



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 50 of 2005

MADISON INSURANCE CO. LTD.....PLAINTIFF/APPLICANT

VERSUS

PETER MUTUNGA MUSILA.....1ST RESPONDENT

CHARLES WAHOME NGATIA.....2ND RESPONDENT

RULING

The applicant filed a memorandum of appeal out of time without leave to do so and filed an application praying that the time for filing of the said appeal be extended to the date of the filing of the appeal. The applicant also prayed for stay of execution of the decree made on 26th January, 2005 in **Nakuru CMCC No. 1645 of 2000** pending the hearing and determination of the applicant's intended appeal.

The application was supported by an affidavit sworn by the applicant's advocate Mr. Andrew Muchingi Karani. He deposed that the applicant's advocates became aware of the entry of judgment on 16th February, 2005 and thereafter began to exchange letters with the respondents' advocates attempting to interpret the judgment that had been delivered on 26th January, 2005 regarding the issue of interest and in so doing they lost time for filing the intended appeal. On 23rd February, 2005, the applicant's advocates wrote to the respondents' advocates and stated that the amount that they believed was payable to the applicant was Kshs.204,600/- and not Kshs.393,796/- which they had indicated in their letter of 26th January, 2005. The applicant's advocates copied their letter of 23rd February to their client, the applicant herein. On 1st March, 2005 M/S Mararo Auctioneers & Court Brokers issued a notice of proclamation of the applicant's goods which indicated that upon expiry of seven (7) days of the said notice they would remove the proclaimed goods to their premises.

On 2nd March, 2005 the applicant instructed their advocates to lodge an appeal arguing that it was not served with a statutory notice prior to the institution of the suit that gave rise to **CMCC No. 1645 of 2000** and that the interest that had been awarded was too high.

The applicant's counsel submitted that the intended appeal had high chances of success and that if the application for stay of execution was not granted and the decretal sum was paid out, the respondents would not be in a position to repay the same in the event that the applicant was allowed to file the appeal and the same succeeded.

The respondents opposed the said application saying that the delay in filing the appeal had not sufficiently been explained. They also argued that the application was an afterthought and was filed merely to block the execution process that had been commenced. The respondents further averred that they were capable of repaying the decretal sum in the event that the proposed appeal was successful.

Mr. Muthanwa for the respondents added that the affidavit in support of the said application was sworn by the applicant's counsel and not by the applicant. He relied on the decision of Ringera J. (as he then was) in **EAST AFRICAN FOUNDRY WORKS (K) LTD VS KENYA COMMERCIAL BANK LTD** [2002] 1KLR 443.

Mr. Muthanwa further submitted that the conditions for grant of stay of execution pending appeal as set out under Order XLI Rule 4 had not been met and in particular there was no averment by the applicant that he would suffer substantial loss if the order for stay of execution was not granted. He cited several authorities to fortify his submissions.

In considering this application, it is important to point out that there was no valid appeal before the court as the purported memorandum was filed out of time. The court must therefore first decide whether the applicant has good and sufficient cause for not filing the appeal in time as required under Section 79G of the Civil Procedure Act. If such cause is not demonstrated, the court can not purport to exercise its discretion to allow the filing of the intended appeal out of time.

I have already set out the grounds that were advanced by the applicant as to why it was not able to file the proposed appeal in time. The issue for determination now is whether those arguments disclose a **“good and sufficient cause”**. The suit that gave rise to this application, **CMCC No. 1645 of 2000** came up for hearing in the morning of 5th October, 2004 and Mr. Muthanwa appeared for the plaintiff and Mr. Kiburi was holding brief for Kamotho Maiyo Advocates for the defendant. The court scheduled the hearing for 3.30 p.m. Come that time, there was no appearance for the defendant and the hearing went on.

One plaintiff testified and thereafter Mr. Muthanwa applied for an adjournment to enable him call a witness to produce a court file in respect of **Nakuru CMCC No. 302 of 1998** which was the original suit between the respondents (as plaintiffs) and the applicants insured (as the defendant) which had already been decided before the declaratory suit in **CMCC No. 1645 of 2000** was filed. The court adjourned the hearing to the 20th of January, 2005. However, on 18th October, 2004 M/S Muthanwa & Co. for the plaintiff and M/S Kamotho Maiyo & Mbatia for the defendant filed a consent letter to the effect that the plaintiff do avail himself for cross examination by the defendant on 20th January, 2005. On that date, the record shows that the matter was called out in the morning and fixed for hearing at 11.30 a.m. At that time, the defendant's advocate was absent and the plaintiffs' witness produced the entire court file No.302 of 1998 and the plaintiffs then closed their case. Judgment was delivered on 26th January, 2005 in the absence of the defendant's advocate and the court on its own motion ordered stay of execution for thirty (30) days. On 11th February, 2005 M/S Kamotho Maiyo & Mbatia Advocates wrote to M/S Kamonjo Kiburi & Co. Advocates requesting them to advise on what had transpired on 20th January, 2005 when the said matter came up for hearing. But before M/S Kamonjo Kiburi & Co. Advocates could respond to the said letter, on 16th February, 2005 the applicant's advocates received a letter dated 26th January, 2005 from the respondent's advocates calling for the judgment sum as awarded in the said judgment.

It is therefore obvious that the applicant's advocates and presumably their client (the applicants) became aware of the judgment in the above matter on the 16th of February, 2005, ten (10) days before the time for filing an appeal expired. I may even add that since the applicant's advocates knew that the matter was coming up for hearing on 20th January, 2005, they should have attended court on that day and cross examined the plaintiffs as per the said letter of consent but they did not do so. And even assuming that they were prevented from attending court by any good reason and had requested another firm of advocates to hold their brief, they should have made enquiry of the matter immediately after the hearing date.

The applicant's advocates offered to pay Kshs.204,600/- by their letter of 23rd February, 2005 which they copied to the applicant and called for the settlement cheque but the applicant did not give any instructions to its advocates to file an appeal until 2nd March, 2005 and only did so after a notice of proclamation of its goods was issued by auctioneers.

In the aforesaid circumstances, can the applicant argue that it was prevented from filing the appeal by a good and sufficient cause? I do not think so. Even where the advocates for both parties were exchanging

letters regarding the interest and costs payable, nothing prevented the applicant from filing an appeal. The same could have been filed then withdrawn in the event that an agreement was arrived at. The applicant's decision to lodge the appeal out of time was more of an afterthought triggered off by commencement of execution process than a well crafted legal move to challenge the judgment of the lower court.

The reason for delay in filing an appeal is important in considering an application of this nature as was held in **MUTISO VS MWANGI** Civil Application No. 251 of 1997 (unreported). I find that the applicant has not shown a good and sufficient cause for not having filed the appeal in time and I am unable to admit the same out of time.

There being no valid appeal before me, I have no basis of considering the prayer for stay of execution pending the hearing and determination of the intended appeal. The applicant's application is therefore dismissed with costs.

DATED, ,SIGNED & DELIVERED at Nakuru this 2nd day of June, 2005.

D. MUSINGA

JUDGE

2/6/2005