



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL MISC. NO.E134 OF 2021

AYAN AUTOMOBILES LIMITED.....1ST APPLICANT

AYAN KASSIM..... 2ND APPLICANT

VERSUS

AHMAD HAMID MOHAMED.....1ST RESPONDENT

MURPHY MERCHANTS AUCTIONEERS2ND RESPONDENT

R U L I N G

1. The application herein is dated **8th June, 2021**, brought under the provisions of **Sections 1A, 1B, 3 and 3A, 79G and 95** all of the **Civil Procedure Act, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6** and **Order 51 Rules 1 and 3** all of the **Civil Procedure Rules, 2010**, and all other enabling provisions of the law.

2. The Applicants are seeking for orders as here below reproduced;

i. Spent;

ii. THAT the Honorable Court be pleased to enlarge and extend time within which the Appellant may file and serve the Memorandum of Appeal against the Judgment dated **4th September, 2020** in Civil Suit No.275 of 2019;

iii. THAT the Honorable Court be pleased to set the time within which the Memorandum of Appeal may be filed;

iv. Spent;

v. THAT pending the hearing and determination of the intended appeal, the Honorable Court be pleased to order stay, vacate or set aside warrants of attachment dated **14th April, 2021**;

vi. THAT the costs of and incidental to the application abide by the result of the intended appeal.

The application is premised on the grounds on the face of the application and the **Supporting Affidavit** of **Ayam Kassim**, sworn on **8th June 2021**.

4. According to 2nd Applicant in the **Supporting Affidavit**, they were served with a **Proclamation Notice** pursuant to a Decree in **Civil Suit No.RMCC No.275 of 2019** between them and **Ahmed Hamid Mohamed**, as the Plaintiff/Respondent. It has been deposed that at the time this suit was filed, the Applicant was insured by Occidental Insurance Company which was notified and it promised to defend the suit. That unknown to them, the insurance failed to defend the suit hence the 1st Respondent was awarded general and special damages hence the Applicants were left exposed and in danger of losing their property. The Applicants have also deposed that they have satisfied the conditions for grant of stay of execution of the orders and that their intended appeal will raise fundamental issues of law such that they ought to be given a chance.

5. The Respondent opposed the application through his **Replying Affidavit** sworn on **21st June 2021**, and stated that the Applicants have not disclosed any material facts because having been served with Summons to enter appearance, they failed to do so or file a defence, hence the

request for Judgment by the Respondent followed by interlocutory Judgment entered on 3rd May, 2019. That after formal proof, Judgment was entered in favour of the Respondent on 17th June, 2020. That the Applicant then proceeded to file an application seeking among other orders, stay of execution of the said Judgment and for leave to defend the suit. The application was heard and dismissed on merit. Further, the 2nd Applicant has deposed that having opted to file an application to set aside the Judgment, the Applicant cannot turn around and apply for leave to file an appeal out of time. The deponent has gone on to castigate the application as vexatious, frivolous, bad in law and an abuse of the court process since the two Applicants are conflicted on whether or not they were served with Summons to re-enter appearance and the same forwarded to Occidental Insurance Company.

Analysis and Determination

6. I have given due consideration to the application, the affidavits on record and the rival written submissions filed on behalf of the parties as well as the authorities cited. In my view, the key issue that crystallizes for determination is whether the Applicants have demonstrated that they are deserving of the exercise of the court's discretion in their favour by granting them the orders they have sought in the Motion.

7. As for whether the Applicant should be granted leave to file this appeal out of time, the operative part of the law in answering the question on whether the prayer to enlarge time is merited is **Section 79G** of the **Civil Procedure Act**, which provides as follows:

“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.”

8. From the above provision, it is clear that this court has wide and unfettered discretion in deciding whether or not to enlarge time for filing of an intended appeal or validating an appeal that was filed out of time provided that the applicant establishes good and sufficient cause for failure to file the appeal within time.

9. I am also well guided by the decision of the Supreme Court in the case of **Nicholas Kiptoo Arap Salat –vs- IEBC & 7 Others, [2015]eKLR**, in which the court held *inter alia* that “extension of time is not an automatic right of a party and that to be deserving of the relief, a party must *place before the court sufficient material proving that there was good cause for failing to file an appeal within the prescribed time*”.

