



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

MISECELANEOUS APPLICATION NUMBER 568 OF 2011

NELLY KIPROTICH.....PLAINTIFF

VERSUS

WYCLIFFE BARASA..... DEFENDANT

RULING

The Appellant's application before me has been filed by way of Notice of Motion dated 30th June, 2011. It was brought under Sections 1A, 1B, 3A 63(e), 7a (G) and 95 of the Civil Procedure Act and Order 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules. I will highlight only those Orders now sought before me in the application, namely:

“3. The Applicant herein be granted leave to appeal out of time against the whole judgment and decree in Mombasa PMCC No. 1449 of 2009 of the Hon. Mr. Omburah Senior Resident Magistrate, delivered on 23rd February, 2011 at Mombasa.

4. The Applicant herein be allowed to file and serve a Memorandum of Appeal and Record of appeal within Thirty (30) days or within such period as the court may deem just and expedient.

5. There be a stay of execution of the Judgment entered against the Applicant on 23rd February, 2011 pending the hearing and determination of the Applicant's intended appeal.

6. That the court be pleased to grant orders sought subject to any condition as the court may deem just.

7. The costs of this application be provided for.

The Motion is supported by the Affidavit of Eric Machira Nyabicha sworn on 30th June, 2011 and exhibits annexed thereto. The background of the matter is that the Appellant/Applicant herein was sued together with Shami Trading Company Limited in the Principal Magistrate's Court in PMCC Number 1449 of 2009. Judgment was entered against the defendants by the Hon. J. Omburah on 23rd February, 2011, for injuries, loss and damage arising out of a motor traffic accident on 14th January, 2009.

The Appellant applied in the same court to appeal out of time and for stay of execution pending appeal. That application was dismissed on both grounds on 20th June, 2011 hence prompting the application now before me. It was first brought under urgency and certified as such by my senior sister

Hon. Lady Justice Odero on 5th July, 2011. Stay of execution was also granted pending interpartes hearing and subject to the Appellant/Applicant depositing with the court the amount of Kshs.500,000/= which she did .

The grounds on which the motion is based are as follows:

“1. That the Applicant herein is dissatisfied with the judgment of the Court in Mombasa PMCC Number 1449 of 2009 entered on 23rd February, 2011.

2. That the Applicant intends to appeal out of time against the said Judgment herein and if the Plaintiff is allowed to execute against the Applicant, the intended Appeal if successful will be rendered nugatory.

3. The Applicant’s intended appeal has overwhelming chances of success.

4. The Applicant’s intended appeal is arguable and not without merit.

5. That should be Applicant pay the Judgment amount to the Plaintiff and the intended appeal succeeds, the said amount will be out of the Applicant’s reach.

6. The Applicant is prepared to comply with any such condition(s) as this Honourable court may deem just so to order.

7. That the Applicant herein has sufficient cause for seeking the orders sought.”

In response to the Motion, the Respondent/Plaintiff filed a Replying Affidavit sworn by him on 9th September, 2011. In the Affidavit the Respondent states that the application is an abuse of the court process; that the application is an attempt to delay and deny him the fruits of the judgment that no appeal had been filed to justify the grant of stay.

The parties filed their written submissions on 15th November, 2011. In her submission, the Applicant says the delay in filing the application for stay was because:

“...there was an understanding with the plaintiff’ advocates that there was to be a stay for forty five (45) days from 23rd April, 2011... That the delay was not deliberate but occasioned by circumstances beyond the control of the Applicant.”

The Applicant argues that the instructions to appeal were communicated to them on 30th March, 2011, which fact was an unforeseeable event and thus the delay was not unreasonable.

Further the Applicant argues that the Respondent will suffer no prejudice as the Appellant has already deposit Kshs.500,000/= in court pending the determination of this application, and that the Respondent had applied for release of Kshs.400,000/= from the deposited funds, then later withdrew the application.

In support of its application, the following authorities were relied upon: (1) **Halima Abdi Mohamed and Another vs Hawa Maalim Ibrahim**(2004) e KLR where the High Court held that a delay in filing a Memorandum of Appeal caused by the time it took the applicant’s insurers to give instructions to file the same, was a reasonable explanation; (2). **Dickson Ndegwa Mbugua vs City Council of Nairobi and 3 others [2010] e KLR** where a nine month delay in filing an application for extension of time to file notice of appeal was uncontested and therefore no prejudice was shown to be likely to be suffered by the Respondent; (3) **William Joel Mutua Maele vs Beard Njoroge Gathua and Mburu Wamungi[2009]e KLR** where a two month delay after receipt of proceedings and judgment was held not to be so inordinate as to justify shutting out of the applicant from the seat of justice; (4) **Fred Wafula and Ken-**

Knit (K) Ltd vs Faustine Iveha Namunyu [2008] e KLR where the court held that delay in filing the applicants appeal was occasioned by the fact that it took the insurer time to confirm whether the applicant was a bona fide employee.

