



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 53 OF 2019

(Being an Appeal from the Judgment of Hon. E. Muchoki (RM) in Mombasa CMCC No. 2098 of 2016 delivered on 5/12/2018)

FIDELITY SHIELD

INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

DANSON KOMBO MWALIMO.....RESPONDENT

RULING

1. The subject of this Ruling is a Notice of Motion application dated 11/3/2020 and filed on an even date by the Appellant (hereinafter the Applicant) and seeks for the following orders:

a) Spent;

b) THAT the order rejecting the appeal upon the grounds that it was filed out of time be set aside and in the meantime there be a stay of any execution against the appellant pending the hearing and determination of this application;

c) THAT the court do give directions on the hearing of the appeal;

d) Those costs of this application are provided for.

2. The Application is brought under Sections 1A, 1B, 3A and Section 79B, all of the Civil Procedure Act, Order 42 Rule 12, Order 22 Rule 52 and Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

3. The Application is premised on among other grounds that:

(a) On 22/2/2019, the Applicant had sought to file the instant Appeal out of time vide Miscellaneous Civil Application No. 121 of 2019, Fidelity Shield Insurance Company Limited vs Danson Kombo.

(b) On 11/3/2019 the court granted to the Applicant leave to file the Appeal out of time on the condition that the memorandum of appeal is filed within 7 days and the Record of Appeal filed within 60 days.

(c) A further condition was that the Applicants do deposit the decretal sum in a joint interest-earning account in the names of the advocates for both parties.

4. According to the Applicant it complied with the conditions set on the 11/3/2019 but came to realize that the Appeal herein had been rejected on the ground that the same had been filed out of time when they tried to list it for a mention for directions.

5. The Applicant thus prays that the order rejecting the Appeal be set aside and/or vacated for if the same is not done, the Applicant avers that he will suffer a great loss and lose an opportunity to prosecute its appeal which raises serious and arguable issues.

6. Further, the Application is supported by the Affidavit of Peter Omwenga, the Applicant's Advocate, sworn on the 11/3/2020. In the said Affidavit, he elucidated the grounds on the face of the application and added that not only did the Court grant it leave to file the appeal out of time, the Applicant was also granted stay of execution of the Judgment and the decree that was issued by the subordinate Court.

7. In response, the Respondent filed a replying affidavit sworn by Danson Kombo Mwalimo on the 11/5/2020. He deposed that the Appeal

herein was summarily dismissed principally for “*No sufficient grounds for interfering*” with the “*decree or order*” and that the reference that the Appeal was filed out time does not oust the fact that there are no sufficient reasons to interfere with the judgment of the Court. The Respondent further averred that the Applicant herein, failed to comply with the Court orders as issued in **High Court Misc. App No. 121 of 2019** in the following acts/omissions: -

a) The Respondent filed its Record of Appeal on 31/10/2019 that is over 210 days after the Order instead of the agreed 90 days.

b) The Respondent deposited the decretal sum of Kshs. 1,190,497/= on the 23/4/2019 well after the lapse of the 30 days agreed which deposit ought to have been made on 11/4/2020.

8. Lastly, the Respondent averred that he is at liberty to execute even if the Appeal had not been summarily dismissed. He prays that the instant application be dismissed with costs.

9. Directions were taken that the application be canvassed by way of written submissions and all parties indicated that they will be relying on the said written submissions. The Applicant’s submissions were filed on 5/6/2020 while those of the Respondent were filed on 9/6/2020.

10. I have had the benefit of reading the written submissions. They replicate much on the grounds in support and opposition of the application as captured above that I need not to duplicate the same herein. None of the parties herein relied on any case law.

Analysis and Determination

11. After perusing all the pleadings filed in this case and the written submissions by the parties herein, the issue for determination is whether this Court should exercise its discretion in favour of the Applicant by vacating the order rejecting the filing of this Appeal.

12. The instant Appeal was rejected by Court on the 6/12/2019 for the reasons that the Appeal herein was filed out of time without the leave of Court.

13. A perusal of the Court record reflects that the subordinate Court delivered its Judgment on the 5/12/2018 and the Applicant before the trial Court, applied and was granted a 30 day of Stay of execution of the decree as issued.

14. The Applicant before bringing this Appeal to this Court had filed **Misc. Civil Application No. 121 of 2019 Fidelity Shield Insurance Company Limited versus Danson Kombo Mwalimo** (in the matter of an Intended Appeal) against the decree made by Hon. E. Muchoki (RM) on the 5/12/2018 vide RMCC No. 2098 of 2016.