10. The Respondent has opposed the applicants' prayer for enlargement of time primarily on the grounds that there was unreasonable delay in filing the instant application and that no plausible reason has been advanced to explain why the intended appeal was not filed within time.

11. The law requires that appeals from subordinate courts to the High Court should be filed within 30 days of the judgment or order appealed against. The trial court's Judgment was delivered on 17th June, 2020, thus the thirty day period limited for lodging of appeals to the High Court expired on or about 30th April, 2020.

12. In this case, the Applicant contends that it was unable to file its intended appeal on time because it was not aware that its insurer had abdicated their role in defending the suit; that it only became aware of the existence of the Judgment when the 1st Respondent commenced the execution process and served it with a Notice of Proclamation and Warrants of Attachment and Sale of its property; that being dissatisfied with the Judgment, it then took swift remedial action by filing the instant application.

13. In the case of **Hezekiah Ngugi –vs- Kenya Power & Lighting Co Limited, [2020]eKLR**, it was held is that there is no standard measure of what constitutes inordinate or inexcusable delay in applications of this nature. The test is subjective and is dependent on the facts and circumstances of each particular case.

14. The facts in this case show that the period between the date of delivery of the trial court's Judgment and filing of the application under consideration is about one year. In my opinion, such delay would be unreasonable or inordinate in ordinary circumstances. I concur with the Respondent's submission that the applicants have not given satisfactory or reasonable explanation for delay which is that their insurer's failed to act, it has been stated time and again that in litigation, the suit belongs to the client, who then has an obligation to do a follow up of its progress. However, considering that the Judgment in this case was delivered during the downscaling of court operations due to the Covid-19 Pandemic, it would have taken some time to file an appeal.

15. It goes without saying that, the right of appeal is both a constitutional and statutory right so that denying a party an opportunity to exercise that right may amount to a violation of the its right of access to justice as guaranteed under **Article 48** of the **Constitution** as well as the right to a fair hearing as enshrined under **Article 50 (1)** of the **Constitution**.

16. Having weighed the competing interests of the parties, I find that if the Applicants' prayer for leave to file an appeal is declined, they will suffer grave prejudice since they will have been removed from the seat of justice before having an opportunity to ventilate their grievances on appeal whereas if the application is allowed, the Respondent is not likely to suffer any prejudice that cannot be ameliorated by an award of costs.

17. In view of the foregoing, I invoke the court's discretionary powers and grant the Applicants leave to file and serve their intended appeal.

18. Now turning to the Applicants' prayer for stay of execution pending appeal, **Order 42 Rule 6 (1) and (2)** of the **Civil Procedure Rules** is

the operative law and it provides that stay of execution pending appeal should ideally be granted when there is an existing appeal which is awaiting determination.

19. In my view, the above rule is clear that a court can only grant a stay of execution of a Judgment or order if an appeal has already been filed and is pending hearing. My take is that the existence of an appeal is a condition precedent to the exercise of the courts discretion under **Order 42 Rule 6(1)** of the **Civil Procedure Rules**. Needless to state, in the instant case there is no appeal pending before this court and that is why the Applicant has sought in prayer No.(2) to file its appeal out of time.

20. In the case of **Subru Motors Limited –vs- Linet Nehema Onyoni & 2 Others, [2020]eKLR**, the Honorable judge was of the view that applications for stay of execution pending appeal should be made within existing appeals and not in applications seeking enlargement of time to file an appeal.

21. In the present case, there is no appeal pending as the Applicants are yet to file an appeal and that is why they sought for, *inter alia*, leave to file an appeal out of time. In my view, there is no basis to exercise discretion to grant orders of stay of execution as sought by the Applicants.

22. The above notwithstanding, given that the court has already exercised its discretion in granting the Applicants leave to file their intended appeal, it is only just and fair that a temporary stay is granted but limited to the period of leave granted in order to preserve the substratum of the intended appeal so that if no appeal is filed within the stipulated time, the Respondent can proceed with execution to recover the fruits of his Judgment.

23. In the resultant, the application is allowed in the following terms:-

a. The Applicant be and is hereby granted leave to file and serve their intended appeal within thirty (30) days of this Ruling.

b. Failure to comply with Order (a) above, execution to proceed.

RULING DELIVERED VIRTUALLY, SIGNED AND DATED AT MOMBASA THIS 12TH DAY OF NOVEMBER, 2021

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for and by Appellant/Applicant

Mr. Ajingo counsel for Respondent