REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 232 of 2006

P.M.M. PRIVATE SAFARIS…..…….....……..…..APPLICANT

VERSUS

KEVIN IJATIA (suing thro his

father and next friend HESBON IJATIA EREGWA……..… RESPONDENTS

R U L I N G

The Notice of Motion herein, under Section 3A, 79G of the Civil Procedure Act Cap. 21, Laws of Kenya and Order 49 Rule 5 of the Civil Procedure Rules seeks extension of time within which the applicant may file the intended appeal against the judgment of the PMCC No. 7476 of 2004, Milimani Commercial Courts.

The application is dated 9/3/06 and is supported by Affidavits by Philip Mwangi Munyua and S. Muregi Chege of even date, and is on the grounds given in the Supporting Affidavits.

The gist of the grounds in support of the application is that the delay was not intentional; that the matter was handled by a counsel for the insured's insurers and the information was not conveyed to the insured – the applicant herein, but was conveyed to the insurers; that the applicant came to learn about the delay when he went to check on the status of the Lower Court's judgment at the insurer's offices where he discovered that the insurers had instructed the counsel to file the appeal but that had not been done. Hence the delay.

In their opposition the Respondent's aver, **inter alia** that the application is incompetent and fatally defective and ought to be struck out; filing of an appeal did not require any affidavit; the appeal was an after thought; the liability was agreed and apportioned at 85:15 at the lower court by consent of the parties and hence no chance of success of the intended appeal.

I have perused through the pleadings and considered the submissions by Learned Counsel for both sides. I have reached the following findings and conclusions.

The judgment sought to be appealed against was delivered on 31/11/05 and the application herein was filed in court on 9/3/06- this is about five months down the line. The Supporting Affidavit, sworn by Philip Mwangi Munyua, a Director of the Applicant company reveals legal fallacies touching on the incompetent manner insurers handle claims against their insureds where counsel is actually appointed and paid by the insurer and for all practical purposes such an advocate is the insurer's lawyer – not lawyer for the insured/Plaintiff/Respondent.

To that extent, the Supplementary Affidavit of Lydia W. Gutu, filed on 24/3/06, is not truthful in that it is sworn on behalf of the applicant when in reality she is not the counsel for the applicant, but counsel for the insurer. The insurer is not a party to the proceedings herein. Hence, the Affidavit is sworn by a stranger to the proceedings both at this appellate level and at the subordinate court's level. The insurance sector clearly misleads the insured, to believe that he/it, the insured is represented by a counsel, which counsel is not answerable to the insured. That is exactly what happened in the instant case. The insured never knew what was going on until too late. Yet the counsel had communicated with her client – the insurer – not the insured/applicant herein.

I agree with Learned Counsel for the applicant that the delay in filing the appeal was not intentional on

the part of the applicant/insured. But the delay was due to negligence on the part of the insurers, and their counsel, who did not inform the applicant/insured of the truth and what had, and was happening in the suit at the subordinate court.

At the Subordinate Court level, counsels for the Respondent and the insurer, consented to the apportionment of liability, in the absence of legal representation for the insured – applicant. I say in the absence of legal representation for the insured because within the Insurance Law, the insurer is only subrogated to the right of the insured – steps into the insured's shoes – upon full settlement of the insured's liability or claim – not earlier. Here, that is not the case, and the rationale of the insurer stepping into the shoes of the insured is clearly foggy, and non-existent, in the law as it obtains today.

The advice of the counsel for the insurer was to settle on the basis of the Lower court's judgment as there was very little chance of success of an appeal. Whether that was right or not is not the issue here. What concerns me, and this court, is that the communication between the insurer did not involve the insured and definitely not the Respondent. That communication by those two parties – Counsel and the client (insurer) is what caused the delay in that whereas the insurer opted for appeal on the basis of quantum of general damages, the counsel never informed, and had no duty to inform, the insured, and the insured/applicant herein, never knew anything until it went to the insurers to check on the status of the suit in the subordinate court. That is when insured was informed of the proposed appeal, and that is when he was informed of the need to apply for leave to appeal out of time. Hence the application before me.

This court should not, and must not, grant such an application. It would be bad in law; and wrong in both policy and principle. A grant of such an application is tantamount to encouragement of exploitation of the insured sector of the society by the insurance industry. As already alluded to, it would encourage the wrong invocation of the principle of subrogation where the insurer steps into the shoes of the insured prior to his/its full payment by the insurer. Secondly, it encourages the untenable position where the counsel for a third party/stranger to the litigation is seen as counsel for the insured – the Defendant in in the suit at the subordinate court level.

This court will not be party to such manipulation and/or distortion of both the law and the facts in a case like this. To grant such an application is tantamount to closing our eyes to the applicant being used to achieve the objectives of the insurer, who both in reality and admission from the correspondence with the insurer's Counsel, would be the actual appellants, not the applicant herein.

For the above reasons, the application herein is dismissed with costs to the Respondent and against the applicant.

It is so ordered.

DATED and delivered in Nairobi this 11th Day of July, 2006.

O.K MUTUNGI

JUDGE