



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

MISCELLANEOUS APPL. NO. E11 OF 2021

BLESSED TRANSPORTERS LTD.....APPLICANT

-VERSUS-

JOSEPH MUTHAMA KIMEU & JOHN KYALO MWANGANGI

(Suing as the legal representatives of the Estate of

TABITHA NZISA MUTHAMA (Deceased).....1ST RESPONDENT

MUTUI (K) LTD.....2ND RESPONDENT

PATRICK KYALO.....3RD RESPONDENT

RULING

1. The Applicant vide its Notice of Motion application dated 2nd February, 2021 filed in Court on 4th February, 2021 expressed to be brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Section 79G, 3 & 3A of the Civil Procedure Act and all other enabling provisions of the law seeks principally two reliefs; that there be an order of stay of execution of the ruling dated 16.12.2020 in **Machakos CMMC No. 594 of 2017** pending determination of the application; that the applicant be granted leave to lodge appeal out of time against the ruling dated 16.12.2020; that costs be provided.
2. The application is grounded on the grounds set out in the body of the application and on the affidavit sworn in support by *Peter Kimeu Mbithi*, Director of the Applicant, and *Perry Asuke*, Legal Officer working with Invesco Assurance Company Ltd, the Applicant's Insurer both sworn on even date.
3. The application was opposed by the respondent through the replying affidavit of the 1st Respondent sworn on 11.2.2021.
4. To contextualize the instant application, it is necessary to give a brief background of the matter. It is apparent from the record that the 1st Respondent/Plaintiff filed a suit against the 1st, 2nd and 3rd Defendants on 31st August, 2017 seeking general and special damages plus costs and interest arising from a road traffic accident alleged to have occurred on 18th April, 2017. Summons were not properly filed upon the Applicant and as such the matter proceeded ex-parte. The Applicant's insurer learnt about the suit through a formal proof notice served upon the Applicant and which notice was then passed over to it after which the client's file was inadvertently misplaced and as a result the Applicant's insurer failed to instruct an Advocate to come on record in time to enter appearance and seek to set aside the Judgement. The Applicant was ambushed with warrants of attachment and sale of movable property by Charlton Auctioneers who proclaimed its moveable property on 28th August, 2020. Further delay was occasioned by Covid-19 Pandemic which brought every economic activity to a standstill. The Applicant's insurer then instructed the firm of Bench & Company Advocates to come on record and file an application dated 7th September 2020 for stay of execution and at the same time seek to set aside the ex-parte Judgement. The application was later dismissed on the 16.12.2020 by the trial court. They then moved to this court and filed the instant application.
5. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 19th February, 2021 while 1st Respondent's written submissions were filed on 22nd February, 2021.
6. The Applicant submitted that it did not appeal against the Learned Magistrate's Ruling of 16th December, 2020 due to time constraints and the Covid-19 Pandemic. The applicant thus argues that it was not guilty of inordinate delay in bringing the instant application seeking extension of time to file an appeal against the magistrate's order of 16th December, 2020 as they were not aware of the said ruling until it was already delivered and the challenges presented by the Covid-19 outbreak didn't provide a conducive environment to enable them do so on

time.

7. The Applicant urged the Court to give the interest of justice priority over procedural technicalities relying on amongst others the cases of **Richard Nchapi Leiyagu vs IEBC & 2 Others, (2013) Civil Appeal No. 18 of 2013** and **Winnie Wambui Kibinge & 2 Others vs Match Electrical Limited (2012) eKLR**.

8. The Applicant submitted that the 1st Respondent will not be prejudiced if leave to file appeal out of time is granted. Further, that there has been no inordinate delay in bringing up the application. The Applicant added that the proposed appeal is an arguable one.

9. The 1st Respondent in response argues that the Applicant did not have an automatic right of appeal against the decision and/or order of the Learned Magistrate dated 16th December, 2020 as the same is an abuse of the court process due to the fact that the Applicant has not given good reasons for filing an appeal out of time. The 1st Respondent submitted that the application was clearly a tactic intended to deny the 1st Respondent from reaping the fruits of his successful litigation.

10. The 1st Respondent further submitted that the Applicant did not demonstrate that it had any good and sufficient cause for not filing the appeal within time to be able to benefit under the proviso to section 79G of the Civil Procedure Act. It was also submitted that the applicants have not shown that they have an arguable appeal and that they have not given a single explanation for failure to file a defence even after being given several chances to do so.

11. It was further contended that the orders being sought to set aside the ex-parte judgment of 23rd May, 2019 were denied by the lower court on a ruling delivered on 16th December, 2020. That the application is therefore res judicata and is not arguable. That in essence the Applicant is attempting to appeal against the final orders of the court dated 16th December, 2020 through the back door.

12. The 1st Respondent finally submitted that the Applicant made several applications in an attempt to delay the course of justice thereby prejudicing the 1st respondent. That conditions for precedent for enlargement of time within which to file an appeal have not been attained. The 1st Respondent urged the court to dismiss the application as he has not offered any security for the due performance of the decree. Reliance was placed on the case of **Kenya Shell Ltd vs Kibiru 1986 eKLR at page 416** where the Court held that there is no stay for a money decree.

The Applicant's instant application is premised on section 79 of the Civil Procedure Act Cap 21 that provides that an appeal may be admitted out of time if the appellants satisfy the court that he has good sufficient cause for not filing the appeal in time.

The Applicant is seeking to appeal against the exparte judgment by the lower court dated 23rd May 2019. It is also seeking for stay of execution of any decree emanating from the aforesaid judgment.

It is not in dispute that the Applicant did file an application dated 7th September, 2020 seeking to set aside the exparte judgment entered on 23rd May, 2020. The application was denied by the trial magistrate vide a ruling delivered on 16th December, 2020.

