



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS APPLICATION 82 OF 2010

AFRICAN LINE TRANSPORT COMPANY LTD.....APPLICANT

VERSUS

ADAN MOHAMED MURSAL.....RESPONDENT

RULING

1. This is a Notice of Motion application brought by the Applicant under Order 50 Rule 6, Order 51 Rule 1 of Civil Procedure Rules and Sections 79 (a), 95, 1A and 3A of the Civil Procedure Act. The Applicant seeks orders that:

“3. That this Honourable court be pleased to order a stay of the execution of the Judgment and Decree issued on 16th June, 2011 in CMCC 970 of 2005

4 This Honourable court do grant the Applicant African Line Transport Company Limited leave to file an appeal out of time in respect of the Judgment delivered on 16th June, 2011 in CMM in Number 970 of 2005 Adan Mohamed Mursal –vs- African Line Transport Company Limited and Abdulkarim Alli Bamragha T/A A.A. Bamragha Transporters.

5 The draft Memorandum of Appeal be deemed as duly filed and served.”

2 The application is grounded on the alleged facts that:

- a) The Applicant was unaware of the date of judgment; and therefore
- b) Unable to file an appeal within time.
- c) It is in the interest of justice that the Applicant be allowed to file his appeal out of time.

3. The application is supported by the affidavit of Mohamed Raji Mohamed an officer in the Claims Department of the applicant. He depones that the lower court read its judgment one year and seven months after it had indicated it would do so; that they discovered the delivery of judgment in September, 2011 when Tip Top Auctioneers proclaimed the Applicant’s goods. Thus, they wish to file an appeal out of time against the said judgment; and that in the intervening period, execution of the judgment should be stayed.

4. The Respondent has filed a Replying Affidavit deponed on 27th February, 2012. He says that: the Applicant filed an application for and obtained stay orders against the third party on 27th September, 2011 in the lower court, but did not seek enlargement of time to file an appeal out of time; that his lawyers sent a letter on 13th October, 2011 notifying the Applicant of the judgment; that the Applicant allowed five

and a half months to lapse from the time of being notified of the entry of judgment and should have filed this application then, the Respondent also filed a list of four authorities.

5. Counsel for Applicant filed a further Affidavit in which he states that after becoming aware of the judgment of the lower court they had to get instructions, which they received from the Applicant's insurers on 14th February, 2012 and acted immediately thereon; and that they have a good appeal as the Applicant has been saddled with unnecessary costs due to an erroneous estimate of damages. Counsel also filed a list of authorities.

6. At the hearing. Mr. Mlandi represented the Applicant and the Respondent was represented by Mr. Wafula. Counsel essentially made arguments in line with the depositions in the affidavits filed by the parties and the grounds thereof. In addition, Mr. Wafula argued that the present application is *res judicata* having been argued and disposed off before the lower court.

7. I have carefully considered the parties' submissions and all documents before me in respect of the application. The first issue is whether this application is *res judicata*, as alleged by the Respondent. To fit the description, the prior determined action or, in this case, prior application in the lower court must relate to the same parties and the same subject matter, that is, "***there must be identity of cause of action, of persons and of parties to action.***" I have looked at the prior application in the lower court annexed in the Respondents affidavit. As argued by the Applicant, the parties are not the same. In the lower court there were two defendants and only stay of execution was sought, unlike in the present application. I therefore, hold that *res judicata* cannot apply. I have seen the case of **Kanorero River Farm Limited and 3 Others vs National Bank of Kenya Limited** [2002] 2 KLR but the differences in the parties herein distinguish this case from the **Kanorero** case.

8. The second issue is whether stay of execution should be granted. There is currently an interim order for stay. The conditions on which it was granted were fulfilled by the Applicant. Further, the courts are usually ready to grant stay in circumstances where there is an appeal, which may be rendered nugatory if stay is not granted. See **Consolidated Marine vs Nampija and Another, Civil Appeal Number 93 of 1989**. In this case, although the appeal has not been filed, the decretal amount has been deposited in court. The draft memorandum of appeal shows that there is a good basis for appeal and that if the stay is not granted the decretal amount will be paid to the estate of the deceased who is the respondent herein. I am therefore, inclined to grant the prayer for stay.

9. On the issue of enlargement of time, I consider that the lower court's rendering of the judgment without notification to the parties highly irregular. This is especially so given that the Judgment was delivered 1 year and 7 months late on 16th June, 2011, so that, as deponed by the Respondent, by the time they were notifying the Applicant, time for filing the appeal had long run out. Order 50 Rule 6 empowers the court to enlarge time. It provides as follows:

"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

In **Francis Gicharu Kariuki vs Peter Njoroge Maina(Personal Representative of Deceased Maria Wangari)** Civil Appeal (Nairobi) Number 77 of 2002, the Court of Appeal held that where the explanation for seeking to file an appeal ten years out of time was plausible, as in that case, the court could, and did, enlarge the time. I am satisfied as to the Applicant's explanation for the delay, but have noted the Respondent concurs that the Applicant is filing his application in piecemeal.

10. I will therefore order as follows:

- (a) The Applicant shall file and serve its Notice of Appeal within (10) days from the date hereof, and
- (b) The Applicant shall lodge and serve his record of appeal within 21 days from the date of filing of the notice of appeal.
- (c) Given that the record of appeal and proceedings have not been produced, one extension of time shall be permitted to the Applicant, provided that the Applicant will have shown that it has acted with all deliberate diligence and expedition.
- (d) Thereafter, if there is default, the orders herein shall lapse and the monies held in court shall automatically be paid over the Respondent.

The Applicant shall bear the costs of this application.

Orders accordingly.

SIGNED BY:

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R.M. MWONGO
JUDGE

Read in open court on this.....30th day ofApril.....2012
(BY HON. JUSTICE JOHN MWERA)

Coram:

- 1. Judge: Hon. John Mwera
- 2. Court clerk: T. Furaha

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d).....