REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 1591 OF 2004

MIRUKA MOMANYI……..…….….1ST APPLICANT

KEROKA EXECUTIVE BUS SERVICE……2ND APPLICANT

VERSUS

FREDRICK NG'ANG'A GITAU

(suing as the legal representative of the estate of

ELIZABETH WAMBUI NG'ANG'A)…….……..RESPONDENT

RULING

Coming before me were two separate applications by Notice of Motion – one dated *4th November, 2004,* by the two applicants, and brought under Order L, rule 1 of the Civil Procedure Rules, and sections 3A, 79 and 95 of the Civil Procedure Act (Cap. 21); and the other dated *1st December, 2004*, by the original respondent, and brought under Order XLIV, rules 1, 2, 4 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act (Cap.21).

The prayers in the Notice of Motion of 4th November, 2004 are as follows:

(i) that the applicants be allowed to file and serve their Memorandum of Appeal from Nairobi PMCC No. 6853 of 2002 out of time;

(ii) that the costs of the application be provided for.

The premise of the application is that there was delay in filing the Memorandum of Appeal occasioned by excusable circumstances, and the delay was not inordinate; and that the applicants do have an arguable appeal, and it would be in the interest of justice that they be given a chance to have their appeal heard.

Evidence in support is set out in the affidavit of ***James Mwangi Njego***, dated 4th November, 2004. He deposes that judgement had been delivered on 18th August, 2004 and thereafter his firm of advocates informed the instructing client, APA Insurance Ltd appropriately and sought instructions regarding a possible appeal. The deponent avers: "by the time our….instructing client communicated with us [on] their views [on] the judgement last week or so, time had already lapsed for the filing of the Memorandum of Appeal."

The respondent's counsel, on 8th December, 2004 swore a replying affidavit (filed on 15th December, 2004), but before that, on 1st December, 2004 she had filed a Notice of Motion as aforesaid.

In the replying affidavit aforesaid, of 8th December, 2004, counsel for the respondent averred in part as follows:

(i) that, the application of 4th November, 2004 had been filed in bad faith;

(ii) that, there was no pending execution as implied in the said application of 4th November, 2004;

(iii) that, the applicants had all along agreed to settle the claim, and so the application of 4th November, 2004 aforesaid only demonstrated that the applicants were hoodwinking the respondent (iv) that, the applicants obtained ex parte orders on 23rd November, 2004 when their affidavit of service dated 23rd November, 2004 shows that they had effected service only on 22nd November, 2004; and this would show that they obtained the ex parte orders improperly;

(v) that, the applicants had withhed information from the Court by not mentioning that they had undertaken to pay, and that there had been more plaintiffs (suing them, like the respondent) in cases No. 6852, 6853 and 6855 all of 2002;

(vi) that, the applicants had not had the intention of appealing, and they had requested the respondent to take no action against them, as they were going to settle;

(vii) that, the applicants had written letters to the respondent offering to forward to the respondent cheques in settlement;

(viii) that, the applicants had not indicated in the lower Court that they intended to appeal, and had not sought stay of execution pending appeal;

(ix) that, the orders sought are oppressive, considering that a minor is involved, and the intention is to deny the respondent the fruits of the judgement in the subordinate Court.

The foregoing responses to the applicants, as already noted, were preceded by the respondent's own application by Notice of Motion, dated 1st December, 2004. The prayers in this application were, firstly, that the Court be pleased to review its orders made on 23rd November, 2004 and secondly, that the costs of the instant application be in the cause. The application was premised on the following grounds:

(a) that, the original applicants did not disclose that they had already undertaken to pay the decretal sum;

(b) that, the failure of the original applicants to disclose that there were three other plaintiffs amounted to misleading the Court which as a result, gave *ex parte* orders;

(c) that, the original applicants failed to disclose that the respondents, relying on the applicants' undertaking to pay up, had made no application for execution — and thus an application for stay of execution was superfluous;

(d) that, the stay being sought was premature and intended to cause injustice to the decree-holder.

In her supporting affidavit counsel for the respondent deponed that the respondent had lost his daughter (***Elizabeth Ng'ang'a***) and he was left with a small child, now aged 6 years. The deponent was then asked by counsel for the applicants to withhold action as they were due to pay the decretal sum. While the judgement of the Subordinate Court had been given on 5th August, 2004, the deponent averred, there had been inordinate delay in filing an appeal by the applicants.

When the two applications first came up for hearing on 17th January, 2005 it became necessary to consolidate them, and I did order as follows:

"As the two applications, the one by the defendant, of 4th November, 2004 and the one by the plaintiff, of 1st December, 2004 are two sides of the same coin, the best hearing mode is through consolidation.

