



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
MISC. CASE NO. 178 OF 2010

ELDORET STEEL MILLS APPLICANT

VERSUS

LAWRENCE OMWANDO MARANGA RESPONDENT

RULING

This is an application by way of Notice of Motion brought under the provisions of Sections 3A and 79G of the Civil Procedure Act and Orders XLI Rule 4 and L Rule I of the Civil Procedure Rules and all enabling provisions of the Law for an extension of time to file the appeal against the judgment of the Senior Resident Magistrate in Eldoret CMCC. No. 669 of 2009 delivered on 25th February 2010. It is brought for the following orders:-

- “1. THAT this application be certified urgent and be heard ex- parte in the first instance.**
- 2. THAT the Applicant be granted leave to file an appeal out of time from the judgment of Senior Resident Magistrate delivered on 25/2/2010 in Eldoret CMCC. No. 669 of 2009.**
- 3. THAT there be stay of execution and/or further execution of the decree in Eldoret CMCC. No. 669 of 2009 pending the hearing and determination of this application.**
- 4. THAT costs hereof be costs in the appeal”**

and it is based on the grounds that judgment was delivered on 25/2/2010 in favour of the Plaintiff/Respondent and that upon delivery of the said Judgment the applicant’s advocates on record M/S Nyairo and Company Advocates wrote to the defendant/applicant informing them of the judgment. That upon receipt of the said information the defendant/applicant referred the matter to its insurers M/S Kenindia Assurance Company Limited who declined to take up the matter and the applicant then gave instructions to their advocates to appeal but by that time the time allowed for filing appeal had lapsed. That the applicant is aggrieved by the court’s finding on liability and quantum and wishes to challenge the same on appeal and that the applications is made promptly and in good faith.

There is then the supporting affidavit sworn by one **Navinder Singh Lochab** described as a director of the applicant which explains in some detail what happened since judgment was delivered leading to the present application.

The facts leading to the present application are fairly simple and straightforward. Hon. Mr. D.K. Kemei Senior Resident Magistrate Eldoret delivered judgment in Eldoret CMCC. No. 669 of 2009 wherein he found for the plaintiff on 100% basis liability and general and special damages amounting to Kshs.201,500/-. The defendant's advocates then advised the defendants of the judgment who in turn advised their insurers to appeal vide their letter of the 6/3/2010 but the insurers declined liability vide their letter of 28/4/2010. Thereafter and more particularly on 14.05.2010 the parties and their counsel negotiated a mode of settlement but the applicant appeared to have changed its mind for on the same date it filed the application now under consideration. The change of mind is explained in the further affidavit as the discovery that the claim was not genuine. Counsel for applicant relied relief fully on the grounds and affidavits.

In opposing the application the respondent in its Replying affidavit sworn by its counsel described the application as incompetent and an abuse of the Court process advised by mala fides. Mr. Chanzu learned Counsel for the respondent described the delay as inordinate, the conduct of the parties an afterthought and that no security was offered.

In this application it is undisputed that judgment was delivered on 25/2/2010 and any intended appeal should have been filed by 21/03/2010. On the 4/3/2010 as per the annexure marked "NSL/I" the advocates for the applicant advised them of the judgment. Two days later on 6/3/2010 the applicants advised their insurers of the judgment and advised them that advocates should be instructed to file an appeal. The insurers did not come back to the applicants until their letter dated 28/4/2010 in which they declined liability. The present application was then filed on 15/05/2010.

It would appear that the applicants were always ready to appeal the judgment of the lower court as is clearly evident from the annexure marked "NSL/I". It would further appear that the threatened execution prompted some settlement negotiations which in turn appear to have been jeopardised by the discovery that the claim was not after all genuine as explained in the further affidavit of the applicant which was not responded to by the respondent despite leave to respond having been granted by this court on 21/09/2010.

The court is being asked to exercise its discretion in an application of this nature. The relevant order reads in relevant part;-

Order XLI rule 4(2) (a) and (b)

"4(2) No order for stay of execution shall be made under subrule (I) unless

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the applicant has been made without 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 reasons given for the delay are that the applicant was dealing with his insurers to have them instruct advocates to appeal. The insurers declined liability and hence the matter reverted to the applicant to deal with. That whole process took between 6/3/2010 and 28/4/2010 when the insurers wrote declining liability. That delay is sufficiently explained and I accept it as not being unreasonable. The period from the date liability was declined upto the date of the filing of the present application is another two weeks or thereabouts. In the circumstances of this case I do not find that delay unreasonable. I am satisfied that the delay is explained and such satisfaction enables me to exercise my discretion in favour of the applicant. Having been so satisfied, then the applicant ought not to be shut out from exercising its statutory right to be heard on appeal.

As to substantial loss it is noted, that the appeal now being brought is against both liability and also quantum. On liability it is alleged that the claim is not a genuine one. The financial status of the successful plaintiff/respondent here is not made known to the court. One never knows therefore whether

the respondent, who is denied as a genuine claimant, would be in a financial position to repay were execution allowed to issue. Substantial loss is sufficiently established.

In the result the application is allowed. The applicant will file its appeal within 21 days of today. It will also furnish a Bank Guarantee for the decretal amount within 21 days of today. In default of any of the above conditions, execution will issue. Costs to abide the appeal.

Orders accordingly.

DATED SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF DECEMBER, 2010.

**P.M. MWILU
JUDGE**

In the presence of;

Absent - Advocate for Applicant

Chanzu - Advocate for Respondent

Tabitha - Court Clerk

**P.M.MWILU
JUDGE**