



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. E385 OF 2020

NJUGUNA NGUGI.....PLAINTIFF

VERSUS

GODFREY ADHIAMBO OYOO.....DEFENDANT

RULING

The application dated 25th September, 2020 seeks the following main orders:-

- 1. THAT this honourable court be pleased to grant leave to the applicants to appeal out of time against the judgment of the Honourable D.O. Mbeja, Senior Resident Magistrate in Milimani CMCC No. 10351 delivered on 12th June, 2020.**
- 2. THAT this honourable court be pleased to stay execution of the judgment and decree in Milimani CMCC No. 10351 delivered on 12th June, 2020 pending the hearing and determination of the application herein.**
- 3. THAT the costs of this application abide the outcome of the intended appeal.**

The application is supported by the affidavit of Pauline Waruhiu and Billy Mumo Ndolo both sworn on 25th September, 2020. The respondent filed a replying affidavit sworn on 16th November, 2020.

Mr. Ndolo, Counsel for the applicant submitted that in the case of **JULIUS KAMAU KITHAKA –V- WARUGURU KITHAKA NYAGA & 2 OTHERS: C.A. No 14 of 2013**, the Court of Appeal set out the basis upon which a court can grant leave to appeal out of time and stated as follows:-

“Some of the considerations to be borne in mind while considering an application for extension of time include:

- i. The length of the delay involved, the reason(s) for the delay**
- ii. The possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion.**
- iii. The conduct of the parties;**
- iv. The need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal;**
- v. The need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes;**
- vi. The public interest issues implicated in the appeal or intended appeal; and**
- vii. Whether, *prima facie* case, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be borne in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”**

It is submitted that the judgment in **Milimani Commercial Court Case No. CMCC 10351 of 2018** was delivered on 12th June, 2020. There was no notice as to when the judgment was to be delivered. The respondent served them with a letter demanding payment on 19th August,

2020. This led to the filing of the application on 25th September, 2020. There is a two (2) months delay which can be explained. The applicant had to trace the trial court's file which he finally did on 23rd September, 2020. In the case of **SAMUEL MWAURA MUTHUMBI –V- JOSEPHINE WANJIRU NGUGI & ANOTHER (2018) eKLR** the court held that failure to provide the appellant with proceedings can be sufficient explanation for delay. The Covid-19 restrictions also caused the delay in tracing the file.

Counsel further submit that the court has to consider whether the respondent will be prejudiced if the application is granted. It is submitted that the respondent will not be prejudiced as the applicant is willing to furnish security in form of a bank guarantee.

Mr. Ndolo also contends that the appeal has high chances of success. The respondent was awarded Kshs. 600,000 for a single fracture of the left clavicle. The award is quite high. Counsel relies on the case of **ATHUMAN NUSURA JUMA –V- AFWA MOHAMED RAMADHAN C.A NO. 227 of 2015** where the court stated:-

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.

Mr. Musili appeared for the respondent. Counsel relied on the replying affidavit. It is submitted that the affidavit in support of the application sworn by one Pauline Waruhiu who claims to be the head of legal office of Directline Assurance Company Limited is incompetent as she is a stranger to the suit. There is no authorization document for her to swear the affidavit. The affidavit is therefore incurably defective. Counsel referred to the case of **P.M.M. PRIVATE SAFARIS –V- KEVIN IJATIA (2006) eKLR Misc Application 232 of 2006** in which Justice O.K. Mutungi (as he then was) stated:-

“The Supporting Affidavit, sworn by Philip Mwangi Munyua, a Director of the Applicant company reveals legal fallacies touching on the incompetent manner insurers handle claims against their insureds where counsel is actually appointed and paid by the insurer and for all practical purposes such an advocate is the insurer's lawyer – not lawyer for the insured/Plaintiff/Respondent.

To that extent, the Supplementary Affidavit of Lydia W. Gutu, filed on 24/3/06, is not truthful in that it is sworn on behalf of the applicant when in reality she is not the counsel for the applicant, but counsel for the insurer. The insurer is not a party to the proceedings herein. Hence, the Affidavit is sworn by a stranger to the proceedings both at this appellate level and at the subordinate court's level. The insurance sector clearly misleads the insured, to believe that he/it, the insured is represented by a counsel, which counsel is not answerable to the insured.”

Similarly, in the case of **MOIJO MATANYA OLE KEIWUA –V- CHIEF JUSTICE OF KENYA & 6 OTHERS (2008) eKLR** the Court of Appeal stated:-

“Affidavits which are sworn by persons who are not parties to the proceedings before the court are incompetent and ought to be expunged from the court record.”

