



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISC APPLICATION NO. E28 OF 2020

SALIM SEIF SALIM BADI.....APPLICANT/INTENDED APPELLANT

VERSUS

1. PATIENCE NYAMVULA MGANGA

2. HABIB MOHAMED SHARIFF

3. BUNGOMA CHEMIST LIMITED

4. CFC STANBIC HOLDINGS LTDRESPONDENTS

CORAM: Hon. Justice R. Nyakundi

M.S.Shariff & Company Advocates for the Plaintiff

Kimondo Gachoka & Company Advocates for the Intended Appellant

RULING

The Notice of Motion dated 20.11.2020 expressed to be brought under Section 1A, 1B, 3 and 3A 79G and 95 of the Civil Procedure Act, Order 11 rule 22, Order 42 rule 6, Order 50 rule 6, Order 51 Rules 1 and 3 seeks the following substantial orders;

- 1. That this Honorable Court be pleased to grant leave to the applicants to file an appeal out of time against the judgment in Cmcc No.216 of 2018.***
- 2. That this Honorable Court be pleased to stay execution of the judgement and decree in Kilifi Senior Principal Magistrate Court Civil Suit No.216 of 2016 pending the hearing and determination of this application and the intended appeal herein.***
- 3. That upon the grant of Order 2 above, the Honourable Court to direct the Executive Officer, Kilifi Senior Principal Magistrate Court to deliver the entirety of the Court file, inter alia, for Kilifi Senior Principal Magistrate Court Civil Suit No. 216 of 2018 for appeal.***

The application is premised on the following reasons; -

- a. Judgement herein was delivered on the 03.06.2020 and the 30 days within which an appeal is to be filed have lapsed.***
- b. The applicants are aggrieved by the judgement on Quantum delivered on the 03.06.2020 by the Honourable Magistrate S.D.Sitati, Resident Magistrate in Kilifi Senior Principal Magistrate Court Civil No.216 of 2018 and seek leave to appeal out of time.***
- c. This application is timely made and without any unnecessary delay.***
- d. The Applicants' stand to suffer substantial and irreparable loss and damage as there is a likelihood that the Applicants will be unable to recover the decretal sum awarded herein from the Respondent.***
- e. Unless this application is allowed, the Applicants' intended appeal will be rendered nugatory.***

f. The Applicants have a good arguable appeal which has high chances of success.

g. The Respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs if this application is allowed.

In addition, the applicant relied on an affidavit sworn by **Pauline Waruhiu** filed in Court on **24.11.2020** whereas the Respondents opposed the application by the averments stated in the Replying Affidavit sworn by **Patience Nyamvula Mganga** dated 25.6.2021 together with annexures demonstrating the litigation history of the subject matter.

The Brief Underlying Facts

This case presents the resolved issue of claim filed by the respondent in **Cmcc No. 216 of 2018** at Kilifi seeking both general and special damages arising out of a road accident which occurred on or about 20.12.2016 at Malindi-Kilifi road against the appellant whose offending number **KAN 364 Y- ZC 5389** collided with another motor vehicle **KBX 411H** as a result of the collision the deceased travelling as a fare paying passenger in motor vehicle **KBX 411H** sustained fatal injuries. The suit involved allegations of negligence involving the appellant to the present application. The Respondent canvassed her case before the trial Court, which on consideration of the issues and evidence pronounced itself as follows in the intended impugned judgement; -

General damages for pain and suffering Kshs.100,000/=.

Loss of expectation of life Kshs.120,00/=

Loss of dependency Kshs.1,685,552/=.

Special damages Kshs.782,213/=

Interest at Court rates.

The liquidated sum in the decree as at the time of this application totaled to Kshs.3,446,995/=. The intended appellant's counsel seeks to lodge an appeal based on the draft Memorandum of Appeal alternatively the Court grants the leave for extension of time and subsequent stay of execution of the decree given that position the applicant counsel chose to rely on the written submissions to support the Notice of Motion for the reliefs being sought to re-activate the appeal process.

Counsel relied on the provisions of the statute in section 79G & 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules. Further reliance was placed on the precedents in the cases of **Nicholas Kiptoo Arap Korir Salat V IEBC [2015] eKLR**, **Joseph Ouma Oluoch V Jane Kisaka Mungali[2018]eKLR**, **Gahir Engineering Works Ltd V Raised Kate Services & Another[2015]eKLR** reverting to stay of execution pending the intended appeal. Counsel invited the Court to be guided by Order 22 Rule 22, Order 42 Rule 6 (1), 2, 3, 4, (5) and 6 of the Civil Procedures Rules. The Respondent essentially submitted by demonstrating that the material in the annexed documents respond to the issues in the Notice of Motion for the Court to deny any such relief on extension of time or stay of execution pending an appeal.

Having considered the Notice of Motion and subsequent materials and submissions there emerges only two critical issues for determination to:-

a. Whether the applicant has satisfied the criteria for grant of extension of time.

b. Secondly if the answer to the above is in the affirmative. The Court can also exercise discretion to grant an order for stay of execution pending the intended appeal.