13. I have considered the grounds as presented in the Motion, the facts deponed in the affidavits supporting and opposing the Motion, and the rival written submissions and authorities cited.

14. The key issue to be determined is whether this Honourable Court should grant leave to Appeal out of time against the ruling of the Honourable Principal Magistrate Mr. Evans H. Keago delivered on 16th December, 2020

15. Under the provisions of Order 50, Rule 6 of the Civil Procedure Rules, the courts have power to enlarge the time required for the performance of any acts stipulated in the Rules notwithstanding the fact that such time has expired. It therefore follows that whether to extend time is a matter of judicial discretion. The discretionary power of the courts was reaffirmed by the Court of Appeal in the case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997 (unreported)** cited by the applicant, when it held that:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first; the length of the delay; secondly, the reason for the delay, thirdly; (possibly) the chances of the appeal succeeding if the application is granted and fourthly; the degree of prejudice to the respondent if the application is granted.”

16. When it comes to appeals from the subordinate court to the High Court, the applicable provision is Section 79G of the Civil Procedure Act which expresses that appeals of such nature must be filed within a period of 30 days from the date of the decree or order from which the appeal lies.

17. The above proviso is also clear that leave to file an appeal out of time can only be granted to a party where sufficient cause has been shown. From the record, it is not in doubt that in the present instance, the applicant did not comply with the timelines set in section 79G of the Civil Procedure Act.

18. For purposes of determining the guiding principles to be met in an application seeking leave of the court to file an appeal out of time/extension of time, I turn to the **Nicholas Salat case**, where the Court delineated the following as:

“the under-lying principles that a Court should consider in exercise of such discretion:

- 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 a case to case basis;*
- d) Whether there is a reasonable reason 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.”*

19. The first and second principles concern the length and reason for the delay respectively. I have already established that the impugned ruling was delivered on 16th December, 2020, while the instant Motion was filed within a period of less than three (3) months on 4th February, 2021. Upon considering the length of the delay, I do not find it to be inordinate or unreasonable.

20. On the reasons behind the delay, I have considered the explanation by the Applicant’s Counsel to show that the impugned ruling was delivered on 16th December, 2020 without prior notice to them. I have also considered the averment by the 1st Respondent that the lower Court ruling was delivered in Court in the presence of both parties in Court and that it is not true that the ruling was to be delivered on notice. I have looked at the annexed copy of the ruling dated 16th December, 2020 and note that there is no existing Court registry notice on the date of delivery of the ruling which should have been the case as the Counsel for the Applicant did enter appearance which was already on record. In the premises and upon further consideration of the prevailing circumstances resulting from the Covid-19 pandemic, I find the explanation by the applicant to be plausible and believable. I accept the same.

21. On the third principle to do with whether an arguable appeal exists, the applicant maintains that its appeal raises serious triable issues regarding the ruling delivered on 16th December, 2020. On looking at the draft memorandum of appeal annexed to the Motion as “PA4” I note that the appeal essentially seeks to challenge inter alia, the decision of the trial court not to consider that the applicant had annexed its draft defence to its application dated 7.9.2020; the trial court ought to have seen that the draft defence shifted liability upon the 2nd Respondent; and that the trial court overlooked some relevant factors in delivering its judgment regarding the issue of liability and quantum of damages. Without going into the merits of the appeal, I am satisfied that the intended appeal raises arguable grounds which the applicant ought to be given an opportunity to ventilate on merit.

22. The fourth principle concerns with the prejudice which will befall the 1st Respondent should leave be granted to the applicant to file an appeal out of time. From my study of the 1st Respondent’s replying affidavit, I did not come across any credible evidence to indicate the prejudice that would befall him, that cannot be compensated by way of costs.

23. For all the foregoing reasons, I am satisfied that it would be a proper exercise of my discretion to enlarge the time required for the Applicant to file an appeal against the Ruling of the trial court.

24. Having arrived at the above determination, I will now proceed to address the second limb of the Motion to do with the granting of an order stay of execution with reference to Order 42, Rule 6 (2) of the Civil Procedure Rules which specifies the principles for consideration in such applications.

25. As concerns the first principle on whether the application has been brought without unreasonable delay, I am satisfied that I have sufficiently analyzed it hereinabove. The application was filed three months after the delivery of the ruling. I find that the said period is not unreasonable and besides the applicant has given reasons for the delay.

26. As regards the second principle concerning substantial loss that will be suffered by the applicant, the averments made in the application and supporting affidavit show that the Applicant is anxious that its operations will be negatively impacted if an order for a stay of execution is denied and that the intended appeal is likely to be rendered nugatory.

27. On the third and final condition relating to the provision of security for the due performance of the decree, the Applicant has not expressed its willingness to deposit the sum of the decretal sum plus costs. Counsel for the 1st Respondent did not focus on the same in his submissions and no proposal was made on the same. The 1st Respondent’s concerns will be taken care of by an award of costs.

28. In the result, it is my finding that the Applicant’s Notice of Motion dated 2nd February, 2021 has merit. The same is allowed in the following terms:

- a) The Applicant is granted leave to file and serve its Memorandum of Appeal within 14 days from the date hereof.***
- b) An order of stay of execution of the judgment and decree in Machakos CMCC 594 of 2017 is hereby granted pending***

determination of the intended appeal.

c) That upon filing of the Memorandum of Appeal the applicant is ordered to file and serve its record of appeal within thirty (30) days.

d) Costs of the application are awarded to the 1st Respondent.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 10TH DAY OF MARCH, 2021.

D. K. KEMEI

JUDGE