Anyango & another v Ogutu (Miscellaneous Civil Application E122 of 2023) [2024] KEHC 857 (KLR) (1 February 2024) (Ruling)

Neutral citation: [2024] KEHC 857 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISCELLANEOUS CIVIL APPLICATION E122 OF 2023

RE ABURILI, J

FEBRUARY 1, 2024

BETWEEN

TERESA ANYANGO .... 1ST APPLICANT

BONNIE BLUE NICOLE .... 2ND APPLICANT

AND

CAREN JUMA OGUTU .... RESPONDENT

RULING

1. *Vide* an application dated 7th August 2023, the applicants herein seek the following orders:
    1. Spent.
    2. That that pending the hearing and determination of this Application, this Honourable Court be pleased to stay execution of the judgement delivered on 30th March 2023 in Tamu PMCC number E063 of 2022.
    3. That the Honourable Court be pleased to stay execution of judgement delivered on 30th March 2023, pending the hearing and determination of the intended Appeal.
    4. That the Honourable court be pleased to grant the applicants leave to lodge an appeal out of time against the decision delivered on 30th March 2023 by the Principal Magistrate Hon. P. Koskey in tamu PMCC number E063 of 2022.
    5. That upon the grant of leave to appeal out of time, the Memorandum of Appeal lodged herein be deemed as duly filed.
    6. That the Honourable Court be pleased to issue any orders it deems fit and just in the circumstances.
    7. That the costs incidental to this application be the cost in the intended Appeal.

2. The application is supported by the affidavit sworn by Edna Kerubo Masanya, the Legal Associate with the applicants' insurers of motor vehicle registration number KCJ 801A Toyota Probox, being Britam General Insurance Company Limited.

3. The deponent acknowledges in her depositions that judgment which is sought to be impugned was delivered on 30/3/2023 and that she instructed their advocates Ms Omaya & Company Advocates on 29/6/2023, three months later, to file an appeal challenging the issue of liability and quantum of damages awarded to the respondent and that they were informed that the time for filing of an appeal had lapsed .

4. That it was not their intention to delay as they had heavy workload and pressure of work hence the delay and the application herein. That the intended appeal raises serious issues of law and that the said appeal as intended has high chances of success. That stay of execution is necessary to preserve the status quo and that the application is brought in good faith and without unreasonable delay.

5. Finally, that the respondent will not be prejudiced in any way if the application is allowed.

6. Opposing the application, the respondent filed a Replying Affidavit dated 18th September 2023 contending in the deposition that the affidavit in support of the application is fatally defective as it is sworn in Kisumu but commissioned in Nairobi; that the application has no merit as it does not meet the conditions for stay and for leave to appeal out of time. Further, that the application has been brought with unreasonable delay hence it should be dismissed.

7. Parties filed written submissions to canvass the application which submissions mirror the parties 'respective pleaded positions as contained in the grounds and the supporting as well as the replying affidavit.

Issues for determination

8. Having considered the application and the arguments for and against, the main issues for determine are:

    1. Whether the application is fatally defective having been sworn in Kisumu and Commissioned in Nairobi?

    2. Whether the Applicant is entitled to be granted leave to appeal out of time?

    3. Whether the Applicant is entitled to orders of stay of execution of the judgement delivered on 30th March 2023 in Tamu PMCC No. E063 of 2022?

On Whether the application is fatally defective having been sworn in Kisumu and Commissioned in Nairobi

9. According to the respondent, the Applicants' supporting affidavit dated 24.07.2023 to their application is not an affidavit at all as the jurat it is not properly on oath as provided for under section 5 of the *Oaths and statutory Declarations Act* Cap 15 Laws of Kenya which provides *inter alia*:

> " Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

10. It was submitted that the said supporting affidavit is purported to have been sworn at Kisumu, but before a Commissioner for Oaths at Nairobi, which is a practical impossibility for there is no way the

deponent could have sworn and/or executed the affidavits at Kisumu before a Commissioner for Oaths at Nairobi. It was argued that the two events could only happen at one place at the same time, for the deponents should present themselves before a Commissioner for Oaths, and execute the affidavits in the presence of the said Commissioner for Oaths. That the deponent and the Commissioner for Oaths, must be both present at the same place at the same time. It cannot, therefore, be that deponent was at Kisumu and the Commissioner of oaths at Nairobi

