



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CIVIL MISC. CASE NO. 18A OF 2021

BETWEEN

REGINA MPINDA.....APPLICANT

AND

REUBEN MUTHIORA JOHNY.....RESPONDENT

RULING

Background

1. On the 17th February, 2021, the court in **NKUBU PMCC NO.35 OF 2019** entered judgment in favour of the Respondent as against the Applicants for Kshs. 3,000,000/-.

2. By a notice of motion dated 16th March, 2021 and filed on 18th March, 2021, Applicant seeks orders for:

1. Leave to appeal out of time

2. Stay of execution of judgment in NKUBU PMCC NO.35 OF 2019 pending the hearing and determination of the intended appeal

3. Costs be in the Appeal

3. The notice of motion is premised on grounds among others that the Applicant is aggrieved by the judgment of the trial court and intends to file an appeal which has high chances of success.

4. The application is also supported by an affidavit sworn on 16th March, 2021 by **KELVIN NGURE**, Legal Counsel for Directline Assurance the insurers of the accident motor vehicle in which reiterates the grounds on the face of the application. Additionally, the deponent avers that the appeal was not filed in time counsel who was handling the matter having left the firm acting for the Applicant without proper hand over. Annexed to the affidavit is draft memorandum of appeal marked **KN 1**.

5. The application is opposed on the basis of a replying affidavit sworn by the Respondent on 10th May, 2021. He contends that the delay has not been explained and further that Applicant has not demonstrated substantial loss.

Analysis and Determination

6. I have considered the application in light of affidavits on record and I have deduced the following issues for determination.

1. Whether Applicant ought to be granted leave to file an appeal out of time

2. Whether there ought to be Stay of execution of judgment in NKUBU PMCC NO.35 OF 2019 pending the hearing and determination of the intended appeal

3. Who should bear the costs of this application

7. The law on extension of time is to be found in Section 95 of the Act which states as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

8. Procedural rules are to be found under Order 50 of the Civil Procedure Rules which provides that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed”

9. The parameters for exercise of court’s discretion were concisely laid out in the case of Mwangi v Kenya Airways Ltd [2003] KLR where the Court of Appeal expressed itself thus: -

“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”. (Emphasis added).

10. Timelines for filing of appeal are prescribed by Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which states: -

“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 anytime 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”.

11. The judgment from which the Applicant propose to appeal against was delivered on 17th February, 2021. The Applicant had up to 16th March, 2021 to file the intended appeal. The present application was filed on 18th March, 2021 which is about 2 days outside the time limited for filing an appeal.

12. I have considered the explanation for the delay and I find it is reasonable and the delay not inordinate.

13. Concerning stay of execution, Order 42 (6) of the Civil Procedure Rules provides:

(2) No order for stay of execution shall be made under sub rule

(1) Unless—

a. The court is satisfied that substantial loss may result to the applicant unless the order is made

b. That the application has been made without unreasonable delay; 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.

14. There is a myriad of cases on what constitutes substantial loss. In Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd –Vs- Alfred Mumea Komu the Court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

15. Similarly, in Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd the Court stated-

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other suits.”

16. Additionally, the court in ABN Amro Bank N.V. v Le Monde Foods Ltd Civil Application No. Nairobi 15 of 2002 held that:

“Each party bears a specific burden regarding proof of substantial loss in a case such as before us.So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that

the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

17. The Respondent was awarded general damages in the sum of Kshs. 3,000,000/-. The Applicant has not demonstrated that the Respondent is not in a position to refund the said sum in the event that the appeal succeeds. (See **Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997**).

18. From the affidavit evidence, I am not convinced that the Applicant has demonstrated that it is likely to suffer substantial loss if the order of stay of execution is not granted.

19. Security is a legal requirement under 42 (6) (2) (c) of the Civil Procedure Rules. The Appellant has offered to furnish a Bank Guarantee for due performance of the decree herein pending the hearing and determination of the appeal.

20. While it is not my duty at this stage to determine if the Applicant has an arguable appeal, I am minded, in the interest of justice to exercise this court's discretion under section 3A of **the Act** to afford the Appellant an opportunity to prosecute his appeal.

21. The upshot of the foregoing is that the notice of motion dated 16th March, 2021 and filed on 18th March, 2021 is allowed in the following terms:

1. Applicant is hereby granted leave to file an appeal out of time and are is directed to file and serve the record of appeal within 30 days from today's date

2. There shall be a Stay of execution of judgment in NKUBU PMCC NO.35 OF 2019 pending the hearing and determination of the intended appeal upon payment into an interest earning account of both advocates the total decretal sum within 30 days from today's date

3. Costs shall abide the outcome of the intended appeal

DATED IN MERU THIS 22ND DAY OF JULY, 2021

T.W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Applicants - N/A for Kimondo Gachoka & Co. Advocates

For Respondent - Ms. Kiriimi for Mutembei & Kimathi Advocates