



**REPUBLIC OF KENYA**

**AT THE HIGH COURT OF KENYA**

**AT SIAYA**

**MISC. CIVIL APPLICATION CASE NO. E003 OF 2021**

**CORAM: HON. R.E. ABURILI J**

**JUBILEE INSURANCE CO. LTD.....APPLICANT**

**VERSUS**

**JUDITH AKOTH WARINDA.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 18/1/2021 under Certificate of Urgency supported by the affidavit of Dancan Njoga Advocate on behalf of the applicant, the applicant Jubilee Insurance Company Ltd prays for primarily, stay of execution of decree in ***Bondo RM's Court Civil Suit No. 9 of 2019***. Jubilee Insurance Company Ltd versus Judith Akoth Warindah, pending the hearing and determination of the appeal to be filed in the High Court at Siaya.
2. The Applicant also prays for leave to appeal out of time from the judgment and decree in Bondo RM CC No. 9/2019 between the Applicant and the Respondent herein.
3. The Application is supported by 11 grounds on the face of the application. The applicant claims that after judgment was rendered in Bondo RM CC 9/2019, on 23/9/2020, it instructed its advocates on record to lodge an appeal to challenge the judgment. However, that the said instructions which were given via email were never received likely due to technological hitch and that it was not until 15/1/2021 when Mary Nyanga, the applicant's Legal Officer called asking whether the appeal had been filed whereupon it was realized that their email instructions had not been received and that the time for filing of the appeal had already lapsed.
4. The applicant's counsel deposes that the delay in filing of the intended appeal is excusable, has been explained and is not inordinate.
5. In their view, the appeal as intended has high chances of success as shown by annexed draft Memorandum of Appeal.
6. In addition, it is disposed and asserted that the Respondent/Decree holder is a person of straw as per her evidence in court hence if the taxed costs is paid to her then the intended appeal will be rendered nugatory as it will be well-nigh impossible to recover the taxed costs from her if the intended appeal succeeds.
7. The application is also willing to furnish security as the court may order for the due performance of the decree and finally, that it is in the interest of justice for the orders sought to be granted.
8. The grounds in support were thus reiterated in the supporting affidavit of Dancan Otieno Njoga Advocate sworn on 16/1/2021.
9. Opposing the application, the Respondent filed a replying affidavit sworn by herself on 22/1/2021 deposing and contending that the applicant's application is consciously and blatantly falsified to this court.
10. That there was no evidence of any rebounded email from the application to its advocates; That contrary to the assertions by the applicant, the Parties entered into a consent for party and party costs, which consent dated 3/11/2020 was adopted as an order of the court after which the applicant requested the Respondent's advocates their Bank Account details to enable them settle the costs. That on 11/1/2021. The Respondent was in her advocate's offices when Mr. Anyul called Mr. Mitch Menezes Advocate on the matter and Mr. Menezes referred Mr. Anyul to speak to Mr. Otieno Njoga Advocate, when the latter notified the former that the applicants' employees had gone on Christmas recess and were yet to sign the requisite cheque and that he promised to settle the costs by 15/1/2021 only for the applicant's counsel to file this application on 18/1/2021 - that therefore there is no evidence of any instructions by the applicant to file the intended appeal given the circumstances.

11. The Respondent reiterated that the application was not merited and was filed 5 months after the judgment hence it should be declined with costs.

12. The application was canvassed by way of oral submissions on 2/2/2021 with Ms. Odieny urging the application on behalf of the applicant whereas Mr. Anyul represented the Respondent. The said application was argued online via Microsoft Teams.

13. Ms. Odieny's submissions in support of the application reiterated the prayers, grounds and affidavit sworn by Dancun Otieno Njoga, Advocate. She relied on Section 79G of the Civil Procedure Act on leave to appeal out of time and on the prayer for stay of execution of decree pending appeal, counsel relied on Order 42 Rule 6(2) of the Civil Procedure Rules. She emphasized that the applicant stands to suffer substantial loss unless stay is granted and that it was willing to deposit security for the due performance of decree, in a joint earning interest account to be operated by both counsel for the parties' advocates.

14. Opposing the application, Mr. Anyul advocate for the Respondent relied on his client's Replying affidavit and maintained that there was no evidence of an email of instructions to appeal sent to the applicant's advocate as alleged and that they were expecting settlement of costs following the applicant's sending an email to its advocate giving a payment advise hence, if it had intended to appeal, as at December 2020, it would have made an inquiry on the position of the appeal, 2 months after the judgment.

15. That the payment advise was sent to the Respondent's counsel which they filled and returned and that when Mr. Anyul spoke to Mr. Njoga on 11/1/2021, the latter promised to clear costs in a week's time, while regretting the delay.

16. On stay, it was submitted that there was nothing to be stayed as this is not a money decree as the suit was, as per the annexed plaint, one seeking for declaration for repudiation of an insurance policy, which suit was dismissed hence there was no decree to be stayed even if leave to appeal out of time was to be granted. In addition, it was submitted that the insurance policy was for one year in 2017. hence there was nothing to be repudiated.

17. On loss, it was submission that there was no prayer for stay of payment of costs awarded to the Respondent and that no prejudice would be suffered by the Respondent as the costs are party and party. Counsel urged the court to dismiss the application with costs.

