



Multiline Hauliers Ltd & another v Ngasa (Miscellaneous Civil Case 299 of 2023) [2024] KEHC 894 (KLR) (5 February 2024) (Ruling)

Neutral citation: [2024] KEHC 894 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CIVIL CASE 299 OF 2023**

FR OLEL, J

FEBRUARY 5, 2024

BETWEEN

MULTILINE HAULIERS LTD 1ST APPELLANT

HITCO LIMITED 2ND APPELLANT

AND

JUSTUS KELI NGASA RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 8th November 2023 brought pursuant to provisions of Section 3A, 79G and 95 of the *Civil Procedure Act*, Order 22, rule 22, Order 42 Rule 6 and Order 51 rules 1 and 3 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers (a) and (b) of the said application are basically spent and the main prayer sought is prayer (c) & (d) that; they be granted leave to Appeal out of time as against the judgement of Hon Francis Andayi, Chief Magistrate dated 25th October 2023 in Machakos CMCC No 8 of 2020 and further that pending hearing and determination of the Appeal, they be granted an order of stay of execution of the judgment/decree referred to above. The application is supported by the grounds on the face of the said application and the supporting affidavit of one of the directors of the appellants company namely; Noah Makau Nthumbi dated 8th December 2023.
2. The applicants aver that they were aggrieved by this judgement and by the time they were informed of the same, the time within which to file the Appeal had lapsed. The intended Appeal was not an afterthought and had overwhelming chances of success. If stay was not granted, there was likelihood of the Respondent attaching their property which would render the Appeal nugatory.
3. This application is opposed by the Respondent, through his advocate, Munyoki Muthangya, who filed a Replying Affidavit dated 26th January 2024. He maintained that the said application was misconceived as the applicant was all along aware of the lower court decree and had not given a good reason as to why



extension of time should be granted. Secondly the applicant had not met the conditions for granting stay under order 42 Rule 6(2)(b) of the Civil Procedure Rules, 2010 and thus the said application should be dismissed

Analysis & Determination

4. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the only issues which arise for determination is whether time should be extended to allow the Appellants file their Appeal out of time and subsequently, if allowed, should this court grant stay of execution of the Judgment/Decree dated 25th October 2023 issued in Machakos CMCC No 8 of 2020.
5. Under Section 79G of the civil procedure Act a party is allowed to appeal against a decree/ruling within 30 days. But where there was a delay, the court could admit/allow the appeal to be filed out of time if the applicant satisfies the court that he/she had a good and sufficient cause for not filing the appeal in time. In the Supreme court citation of Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others [2014] eKLR the following principles of extension of time was laid down;
 - a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on case by case basis;
 - d. Whether there is a reasonable explanation for the delay. The delay should be explained to the satisfaction of the court.
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
6. The court too could fall back on provisions of Section 1A, 1B & 3A which granted the court inherent powers to grant such orders as it may deem necessary and further enjoined court to determine disputes in a just manner while considering the lower rather than higher risk of injustice. In the citation of Shabbir Ali Jusab v Anaar Osman Gamrai & another [2013] eKLR it was held that; the court should focus on substantive justice and disregard procedural technicalities
7. The Appellants allege that they were not aware that the stipulated time of filing an Appeal had lapsed and requested court to excuse their delay in instructing their counsel to file the said Appeal, abietly out of time. Further the Appellants submitted that the reason why there was a delay to instruct their counsel, was due to the fact that they had to go through the judgment themselves and were late in issuing instructions to Appeal. Substantive justice dictated that they be given a chance to ventilate the Appeal which was said to be meritorious.
8. The Respondent strongly opposed this application and averred that, the Judgement was read out on 25th October 2023, in the presence of the Appellants advocate and further on 8th November 2023, he served the Appellants advocates, with a letter informing them of the decree and a tabulation of costs for assessment. Further on 24th November 2023, he did serve the appellants counsel with a draft decree and



no comments were raised objecting thereto. This application was therefore an afterthought to deny the Respondent the fruits of justice.

9. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court. An applicant must give court a reasonable explanation for the delay to the satisfaction of the court before the court can issue discretionary orders to his/her favour.
10. Unfortunately for, the Appellants, their explanation for the delay, does not hold. Their excuse that they were not aware of the stipulated time to file the appeal cannot hold, since their counsel was in court during delivery of the judgement and subsequently it has been adequately proved that indeed, their advocate was served by the Respondents advocate, with proposed costs for assessment on 8th November 2023 and subsequently the decree on 24th November 2023.
11. Further the applicant has not provided any proof of lack of communication/late communication between them and their advocate during this intervening period to indeed prove their ignorance of the judgement earlier delivered and appeal timelines. The reasons for the delay are thus not plausible and are hereby rejected.
12. There being no Appeal filed, the provisions of Order 42 Rule 6(2)(b) of the Civil Procedure Rules, 2010 cannot come into play and thus it is unnecessary to consider the aspect of stay of the decree dated 25th October 2023, issued in Machakos CMCC No 8 of 2020

Disposition

13. Taking all relevant factors into consideration I do find that the application dated 8th November 2023 is unmerited and proceed to dismiss the same with costs to the Respondent.
14. The costs of this Application is assessed at Kshs.25,000/=.
15. It is so ordered.

RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 5TH DAY OF FEBRUARY, 2024

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 5th day of February, 2024

In the presence of: -

Ms Wataka for Appellant

Mr. Munyoki for Respondent

Sam - Court Assistant

