



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. E002 OF 2020**

**KENYA ORIENT INSURANCE COMPANY LTD.....APPELLANT**

**VERSUS**

**SIMEON YAAH CHOGA (*suing on behalf of the***

***estate of the late* KATANA NGALIA MWARO.....RESPONDENT**

**RULING**

1. I have before me for determination two applications both filed by the Appellant/Applicant. In the **first Notice of Motion** application dated **7<sup>th</sup> October, 2020** the Appellant seeks that their Appeal be admitted out of time. The Application premised in summary on the grounds that the **Judgment** dated **20<sup>th</sup> August, 2020** was delivered without notice to the parties. The Appellant states that they immediately proceeded to request the subordinate court for a copy of the Judgment but no response was forth coming. The Appellant stated that the Court has since not provided the Appellant with a copy of the **Judgment** and **Decree** and thus they have a sufficient reason for filing the Appeal out of time.

2. In the **second Notice of Motion** application dated **19<sup>th</sup> October, 2020**, the Appellant prays for Stay of execution pending Appeal of the Judgment of the subordinate court delivered on the **20<sup>th</sup> August, 2020** vide **Mombasa CMCC No.1574 of 2018**, awarding damages of Kshs.1,246,897/= plus costs and interest. The Application is premised on the grounds that the Respondent has threatened to execute causing the Appellant to suffer substantial loss and that if stay is not granted their appeal will be rendered nugatory.

3. The two applications were opposed by the Respondent vide the **Replying Affidavit** sworn by **Musyimi Stephen Advocate** on behalf of his client on **23<sup>rd</sup> November, 2020**.

4. By its Orders of **17<sup>th</sup> November, 2020** the court directed that the two applications be heard together and parties duly exchanged submissions. The Appellant filed submissions on the **8<sup>th</sup> December, 2020** while the Respondents filed submission on the **14<sup>th</sup> December, 2020**.

**ANALYSIS AND DETERMINATION**

5. I have read through the two applications, their respective affidavits in support, the reply filed by the Respondent, Applicant's **Supplementary Affidavit**, as well as the written submission and the authorities relied upon by both sides in support of their respective positions. I find that there are only two issues for determination in the two applications;

*a) Whether to admit the Appeal out of time, and;*

*b) Whether to grant stay of execution pending Appeal.*

*a) Whether to admit the Appeal out of time*

6. **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.”***

7. Therefore, for an Appeal to be admitted out of time, the Applicant must show that he has good and sufficient cause for doing so. In the case of **Dilpack Kenya Limited –vs- William Muthama Kitonyi [2018] eKLR Odunga J**, in placing reliance on **Feroz Begum Qureshi & Another –vs- Maganbhai Patel & Others [1964] EA 633**, found that there is no difference between the words “sufficient cause” and “good cause”.

8. In the case of **Daphne Parry –vs- Murray Alexander Carson [1963] EA 546**, the Court stated the following when considering what amounts to “sufficient cause”:-

***“...Though the court should no ‘doubt’ give a liberal interpretation to the words ‘sufficient cause,’ its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy...”***

9. In the present case, the Judgment from the lower court was delivered on **20<sup>th</sup> August, 2020**. The **Memorandum of Appeal** was filed on the **28<sup>th</sup> September, 2020** making the instant Appeal ten (10) days late. The reason for the delay is that the Applicant has on various occasions sought that they be furnished with a copy of the **Judgment and Decree** from the court, but no response has been forthcoming from the subordinate court.

10. **Section 79 G** of the **Civil Procedure Act** provides that the period for filing an Appeal to be thirty (30) days, excluding the period which the lower court takes to prepare and deliver to the Appellant a copy of the Decree or Order.

11. In this Application, the Applicant has stated that they have made several requests to the subordinate court to be supplied with a copy of the Judgment and Decree but to no avail. The Applicant has attached the various correspondences to the lower court in their **Supplementary Affidavit** to prove that they sought from court for a copy of the Judgment and Decree.

12. The Respondents have also acknowledged the efforts of the Applicant to acquire the Judgment and Decree despite raising a non-substantiated claim that the Applicant’s took letters to the registry and went back with them without the same being exhibited in the trial court’s file.