Accordingly, I will make the following orders:

> ***1. The defendant's application of 4th November, 2004 is hereby consolidated with the plaintiff's application of 3rd December, 2004.***
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> ***2. When the consolidated case comes up for hearing, the defendant shall begin and shall make comprehensive submissions on both applications, following which the plaintiff's counsel will respond, again, on both applications. The defendant shall have a right of reply; provided that if he should raise any new matter, then counsel for the plaintiff may seek permission to make a rejoinder."***

Hearing took place on 27th January, 2005 when Mr. Mwangi for the defendants/applicants submitted that delay in lodging an appeal had been occasioned by belated receipt of instructions from his client. He was therefore seeking extension of time for filing an appeal, and he sought the Court's exercise of discretion, in that regard. He contended that there had been a delay that was not inordinate, being a delay of two months.

Although this does not emerge from the defendants/applicants' depositions – though it unequivocally does from the plaintiff/respondent's side — counsel stated that there had been three consolidated suits before the Principal Magistrate's Court, and that the defendants had already satisfied two of the sums in the decretal orders. Counsel contended that the overall sum was too inflated, and that this justified the intended appeal. Relying on the defendants' depositions, ***Mr. Mwangi*** stated that they could not have appealed in time because of delays in the delivery of instructions by the insurance company. Counsel contended that the draft memorandum of appeal did raise weighty matters which should be given a chance to be heard.

To the defendant/applicant's application, a draft memorandum of appeal is attached. The following are some of the grounds therein:

(i) the learned Magistrate misdirected herself on the applicable multiplier, in light of the age of the deceased, thereby arriving at an exaggerated multiplier;

(ii) the learned Magistrate erred in fact and in law, in applying a speculative multiplicand;

(iii) the learned Magistrate erred in fact and in law in applying a dependency ratio of 2/3 instead of 1/3;

(iv) the learned Magistrate erred in fact and in law in granting excessive damages for loss of expectation of life.

Learned counsel submitted that if stay of execution of the Principal Magistrate's Court decree was not granted, then an opportunity to appeal if allowed, would be nugatory; and so the defendant/application would be willing to give security if need be.

Learned counsel for the plaintiff/respondent, ***Ms. Njagi*** contended that the applicant's delay in lodging an appeal was both unreasonable and inexcusable. She remarked that when judgement had been delivered, in August, 2004 counsel for the defendants had given no notice of any intention to appeal, and that it could not be true that counsel had been waiting for instructions so as to give such notice. She contended that the defendants had not intended to appeal, as they had given the clear indication in writing that they would be paying up, in accordance with the decree issued by the Court. Counsel noted that on the very same day, 4th November, 2004 when the defendants' counsel indicated in writing to the plaintiff's counsel that cheques were being prepared for satisfying the decretal amounts, the self-same counsel for the defendants was signing an application to stay the hand of the plaintiff in execution; and counsel saw this, I think, with justification, as evidence of bad faith. On the basis of that application the defendants obtained stay orders which they are currently enjoying. Learned counsel wondered how the instructions to promise the plaintiff cheques had reached the defendants' counsel, when the instructions to lodge an appeal failed to reach him. *Ms. Njagi* submitted that such instructions could only have come

from the client; and therefore there would be no veracity in the contention that counsel for the defendants only belatedly received instructions to lodge an appeal.

On the issue of stay of execution of the Principal Magistrate's Court's decree, *Ms. Njagi* cited Order XLI, rule 4 which states that no order for stay of execution may be made unless the Court was satisfied that substantial loss may result to the applicant, and besides, the application has been made without delay. Counsel contended that there had been undue delay in making the defendants' application; that there would be no substantial loss to the defendants; that the insurance company would have the duty to pay up; that the plaintiff/respondent was suffering as a result of the non-payment of the decretal amount. Counsel also noted that no execution of the Principal Magistrate's Court's decree had taken place to-date, to justify the stay orders which the defendants had secured ex parte and which they continue to enjoy.

Learned counsel, Ms. Njagi sought to rely on a Court of Appeal decision, ***Gateway Insurance Co. Ltd. v. Flora Opanyi Oduat & Two Others***, Civil Appeal No. 41 of 1996, in which a Notice of Appeal had been lodged four days out of time in contravention of rule 74 of the Court of Appeal Rules. It was held that the appeal was "defective and incompetent". It was ordered to be struck out with no order as to costs. The Court also struck out the application for extension of time for being premature. Counsel noted that in the instant mater, "there is even no notice of appeal to consider."