11. Reliance was placed on the case of *Mary Gathoni & another v Frida Ariri Otolo & another* [2020] eKLR where Justice W. Musyoka J when faced with a similar situation where affidavits were purported to have been sworn at Eldoret, but before a Commissioner for Oaths at Kakamega ruled at paragraph 8 of the said ruling as follows:

> " 8. I need not say more. The affidavits on record, purportedly sworn by Mary Gathoni and Emmanuel John Amboye, on 27th September 2019, were not properly commissioned. They are not on oath. In fact, they are not affidavits at all. I, accordingly, hereby strike them out. They were drawn in support of the interlocutory Motion dated 27th September 2019. The effect of the striking out of the purported affidavits would be that the said application would now be without any evidential foundation. The same is amenable to dismissal, and I hereby dismiss it. The respondents shall have the costs."

12. This court was therefore urged to uphold the ruling of W. Musyoka J in this application that the Applicant's supporting Affidavit dated 24th July 2023 purported to have been sworn in Kisumu but commissioned before a commissioner of oaths in Nairobi is not properly commissioned, it is not on oath and in fact it is not a supporting affidavit at all and the same should be struck out hence making the said application with no any evidential foundation .

13. I have considered the objection to the affidavit in question. I am in agreement with the respondent's counsel that an affidavit is an affidavit only if it is sworn before a commissioner for oaths and that it cannot be sworn at a different place but commissioned at a different place as was in this case. Applying the decision in the *Mary Gathoni & another v Frida Ariri Otolo & another*(supra) case, I find and hold that the "supporting affidavit" as filed by the applicant is fatally defective and offends the provisions of the *Oaths and Statutory Declarations Act*. The defect in my view is not the type that is curable under Article 159 of the *Constitution*. It goes to the root of the matter. I uphold the objection by the respondent and strike out the affidavit.

14. Having struck out the affidavit in support as it was no affidavit at all, Iam not in agreement with the respondent's counsel that the entire application must also go. I say so because there is no mandatory requirement that an applicant for stay of execution of decree pending appeal under Order 42 Rule 6 of the *Civil Procedure Rules* and leave to appeal out of time must be accompanied by an affidavit and that in default, then there would be no application at all. The only disadvantage that the party applying would have is that if they relied on facts on oath, then there would be no facts.

15. However, if the party relied on the law, as affidavits are not expected to contain legal arguments, then an application and grounds would suffice. Neither does section 79 G of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules* on enlargement of time demand that an affidavit be filed in support of an application. What is necessary is satisfying the court that one has sufficient and good reason for the delay. In some instances, the court record would show that the delay was occasioned by the court not supplying copies of proceedings and judgment in good time hence the need for a certificate of delay to issue.

16. This permissive nature of affidavits in support is also reflected in Order 51 Rule 4 of the *Civil Procedure Rules* on the contents of the notice of motion that:

> " Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served."

17. I also observe that a copy of judgment in the lower court is filed. Whereas no affidavit is on record, the court cannot ignore a judgment of a court of competent jurisdiction. Courts take judicial notice of such judgments.

On whether the prayers sought are merited

i. Whether the prayer for enlargement of time for filing an appeal is merited

18. The judgment subject of this suit was delivered on 30/3/2023 and this application was filed in August 2023, five months away. Section 79 G of the *Civil Procedure Act* provides for timelines for filing of appeals from the subordinate court to this court which is thirty days of the date of decree or order. Under the Proviso thereto, on application, this court may in its discretion and for sufficient reasons given for the delay, enlarge time for filing of the appeal.

19. Further, Order 50 Rule 6 of the *Civil Procedure Rules* gives this court the power to enlarge time where a limited time has been fixed for doing any act or taking proceedings under the Rules or by summary notice or by order of the court.

20. The applicant was aware of the judgment to be impugned, from the copy of judgment a filed herein. their advocate was in court. The applicant has not laid any blame on its advocate or the court for the delay. There is no acceptable or sufficient or good reason provided for the delay which I find inordinate.