#### **DETERMINATION**

18. I have considered the application, the grounds thereof, supporting affidavit, Replying affidavit and annexures. I have also considered the oral submissions by both counsel for the parties. In my humble view, the issues for determination are; 1) whether the applicant deserves the orders for leave to appeal out of time and 2) whether the prayer for stay pending the intended appeal is merited.

19. On whether the application for leave to appeal out of time is merited, the commencement point is the law. Section 79G of the Civil Procedure Act stipulates 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 applicant 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. In the instance case, the judgment intended to be appealed from was delivered on 23/9/2020. The application for leave to lodge an appeal out of time was filed on 18/1/2021 which was over 3½ months. The appeal ought to have been filed on or before 23/10/2020. The delay in the filing of the intended appeal as admitted by the applicant's counsel is apparent. The question is whether the reasons given for the delay are sufficient and therefore acceptable to court to enable the court exercise discretion. Ordinarily, this court would have no reason to deny an intending applicant an opportunity to file an appeal out of time in order to ventilate its grievances fully.

21. However, in the instance case, despite the explanation given by the applicant's counsel that the applicant gave written instructions by way of an email for an appeal to be filed, there is absolutely no evidence of such instructions.

22. There is also no evidence of oral instructions given to counsel by the applicant to file an appeal to challenge the order of the trial court dismissing the applicant's suit.

23. The Respondent has sworn an affidavit countering the assertions by the application's counsel and contending quite authoritatively that after the judgment intended to be impugned, parties even agreed on the costs awarded in favour of the Respondent and filed consent which was adopted by the trial court. Thereafter, the applicant's counsel sent to the Respondent's counsel a payment advise and asked for Bank details where the costs would be paid into and all those events were taking place after time for filing an appeal had lapsed.

24. The Respondent further deposes and there is no contrary position or denial, that when she visited her advocates offices on 11<sup>th</sup> January, 2021 to inquire on the payment of awarded costs, her advocate called the Respondent's advocate and spoke to Mr. Njoga advocate who explained the reason for the delayed remittance and promised to settle the costs as agreed, by 15/1/2021.

25. To her surprise, on 18/1/2021 this application was filed seeking to appeal out of time after the Respondent's counsel wrote to the applicant's counsel inquiring on why the settlement was not forthcoming after a promise to settle by 15/1/2021.

26. In my humble view, the application was filed in bad faith and smacks of dishonesty on the part of the applicant who has come to court with unclean hands and failed to disclose to court all the above material facts of the events following the delivery of judgment.

27. The payment advise dated 1/12/2020 issued by the applicant to the Respondent's counsel is a clear indication that as at that time, the applicant had resolved to settle the costs as agreed at Kshs. 50,000/= as per the annexed copy of consent dated 3/11/2020 and filed in court on 20/11/2020 again, long after the time for appealing had lapsed.

28. The said consent is clear on the face of it that there was stay of Execution for 30 days from the date of filing of the consent order". 30 days lapsed on 20/12/2020 and still no settlement was made and come January 2021, the applicant's counsel gave an excuse that their clients-staff had been out of office for Christmas. After promising to settle the same by 15/1/2021, what followed was this application.

29. This court frowns upon dishonesty and bad faith in that from the record herein, why was the applicant not contemplating an appeal as at 3/11/2020 when a consent for costs stipulating the timelines for settlement were given, only for the applicant to change its mind and claim to have instructed its counsel by email to file an appeal, which email was never annexed to counsel's affidavit in support of this application?

30. The letter by the Respondent's counsel dated 2/12/2020 forwarded the Bank details, requested by the applicant's counsel, which were never acted upon.

31. For all the above reasons, I find that there is no sufficient cause for the delayed filing of the appeal from the judgment of the trial court delivered on 23/9/2020 and that the application dated 18/1/2021 is an afterthought, disentitling the applicant discretion of this court.

32. The application for leave to appeal out of time is accordingly found to be devoid of merit and therefore the same is hereby dismissed.

33. On the prayer for stay of execution of decree pending the intended appeal, as the prayer for leave to appeal out of time is dismissed, there cannot be a stay order pending nothing. Suffice to say that the decree in the lower court is a negative decree dismissing the applicant's suit with costs hence, such decree is incapable of being stayed.

34. Even assuming that the stay would affect payment of costs of Kshs. 50,000/= as taxed by consent, the parties agreed the costs by consent, which consent was never set aside, and the said consent clearly states that the said costs would be settled within 30 days of the date of filing of the consent on 20/11/2020. Thirty days lapsed on 20/12/2020 and no consent was entered to extend the 30 days. That being the case, the prayer for stay could not be granted even if I was to find that the applicant's prayer for leave to appeal out of the time was merited. This is because a time bound consent unless set aside must be complied with.

35. For the above reasons, I find this application an afterthought and unmerited. It is declined and dismissed with costs assessed at Kshs. 20,000/= to the Respondent, payable within 14 days of today's Ruling in default, the Respondent is at liberty to execute for recovery.

36. The order granting temporary stay of execution made on 25/1/2021 is hereby vacated.

37. Orders accordingly.

**Dated, signed and Delivered at Siaya, this 8<sup>th</sup> Day of February, 2021 virtually in open court via Microsoft teams.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Ms. Odieny advocate for the applicant

Mr. Anyul Advocate for the Respondent

CA: Modestar and Mboya