Counsel then cited another Court of Appeal decision, ***Daima Bank Ltd. & Whitestone Auctioneers v. K.H. Osmond,*** Civil Application No. Nai 359 of 2000, to support the argument that where a notice of appeal has not been filed, as in the present instance, there would be nothing to extend on the lines proposed by the defendants. Now while her argument here appears quite logical, it is not clear to me that this is the principle in the ***Daima Bank*** case. The critical passage carrying the principle in that case appears to be as follows:

"The appeal not having been lodged in time the fate of the notice of appeal in question is clear. It is spent. It is ordered struck out."

The obvious meaning is that there *was*, in that case, a notice of appeal, whereas it is missing in the instant matter.

Ms. Njagi submitted that the defendants' application deserved dismissal with costs – for want of good faith, and for non-compliance with the applicable rules of procedure.

In his rejoinder, learned counsel, ***Mr. Mwangi*** contended that it was entirely in order for him to come before the Court to seek extension of time to lodge an appeal. In his view it was not necessary he should have filed a notice of appeal, if he did not at the time intend to appeal. Counsel also doubted whether the plaintiff/respondent stood to suffer any substantial loss if stay of execution of the Principal Magistrate's Court's decree was granted. He contended that the condition that there should be such loss, moreover, referred to loss by *all* the parties. This, with respect, appears doubtful. Counsel restated his client's willingness to provide security, as an answer to any claims of prejudice by the plaintiff/respondent.

Is a party at liberty to simply make up their mind at any time, following the delivery of a judgement, that they will appeal against the same, and then the Court must facilitate that process of appeal? I doubt it. An appeal is a serious and weighty step in litigation, which engages the resources of the Court, and imposes strains on the respondent. Therefore, a party who intends to appeal, where required, takes leave of the Court appealed from; and where appeal is as of right, complies with the prescribed time-limits by first filing a Notice of Appeal. This is a preliminary step which will enable the Court to decide on the merits, and to exercise its discretion when a case is sought to be made for extension of time for lodging the record of appeal. What has come before me is a case in which no notice of appeal had been filed, and counsel asserts that no such notice could have been filed because the intending appellants *had not made up their minds whether to appeal,* and they had not given instructions for an appeal; they did not give such instructions, they say, until well after the deadline for lodging an appeal. This state of affairs would not, I think, invite a favourable exercise of discretion by virtue of Section 3A of the Civil Procedure Act

(Cap.

There is evidence that the defendants' application by Notice of Motion of 4th November, 2004 was signed on the very same day that their advocates expressly stated to counsel for the plaintiffs, that they would pay up in satisfaction of the Court decree in PMCC No. 6853. This fact, as learned counsel for the plaintiff has observed, would not show *bona fides.* That would also run against the equitable principles on the basis of which the Court will exercise a favourable discretion.

It is now common cause that the decrees of the Principal Magistrate's Court, in PMCC No. 6853 affected not only the plaintiffs/respondents herein, but also other plaintiffs; and even though belatedly, the defendants/applicants have made some of the payments of decretal amounts, and also promised payments in respect of the respondents herein. It is, with respect, somewhat unusual that the defendants/applicants suddenly discovered that the payments due to the plaintiff/respondent herein was so fundamentally wrong, that an appeal had become essential. Such a state of affairs would not bespeak good faith, and does not satisfy the conditions for the exercise of judicial discretion.

The basis of exercise of the judicial discretion is further undermined by the fact that *improper service* had been effected by the defendants/applicants on 22nd November, 2004 as a basis for what amounted to *ex parte* orders which they obtained on 23rd November, 2004.

For the reasons set out above, I have seen no basis for the exercise of discretion in favour of the defendants on their Notice of Motion of 4th November; and consequently I will also find in favour of the plaintiff/respondent's Notice of Motion of 1st December, 2004.

I will make the following specific orders:

1. The defendants/applicants' prayer that they be allowed to file and serve their Memorandum of Appeal from Nairobi PMCC No. 6853 of 2002 out of time, is refused.

2. The defendants/applicants' prayer that there be a stay of execution of the judgement and decree in Nairobi PMCC No. 6853 of 2002 is refused.

3. The defendants/applicants' Notice of Motion of 4th November, 2004 is dismissed with costs to the plaintiff/respondent.

4. The plaintiff/respondent's Notice of Motion of 1st December, 2004 is allowed, and the costs thereof shall be borne by the defendants/applicants.

Orders accordingly.

DATED and DELIVERED at Nairobi this 18th day of February, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Defendants/Applicants: Mr. Mwangi, instructed by M/s. Anne Kimani & Co. Advocates

For the Plaintiff/Respondent: Ms. Njagi, instructed by M/s. Njagi Nyaboke & Co. Advocates.