Counsel for the respondent maintain that the trial court delivered its judgment on 12th June, 2018. In the case of **MWANGI –V- KENYA AIRWAYS LIMITED (2003) KLR**, the court set out the factors to be considered in an application for extension of time and stated:-

- 1) **The period of delay;**
- 2) **The reason for the delay;**
- 3) **The arguability of the appeal;**
- 4) **The degree of prejudice which could be suffered by the Respondent if the extension is granted.**
- 5) **The importance of compliance with time limits to the particular litigation or issue, and**
- 6) **The effect if any on the administration of justice of public interest if any is involved.**

It is submitted that Counsel for the respondent wrote a letter dated 17th July, 2020 informing the applicant's counsel about the judgment in CMCC No 10351 of 2018. The applicant has failed to demonstrate and give substantive reason for the delay. Counsel relies on the case of **MONICA MALEL & ANOTHER –V- R Eldoret Civil Application No. 246 of 2008 (2009) eKLR** where Justice Aganyanya J.A (as he then was) stated:-

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show.”

On the issue of stay of execution, Mr. Musili referred to the case of **ANTOINE NDIAYE –V- AFRICAN VIRTUAL UNIVERSITY (2015) eKLR** where Justice Gikonyo F. stated:-

The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

- a) The application is brought without undue delay;
- b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered, and
- c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

According to Mr. Musili, no substantial loss will be suffered by the applicant. Substantial loss was explained in the case of **JAMES WANGALWA & ANOTHER –V- AGNES NALIKA CHESETO, Bungoma Misc Application No. 42 of 2011 (2012) eKLR**. The issues for determination revolve around extension of time to file appeal and whether execution should be stayed pending the intended appeal. Counsel for the respondent maintain that the affidavit of Pauline Waruhiu does not support the application. The application indicates that it is supported by two affidavits. Even if I struck out the affidavit of Pauline Waruhiu, still there will be the affidavit of Billy Ndolo supporting the application. In my view, once someone has knowledge of the dispute in court, he/she can swear an affidavit stating what he/she knows about the case. The applicant was insured by an insurance company where Pauline Waruhiu works. The respondent must have served a statutory notice upon the insurance company before filing the case in compliance with Chapter 405 laws of Kenya. Further, upon service of summons the applicant (insured) must have taken the summons to his insurers. The insurers' legal Department where Pauline Waruhiu works must have appointed an advocate to represent the company's insured. All along Pauline Waruhiu has been aware of the matter. Counsel for the respondent dealt with the issue of subrogation but in my view the insurer is not seeking any compensation from the respondent. All that the insurer is doing is to safeguard its interest so that exorbitant awards are not made against its insured clients which awards will ultimately be forwarded to the insurance company for settlement. Even if the insurance company is not a party to the suit, it has a legally recognized interest in the matter and I see no good reason why its staff who have knowledge about the dispute cannot swear affidavits in relation to the case. Should the applicant fail to settle the decretal sum, the respondent has the leeway of filing a declaratory suit against the insurer. It cannot be held that the insurer should remain silent until when involved in a declaratory suit or in a subrogation claim. Pauline Waruhiu has averred about what she knows about the dispute and what she has been informed by the counsel on record for the insured. She can be summoned for cross-examination and in my view she is competent to swear the affidavit in support of the application. I do find that the application is properly supported by two affidavits.

The respondent was awarded Kshs. 600,000 as general damages for fracture of the left clavicle. The applicant is aggrieved by the award and would like to pursue the intended appeal. There was delay in filing the Memorandum of Appeal. Judgment of the trial court was delivered on 12th June 2020. The current application was filed on 25th September 2020. Counsel for the respondent maintain that on 17th July, 2020 he notified counsel for the applicant about the judgment. The effect of that letter does confirm that even by 17th July 2020, time to file the appeal as required by Section 79G of the Civil Procedure Act had already lapsed. The supporting affidavit of Pamela Adhiambo Oloo did not annex Mr. Musili's letter of 17th July, 2020. Billy Ndolo avers at paragraph 5 of his affidavit that he came to know about the judgment on 19th August, 2020 when he received a letter demanding payment. The said letter is not annexed.

It is evident that judgment of the trial court was not delivered in the presence of counsel for the applicant. By the time counsel came to know about the entry of Judgment, whether in July or August, time to lodge an appeal had lapsed. The application was filed within three months. Considering the circumstances of the case, I am satisfied that the delay is not inordinate.

The applicant is willing to provide a security. Balancing the interest of both parties, I do find that the applicant's right of appeal should be upheld on condition that he provides security for the decretal sum so that the respondent will not be kept waiting as he initiates fresh execution proceedings should the appeal be dismissed. This way, the interest of both parties are catered for.

In the end, the application dated 25th September, 2020 is merited and is hereby granted on condition that the applicant do provide a bank guarantee for the sum of Kshs. 600,000 within 45 days hereof. The applicant to file and serve the Memorandum of Appeal within fourteen (14) days hereof. Costs shall follow the outcome of the appeal.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF MARCH, 2021

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S. CHITEMBWE

JUDGE