21. I find that the intended appeal as intended is an afterthought. The Applicant s in my view merely seeking to deny the Respondent his right to enjoy the fruits of the judgement delivered in her favour.

22. The applicant must embrace the fact that litigation must come to an end in one way or another. The applicant has neither demonstrated to this court that he is entitled to the orders sought enlarging time for filing of an appeal.

23. I find the application to be barren and devoid of any merit. I dismiss the prayer for enlargement of time.

24. There would be no need to delve into whether or not the prayer for stay pending appeal are deserved as the court has declined to enlarge time for filing of the appeal out of time.

25. However, even assuming that I had granted leave to file an appeal out of time, the question is whether the prayer for stay is merited.

26. Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 sets out the conditions for grant of stay of execution of decree pending appeal. These conditions that:

    i. Substantial loss may result unless the order is made.

    ii. The application has been made without unreasonable delay.

    iii. Such security as the court orders for the due performance of the decree has been given before the applicant.

i.Substantial Loss

27. From the copy of judgment which I take judicial notice of, the trial court found the applicants herein 100% liable for the accident and awarded the respondent Kshs 500,000 general damages for pain and suffering and loss of amenities in compensation for the injuries sustained in the accident.

28. I observe that the respondent was a passenger in the appellants 'motor vehicle and although the applicants wanted the trial court to apportion liability, the court declined as there was no proof of how as a passenger, the respondent could have contributed to the occurrence of the material accident.

29. On the question of quantum of damages, I observe that the applicant herein proposed damages in the sum of Kshs 400,000 while the trial court awarded Kshs 500,000. I have examined the injuries sustained by the respondent as summarized by the trial court and indeed, they were serious in nature and that is why the applicants suggested Kshs 400,000.

30. Albeit the applicants claim that the intended appeal raises serious issues of law and has high chances of success, and whereas the issue of the success of the appeal is not for this court to determine, Iam inclined to find that the applicants have not demonstrated what substantial loss they will suffer unless stay is granted.

31. There is no evidence that should the respondent be paid the decretal sum, then she will not be in a position to refund the same should the appeal succeed and that therefore the appeal shall be rendered nugatory.

ii.Whether the application was made without unreasonable delay

32. This application was filed on the 17th August, 2023. The judgment sought to be impugned was delivered on 30/3/2023. Instructions to appeal were given on 29/6/2023. The reason for the delay is pressure of work and that is by the insurance company itself not the advocate.

33. Delay defeats equity and the *Constitution* at Article 159 abhors delayed justice. In this case, I find that the delay is inordinate and the same has not been explained to the satisfaction of the court. The applicants advocate was present in court on the judgment day and there is no way a party who wishes to appeal a judgment could have waited for five months to finish the other work that they were engaged in which was more important and remember quite belatedly that this other matter was on a waiting list, five months later, and hoping that the decree holder would be waiting for the appeal and not execute decree.

34. In my view, the respondent decree holder is prejudiced by such delay which is unreasonable and unexplained to the satisfaction of the court. I find the application to be an afterthought.

iii. On what security that this court would order for the due performance of decree,

35. The applicants have not said anything to do with what security they are willing to deposit for due performance of decree. However, that failure is not fatal as the court has the discretion to order for such suitable security. The respondent has asked for payment of Kshs 400,000 plus costs since the applicants had proposed this amount in damages, then the balance be deposited in advocates joint interest earning account.

36. In this case, I find no reason advanced for depriving the respondent of her lawfully obtained judgment.

37. In the end, I find and hold that the application herein on both limbs on the prayer for leave to file an appeal out of time and for stay of execution of decree pending the hearing and determination of the

intended appeal is devoid of any merit and the same is hereby dismissed with costs assessed at Kshs 20,000 in favour of the respondent and payable within 14 days of this date in default, the respondent is at liberty to execute for recovery of the same.

38. Order to be typed and sealed by the Deputy Registrar.

39. This file is closed.

40. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 1ST DAY OF FEBRUARY, 2024

R.E. ABURILI

....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR