



REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Application 66 of 2012

LOCHAB BROTHERS LIMITED APPLICANT

VERSUS

DAVID SHIKUTWA KHAZALALI RESPONDENT

RULING

The Notice of Motion dated 5th September 2012 is brought under Sections 1A, 1B, 3A and 79G of the Civil Procedure Act, Order 50 Rule 6 and Order 51 of the Civil Procedure Rules and Rule 3 (2) of the High Court (Practice and Direction) Rules. The Applicant seeks two main prayers; that it be granted leave to file appeal out of time and that there be a stay of Judgment and execution of the decree in **ELDORET CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 30 OF 2012**. It is based on grounds that:-

1. The Applicant wishes to appeal against the whole Judgment in **ELDORET CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 30 OF 2012**.
2. The Appeal is meritorious.
3. The application has been brought to Court timeously.
4. Reasons for delay in filing appeal are reasonable.
5. Respondents are unlikely to be prejudiced if orders are granted; and
6. It is in the interest of justice that the orders sought be granted.

It is further supported by the affidavit of Omollo H. Aseso Advocate sworn on 5th September, 2012 and a Further Affidavit also sworn on 15th November, 2012.

The deponent who is Counsel for the Applicant depones that he was aware that Judgment in the Subordinate Court case was delivered on 13th July 2012 and on 19th July, 2012 informed his client of the outcome of the same.

Subsequently on 27th July, 2012 he was given instructions to appeal against the Judgment. But as fate has it, he became indisposed until 14th August, 2012. That therefore his mistake should not be visited upon his client and that no prejudice will be suffered by the Respondent if orders sought are granted.

The application is opposed vide a Replying affidavit sworn by the Respondent on 7th September, 2012. He depones that application lacks merits as no prove was provided of indisposition of Mr. Aseso

Advocate, that the application was filed after expiration of time within which an appeal should be filed, that the instructing client all along wanted to settle the decretal sum, that the applicant has not satisfied the provisions of Order 42 Rule 6 of the Civil Procedure Rules, that the appeal has low chance of success and in any event, Mr. Aseo should have instructed another Lawyer to take up his brief as the law firm in which he works has other Lawyers.

In the Further Affidavit, Mr. Aseo Advocate depones that he visited an optical clinic where he made orders for eye spectacles which took sixteen (16) days to process and that the bill of costs was assessed long after instructions to appeal had been received from his clients.

Both parties were represented at the time of hearing this application and they made oral submissions. I have carefully considered the submissions and I take the following view:-

Order 50 Rule 6 must be read alongside provisions of Section 79G of the CPA. The former gives power to the Court to enlarge time to do an act or take proceedings on such terms as the justice of the case may dictate. The latter provides that such time may be enlarged as long as the Court is satisfied with the reasons given for not filing the appeal on time. It reads:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty (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 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 satisfied the court that he had good and sufficient cause for not filing the appeal in time.”

In the instant case Counsel for the Applicant (Appellant) concedes that he was aware that Judgment was delivered on 13th July, 2012 and he informed his client on 19th July, 2012 which was six (6) days after delivery of the Judgment. He depones that eight (8) days after 19th July, 2012 that is on the 27th July, 2012 he was instructed to appeal. But as fate has it he became indisposed on 30th July, 2012; the indisposition being that his reading glasses broke which incapacitated him to read and so prepare and file an appeal on time. He further depones that it was not until 14th August, 2012 when he collected a new pair of eye glasses that he would be able to act on the instruction. Effectively, the reason why the appeal was not filed on time was the indisposition of the Counsel on record for the Applicant. My onerous duty is to assess the veracity of this contention and find whether it is a good enough reason to allow the application in the interest of justice.

Annexed to the supporting affidavit is annexure OHA.1 being an email dated 20th July, 2012 from the instructing client of the Applicant, the Kenindia Insurance to the Advocates of the Applicants acknowledging receipt of an email dated 19th July, 2012 from its Advocates informing it of the outcome of the Judgment. In the same email, Kenindia Insurance requests for relevant documents that would enable it process the Judgment. Annexure OHA.2 is an email from the deponent to the instructing client Kenindia Insurance outlining the terms of the Judgment. Annexure OHA.3 is an invoice order dated 6th August, 2012 and receipt dated 14th August, 2012 for and in payment for the deponent's eye glasses.

Annexed to the Further Affidavit also sworn by the Applicant's Advocate Mr. Omollo H. Aseo is an email dated 27th July, 2012 marked OHA.2 from Kenindia Insurance instructing the law firm of Nyaundi Tuiyott & Company Advocates in which Mr. Aseo Advocate works to file an appeal as a matter of urgency. Annexure OHA.3 to the Further Affidavit is a letter dated 17th September, 2012 from Baus Optical which states that indeed Mr. Aseo Advocate had ordered for eye glasses from them and that he is myopic, a condition in which the patient cannot use a computer and do paper work without corrective glasses.

It is thus clear that instructions to the law firm of M/s. Nyaundi Tuiyott & Company Advocates were given to them slightly over two weeks before time to file the appeal expired as provided by the law. Unfortunately, Mr. Aseo Advocate fell

ill during this period within which the appeal would have been filed. He has clearly demonstrated that indeed he was indisposed and the reasons for his indisposition leave no doubt in my mind that he would not have undertaken to prepare documentations necessary for filing of the appeal.

