parties until the intended appeal is heard and determined or until the court gives appropriate green light on its disposal.

4) The costs of this application shall be borne by the applicant in any event and in the intended appeal.

Dated, signed and delivered at Nairobi this 16th day of December 2014.

R.E. ABURILI

JUDGE