Discussion

To obtain extension of time from the Court to re-evaluate the appeal process a party must demonstrate general matters surrounding the delay. The reasons for the delay, the chances of the intended appeal succeeding and if so if refusal of the relief would also render the appeal nugatory. Finally, the degree of prejudice likely to be occasioned to the respondent in view of the fact that he or she has in possession the fruits of a valid judgment. These factors weigh in favor or against the applicant's application in this motion at stake (See the clarity of these principles in **Salat V IEBC & 7 Others [2014] eKLR**, **Paul Wanjohi Mathenge V Duncan Gichane Mathenge [2013] eKLR**, **Mwangi V Kenya Air Ways Ltd [20003] KLR 486**, **Leo Sila Mutiso V Rose Hellen Wangari Mwangi CA No. 255 of 1997**).

The principles in the cited authorities implicates an impartial right of a litigants to access to the Courts for him or her to have the ability to address any such legal grievances on the merits. In light of the imperative of the constitutional right of appeal the court has unfettered discretion to rule for or against the applicant. The only analysis issue here is for the court to weigh the interest of justice factors balancing them with laid down guidelines in the cited precedents.

Timelines in conducting litigation is both a constitutional imperative in Article 50 (2) (e) of the Constitution which provides that trials should begin and concluded without unreasonable delay. Furthermore, in Article 159 (2) (b) justice shall not be delayed.

In the instant case the chronology of the filed documents demonstrates that the judgement set to be challenged on appeal was delivered on 3rd June, 2020. The application to invoke the Court's jurisdiction under the proviso of section 79 (G) of the Civil Procedure Act was made on

20th November, 2020 as against the 30 days period under section 79 (a) of the Act. There was an overreach by the applicant of the length of delay of about 5 ½ months. In the same Motion, the applicant contends that the reason for the delay arose as result of the judgement being read in their absence and by the time matters came to their attention, the prescribed time of 30 days had lapsed.

More importantly, the applicant avers that the intended appeal has high chances of success and should leave be granted such issues on the merits will correctly be made at the appeals court. By this explanation the applicant is laying blame for the delay on an inadvertent act of counsel and squarely at the fact of the Court when dealing with the delivery of judgement. On the first lines of authorities there are numerous cases dealing with the issue of litigant missing deadlines because of their legal counsel blunder, mistake, omission, lapse or inadvertence conduct. The same principles also emphasize that legal counsels mistake or error should not be visited upon a diligent litigant in being denied for the grant of the equitable remedies like extension of time to appeal.

On consideration of the matter this over reliance on the sins of Counsel has contributed immensely to delay in complying with statutory timelines. Although such circumstances have been taken as gospel truth sufficient reason has to be advanced on this condition why instructions were not received within time. It is therefore important for the Applicant to draw attention to the Court on the issues involved which made it impracticable for retainer or professional legal services to be confirmed by the intended appellant. The General principle is that ignorance of the law is not a material factor to excuse compliance with statutory set timelines. Thus in the case of *Long-John V Blakk*;- **“The discretion jurisdiction of the Court must depend strictly on the facts or circumstances of a given case. This must be so far as I have already observed, no one case can be authority for another in matters of discretion and the Court cannot be bound by previous decisions to exercise its discretion in a particular way, because that would in effect be putting an end to the exercise of discretion.”**

I find the applicants reasons for the delay in seeking extension of time insufficient for the Court to exercise discretion however he succeeds on the question of prejudice and the possibility of success and such other factors and the intended appeal. Much of the view I have taken is underpinned on the nature of the matter at hand and the gravity of the prejudice likely to be suffered by the Applicant in the event the appeal succeeds as presupposed in the Memorandum of Appeal.

The second limb of the Notice of Motion is on Stay of Execution under Order 42 rule 6 which provides as follows; -

1. No appeal or second appeal shall operate as a Stay of Execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

2. No order for Stay of Execution shall be made under subrule (1) unless-

a. The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;

b. 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.

The consideration which guides Courts in arriving at appropriate decisions were outlined in the cases of *Carter & Sons Ltd V Deposit Protection Fund Board & 2 Others – Civil Appeal No.291 of 1997*, as follows; -

“.....the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay.....the applicant must establish a sufficient cause: secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

Giving effect to the above principles and having regard to the said judgement of the trial Court it will be just and convenient to make an order for a stay of execution pending the hearing and determination of the intended appeal. I believe there would be a realistic prospect of substantial loss and the appeal being rendered nugatory in some way or another if stay is not granted at this stage. This discretion has been exercised underpinned on all the circumstances of the case and in answer to the social question there might be a risk of injustice or prejudice if the application is denied.

In conclusion this is an appropriate case in which the Court grants both extension of time and Stay of Execution in favor of the Applicant with the following conditions; -

a. The Applicant Memorandum of Appeal be deemed as duly filed within time.

b. The Record of Appeal be served upon the Respondent within 30 days of today's date.

c. The Application for Stay of Execution is hereby conditioned upon the Applicant depositing security of the decretal sum in the joint interest earning account of both Counsels within 30 days of today's Ruling.

d. In default of order (c) above Stay of Execution lapses and the Appeal may be canvassed without the preservation of the subject matter.

e. Costs of this Application to abide the outcome of the Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED via Email AT MALINDI THIS 19TH DAY OF JULY, 2021.

.....

R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting Court operations due to the third wave of Covid-19 pandemic this ruling/judgement has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

info@kghazina.co.ke, info@kglaw.co.ke, shariflaw7@gmail.com)