Counsel for the Respondent has argued that Mr. Aseo is not the only Counsel in the law firm of M/s. Nyaundi Tuiyott & Co. Advocates. That is the position but Mr. Aseo clearly explained that he was personally seized of the conduct of the matter. I do agree with him as the email correspondences referred to herein above from Kenindia Insurance Company are addressed to his attention.

Respondent's Counsel has also argued that the application lacks merit in that Kenindia Insurance company was willing to settle the Judgment sum as evidenced by annexure OHA.1 attached to the Supporting Affidavit. That is also factual. However such intimation to settle was given before the Insurance Company had received the terms of the Judgment. Those terms were conveyed to the Insurance Company vide the email dated 27th July, 2012 and on the same date it wrote the email marked OHA.2 annexed to the Further Affidavit giving the instructions to Mr. Aseo to file an appeal on grounds that the award was too high and not commensurate with the injuries the Respondent had suffered. As such I find no contradiction with the instructions given to Mr. Aseo. Indeed they are systematic with information disclosed to it (Insurance Company) by its Counsel. Hence the previous indication of settlement of the Judgment sum would not bar the Applicant to appeal as long as it felt aggrieved by the results of the Judgment subsequent to conceding to settle the same.

The Respondent's Counsel too has argued that the Applicant has not complied with Order 42 Rule 6 of the Civil Procedure rules. I need not go into what this rule provides, save to say that it operates when an appeal has already been filed. In this case no appeal exists and so any order of stay of execution granted would be governed by any other provisions of the law.

In the premises I am not persuaded to believe that Mr. Aseo feigned illness, and even if he did, my view is that matters of illness should be approached cautiously. I would give him the benefit of doubts and uphold that the appeal could not be filed on time due to his illness. In this regard I rightly agree with him that his indisposition should not visited against his client.

In **LUCIA MWETHYA T/A KALEBRAN ENTERPRISES -VS- NAIROBI BOTTLERS LIMITED & 3 OTHERS (2012) E KLR**, the Court declined to strike out pleadings on the basis that at the time of filing the plaint Counsel for the Plaintiff had not taken out a current Practising Certificate in accordance with provisions of the Advocates Act, Cap 16, Laws of Kenya. The Judge hearing the case ruled that it was the Counsel for the Plaintiff who had failed to renew his Practising Certificate on time, which fact was not within the knowledge of his (Plaintiff) client. In his own words he ruled:-

“Striking out the said pleadings will serve no purpose and will be contrary to Sections 1A and 1B of the Civil Procedure Act since it will only enable the Defendants to extract costs and waste time.”

The Court cited several decided cases amongst them **CROMWELL KITANA -VS- JOHN MWEMA MBEVI CIVIL APPEAL NO. 50 OF 1984** which held that the fault of an Advocate is not the fault of his client and therefore a client should not be penalised for the mistake of advocate.

I hold the same view, since even as Mr. Aseo Advocate became indisposed, his client who had given instructions to file the appeal on time was unaware of such indisposition. In such a scenario Court should focus on resolving the real issues in question as opposed to concentrating on technicalities that do not go into the root of resolving the dispute for which the appeal is intended. In this regard there is no doubt that good grounds have been laid why the appeal should be filed.

For ends of justice to be seen to be met it is only fair to allow the appeal to be filed out of time. This will enable the court in facilitating the fulfillment of the overriding objective of the Civil Procedure Act, as provided in S.1A thereof to the effect that:-

“1 (A) (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

Having allowed the appeal to be filed out of time, I now explore on whether the Applicant is entitled to the order of stay of execution of the Subordinate Court's Judgment. The grounds of appeal listed in the draft Memorandum of Appeal are to me plausible.

Section 65 (1) of the Civil Procedure Act provides that an appeal from any original decree or part of a decree of a subordinate Court, other than a Magistrate's Court of the third class lie on a question of law or fact. The draft Memorandum of Appeal annexed to the Supporting Affidavit meets this standard set by the law. In my view, if a stay is not granted the appeal may be rendered nugatory.

Moreover, S. 63 (e) does also provide that:

“In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed make such other interlocutory orders as may appear to the Court to be just and convenient”

Further Sections 3 and 3A of the Civil Procedure Act give the Court such wide powers as to make orders that will ensure ends of justice to be met and to prevent the abuse of the process of court. They read as hereunder:-

“3. In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

Given the foregoing, convenience leans towards granting a stay of execution pending the hearing and determination of the appeal.

My final orders would thus be as follows:-

1. The Applicant be and is hereby granted leave to file appeal out of time.
2. That the appeal be filed within seven (7) days from the date hereof.
3. That stay of execution be and is hereby granted of the Judgment in **ELDORET CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 30 OF 2012 – DAVID SHIKUTWA KHAZALALI -VS- LOCHAB BROTHERS LIMITED.**
4. That the Applicant deposits half the decretal sum and half the costs as awarded and assessed respectively in the said **ELDORET CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 30 OF 2012** in a joint interest-earning bank account in the names of the Advocates of the Applicant and the Respondent within fourteen (14) days from the date of this ruling.

5. That costs of this application be to the Respondents.

DATED and **DELIVERED** at **ELDORET** this 11th day of December, 2012.

G. W. NGENYE - MACHARIA
JUDGE

In the presence of:

No appearance for the Applicant

Mr. Chanzu Advocate for the Respondent