The Respondent in his written submissions argues that after the Hon. Magistrate issued his judgment, the Applicant confirmed that she would pay the full decretal sum with forty five (45) days but later changed her mind. He also argues that since there is no appeal before the High Court, there is no power vested in the court to stay execution because Order 42 Rule 6 allows for stay only when the procedure for instituting an appeal has been complied with. Further he argues that Section 79 G of the Civil Procedure Act is inapplicable because it provides for filing an appeal within 30 days and there was no sufficient cause shown for not filing the appeal in time, as the time had lapsed when Applicant sought 45 days from the Respondent to make payment. Thus, failure to pay was a sign of bad faith.

I have carefully considered the parties' submissions and their affidavits and exhibits in support of and in opposition to the application.

It is clear from the authorities cited by the Applicant, that courts will allow filing of an appeal out of time where the delay is clearly and adequately explained, for example:

- As being connected to causes beyond the reasonable control of the applicant – see **Fred Wafula** case
- As being caused by the non-notification of the delivery date of judgement to a party see **Dixon Mbugua** case
- As arising from delays in obtaining the record of proceedings applied for - See **William Joel Maeke** case
- As arising from the ignorance of a party as to the statutory time frame but where the Memorandum of Appeal clearly discloses an arguable appeal. See **Halima's case**.

In the case before me, Eric Nyabicha, the plaintiff's counsel, in his supporting affidavit dated 30th June, 2011 gives the following explanations for the delay in filing the appeal:

“6. That whereas there was no stay of execution of the said judgment, the Applicant herein through her Advocates on record; sought to be allowed more time to inform and consult her insurers further in respect of the said judgment.

8. That after being made aware of the said judgment and being dissatisfied with the same the Defendant and her insurer further instructed the Advocates on record for the Applicant to appeal against the said judgment and more specifically against the quantum in General Damages awarded therein.

9. That on or about 4th April, 2011 the Applicants Advocates on record applied for certified copies of the proceedings, judgment and decree therein together with a Certificate of Delay to facilitate the lodging of the intended appeal on the Applicant herein. The said documents have been availed to date.....”

Is this a sufficient or adequate explanation for the delay?

It is clear that after the judgment was delivered on 23rd February, 2011, the thirty day appeal period begun to run.

By 26th February, the Applicant's counsel had received the Respondent letter of 24th February, 2011 setting out the full quantification for the judgment debt and other costs, all amounting to Kshs.721,865.00 which the plaintiff demanded be paid within 45 days. That demand period would expire on 10th April, 2011.

And what did the Applicant do? She decided to inform and consult her insurers during this period. She

knew, or ought to have known, that thirty days appeal period would expire on or about 23rd March, 2011. There is no indication that she even bothered to apply for proceedings in the meantime. It was not until 4th April, 2011, that the Applicant applied for the Judgment, proceedings and decree of the lower court. This was already ten days out of time. No explanation whatsoever is given for this delay in applying for the proceedings and judgment. On 6th April, 2011, the Applicant then filed notice of motion in the Principal Magistrate’s court under Order 42 Rule 6 seeking stay of execution of the judgment, and leave to appeal out of time against the quantum awarded. She also annexed a draft Memorandum of Appeal. The lower court, correctly in my view, dismissed the application on grounds, inter alia, of lack of jurisdiction as Order 42 Rule 6 applies to and is only enforceable by the High Court. The Ruling of the lower court was delivered on 20th June, 2011, further delaying her appeal. This prompted the filing of this application in the High Court on 30th June, 2011.

The Applicant did not exhibit copies of any correspondence with her insurance company that would assist the court determine or verify the actual reasons for delay. Further, other than her initial letter applying for the proceedings, she has not annexed any follow- up correspondence with the lower court seeking to extract the record of proceedings, or showing some sort of urgency in or concern about the delay. Although her counsel avers at Paragraph 9 of the supporting affidavit that:

“...The said documents have not been availed as requested to date, despite our concerted visits and enquiries.”

there is nothing exhibited to show any such actions or a letter complainant to the lower court delays in issuing the proceedings.

I have noted that there is no disclosure in Applicant’s affidavit that the application for the record was in fact made after expiry of the appeal period. Nor is there disclosure that an application for stay of execution and appeal out of time had been filed in the lower court and dismissed. This raised some concern on my part, but I need say nothing more on it.

I find that the real reasons for the delay herein, are attributable to the applicant’s misjudgment when seeking to discuss the lower court’s judgment with her insurers, and in counsel’s filing the first application in the lower court, which had no jurisdiction. As none of these actions were beyond the Applicant’s control they do not constitute the sort of grounds which the court considers sufficient or adequate to discharge the requirement in Section 79G for admission of an appeal out of time.

Accordingly the motion is hereby dismissed, and the order of this court given on 30th June, 2011 is hereby discharged. The Applicant shall carry the costs of this application.

Dated and Delivered on this 25th Day of November, 2011

R.M. MWONGO
JUDGE

Read in Open Court

Coram:

1. Judge: Hon. R.M. Mwongo
2. Court clerk: Amos

In Presence of Parties/Representative as follows:

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