13. Furthermore, the Respondent has not shown any prejudice that will be occasioned if the Appeal is admitted that cannot be adequately compensated by an award of costs.

14. It is for the above reasons that I hereby grant to the Appellant Leave to file an Appeal out of time and the Appeal herein as filed is hereby deemed to be duly filed.

***b) Whether to grant stay of execution pending Appeal.***

15. On the issue of whether the Appellant is deserving of the orders of Stay of execution of decree pending the hearing and determination of the Appeal, the applicable law is **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** which requires the Applicant to demonstrate: -

***a) Substantial loss may result to the applicant unless the order was made;***

***b) The application was made without unreasonable delay; and,***

***c) Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.***

16. On substantial loss, the Applicant stated that if Stay of execution pending Appeal is not granted the Respondent will execute Decree as awarded by the lower court and will therefore render the Appeal herein nugatory.

17. The Applicant stated that they will suffer substantial loss in the event the Appeal succeeds and the Respondent will not be able to reimburse the sums to Appellant. The Applicant further stated that the sum awarded is huge, if paid it will interrupt the Appellant’s finances and/or destabilize the Appellant’s financial standing.

18. The Respondent on the other hand stated that they will suffer an injustice as this is a matter that began in the **year 2009** as **CMCC No.1929 of 2009** and it has been more than ten (10) years since the matter has been concluded. Further, the Respondent stated that they should not be delayed and or denied the right to enjoy the fruits of a lawfully obtained Judgment.

19. It is true that the Appellant is not privy to the resources of the Respondent and they have not shown in their pleadings how they intend to pay the said amounts in case the Appeal succeeds.

20. It is the Appellant’s concern that the Respondent will commence execution of the Decree to their detriment. The Appellant is convinced that should the Decree be executed their Appeal will be rendered nugatory and thus an academic exercise.

21. On whether the application was made in a timely manner, the Application for Stay of execution was filed on **19<sup>th</sup> October, 2020** after the

application to admit the Appeal was on **7<sup>th</sup> October, 2020**. In view of my finding that the application to admit the Appeal was not made in a timely manner, I find that the Stay application was also not made in a timely manner but the delay has been satisfactorily to the court by the Applicant and which delay in my view has not occasioned to the Respondent any prejudice that cannot be compensated by an award of costs.

22. On the deposit of security for the due performance of Decree, the Applicant at **paragraph 6** of the **Supporting Affidavit** to the Stay application dated **19<sup>th</sup> October, 2020**, indicated that they are ready and willing to provide any such security as would be required by this court.

23. The Respondent on the other hand submitted that if the Court were to grant Stay of execution pending Appeal, the Appellant should be directed to issue a bank guarantee to this court for the entire decretal sum plus costs awarded in **Mombasa Civil Suit CMCC No.1574 of 2018** being Kshs.1,868,125/= (inclusive of interest as at **30<sup>th</sup> September, 2020**) from a reputable Commercial Bank within 21 days of the Ruling of this Court and in default they be allowed to execute.

24. In view of the above, I grant an Order of Stay of Execution pending the hearing and determination of the Appeal on the condition that the Applicant shall within 30 days from the date hereof provide a bank guarantee of in the sum adequate to cover the entire Decree with costs or in the sum of Kshs.1,868,125/=-, whichever is the lower.

25. In light of the above, I therefore made the following orders: -

*a) That the Appeal filed herein be and is hereby admitted out of time and the same deemed as duly filed and served within the stipulated statutory period.*

*b) That there be a Stay of Execution of Decree in Civil Suit CMCC No.1574 of 2018 pending hearing and determination of the Appeal herein on the condition that the Appellant provides a bank guarantee for a sum of Kshs.1,868,125/=-, the Respondent be at liberty to execute.*

*c) That the Appellant to compile, file and serve upon the Respondent a complete Record of Appeal within 90 days.*

*d) The costs shall abide by the outcome of the Appeal.*

It is so ordered.

**DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 6TH DAY OF JULY, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Okello Ouma Counsel for Appellant/Applicant

No appearance for Respondent

Court Assistant Winnie