15. In Misc. Civil Application No. 121 of 2019, the Applicant sought for

extension of time to Appeal and stay of execution of the Judgment and decree of the trial in RMCC No. 2098 of 2016.

16. The parties herein, entered into a consent order on 11/3/2019 in Misc. Application No. 121 of 2019 that:

(a) THAT the Applicant do file the Memorandum of

Appeal within 7 days from today and a record of appeal within 90 days from today.

(b) THAT the applicant do deposit the decretal sum of Kshs. 1,190,597/= in an interest earning account in the names of both advocates on record within 30 days from today.

(c) THAT the applicant do pay the auctioneers costs as agreed or to be taxed and in absence of agreement.

(d) THAT the applicant do pay costs of this application to be agreed on or taxed.

(e) THAT in case of failure to comply with any of the terms set out in (a) and (b) above application do stand dismissed and the respondent shall be at liberty to execute the decree of the trial court.

17. According to the Respondent, the Applicant herein, filed his Memorandum of Appeal on the 15/3/2019, Record of Appeal on the 31/10/2019 and deposited the decretal amount in a joint interest-earning account of counsel for both parties on the 23/4/2019. The Respondent avers, that the Applicant was not compliant with the Consent order save for the filing of the Memorandum of Appeal that was done within the stipulated time.

18. The Applicant on the other hand averred that it had fully complied with the Court order and all the set conditions but does not understand why the appeal herein was rejected for having been filed out of time.

19. **Section 79G of the Civil Procedure Act** provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

20. The Applicant, after the delivery of the judgment of the trial Court, realized they were out of time of filing their Appeal, they properly sought for leave from this Court and the same was granted on the 11/3/2019 with set conditions.
21. As there is already in existence an order of the Court granting the Applicant leave to file its Appeal out of time, the Court then is invited to investigate if the Applicant fulfilled the conditions as were set in the consent order of the parties as adopted on 11/3/2019 as an order of this Court.
22. The Court has perused the pleadings and records before it, and find that in the strictest sense, the Applicant partially complied with order (a) of the Consent Order granted on the 11/3/2019 by filing the Memorandum of Appeal on the 15/3/2019.
23. The Consent Order was not fully complied with in terms of Order (a) that required the Applicant to file his record of appeal within 90 days and Order (b) that required the Applicant to deposit the decretal amount in an interest-earning account within 30 days.
24. The Applicant filed its Record of Appeal more than seven (7) months later on the 31/10/2019 and the deposit of the decretal sum was done way beyond the 30 days prescribed on the 23/4/2019.
25. The terms of the consent order entered into on 11/3/2019 were very Clear that the Applicant was required to comply with order (a) and (b), and if the same was not complied with, order (e) indicated that the Applicant's Application was to be dismissed and the Respondents allowed to execute.
26. As it stands, the Applicant has not complied with the terms of the Consent orders of 11/3/2019. The Applicant is non-compliant in terms of order (a) and (b) by failing to comply with the timelines as set by the said consent of both parties.
27. In the case of **B v Attorney General [2004] 1 KLR 4 31 Ojwang, J** (as he then was) opined that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

28. The Applicant has come to this Court seeking orders that its Appeal be reinstated, fully aware that it has been hesitant in complying with the consent order Court adopted as an order of the Court on the 11/3/2019. The Applicant has not given reasons as to why he failed to comply with the terms in the consent order. Further, it is quite evident that the said consent has never been set aside, hence it ought to have been complied with by the Applicant.
29. See the case of **Republic v Principal Secretary, Ministry of Defence Ex-Parte George Kariuki Waithaka [2018] eKLR, G. V. Odunga J**, observed correctly as follows:

“...It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal...”

30. To uphold the rule of law, it goes without the saying that once orders are issued by a Court of competent jurisdiction, those orders are not issued in vain and the same must be complied with unless discharged.
31. Having not complied with the orders of the Court issued on the 11/3/2020, the Applicant's cannot come to Court on the pretext that they have fully complied with the Court order as issued on 11/3/2020 and that their Appeal is rightfully before this Court.
32. What has clearly been demonstrated in the instant case is that the Applicant does not seem to have regard to obeying orders as issued by this Honourable Court, hence this Court does not see any reason for setting aside the order rejecting the Appeal.
33. The upshot of my finding therefore is that the Application dated 11/3/2020 be and is dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and Delivered at Mombasa this 9th day of February, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D. O. CHEPKWONY