



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISC. CIVIL APPLICATION NO. E001 OF 2020

BETWEEN

ANCHOR FLOUR MILLERS COMPANY LIMITED..... APPLICANT

VS

BULLPAK LIMITED.....RESPONDENT

RULING

1. The applicant, **ANCHOR FLOUR MILLERS COMPANY LIMITED**, filed a Notice of Motion dated 3rd November, 2020. The two prayers the applicant seeks by that application is for leave to file an intended appeal out of time against the judgment of *Honourable V. Kachuodho* delivered at Thika on 28th May, 2020 in Thika Chief Magistrate's Civil Case NO. 1231 of 2016, and for stay of execution of that judgment pending hearing and determination of "the intended appeal".

2. The application is supported by an affidavit of *Winfred Mutinda*, the applicant's advocate. The said advocate deponed that the said judgment was fixed to be delivered on 20th April, 2020 but it was not delivered on that day. The learned advocate for the applicant deponed that she was informed by Thika Chief Magistrate court registry that the judgment would be delivered on notice. The said advocate further deponed that her law firm wrote emails severally to the Thika Chief Magistrate's court registry for update on when the judgment would be delivered and also severally wrote emails requesting to be supplied with a copy of the judgment but that those emails were not responded to. The applicant attached copies of emails.

3. The application is opposed by the respondent, **BULLPAK LIMITED**. The respondent through the affidavit of *Paul Munga*, its Finance Manager deponed that the judgment could not be delivered on the scheduled date, 20th April, 2020; due to the court's closure because of COVID-19 pandemic measures. That the judgment was electronically delivered on 28th May, 2020 and a copy of the judgment was served on 8th June, 2020 on the advocates for the parties through their email. The respondent annexed a copy of the Thika Chief Magistrate's court email dated 8th Jun, 2020 forwarding a copy of the judgment to the law firm for the applicant.

ANALYSIS

4. **Section 79G** of the Civil Procedure Act Cap. 21 provides that an appeal from the subordinate court to the High Court should be filed within 30 days from the date of judgment. That Section is in the following terms:-

"79G. 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 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.' (underlining mine)

5. It will be recalled that the applicant seeks, by its application, leave to file an appeal out of time and stay of execution of the judgment pending hearing and determination of the yet to be filed appeal. The prayer for stay of execution of the judgment can only be considered once the applicant is granted leave to appeal. That is what Order 42 Rule 6 of the civil Procedure Rules provides.

6. In my consideration of the prayer for leave to file an appeal out of time, I draw attention to my underlining of the proviso of **Section 79G of Cap 21**, above. That proviso states that an appeal may be admitted out of time if the applicant satisfied the court he has a good and sufficient cause for not filing the appeal in time. The Black's Law Dictionary Tenth Edition defines 'good cause' as:-

“A legally sufficient reason. Good cause is often the burden placed on the litigant to show why a request should be granted or an action excused.”

7. ‘Sufficient’ is defined in that dictionary as:-

“Adequate of such quality, number force, or value as is necessary for a given purpose.”

8. It therefore follows that by that proviso under **Section 79G of Cap 21** the applicant was required to provide sufficient reason why leave should be granted.

9. The applicant by its affidavit in support of the application attached emails its advocate sent requesting for a copy of the judgment. Those emails are dated between May to August, 2020. No evidence was attached to those emails proving that they were indeed sent and received by Thika Chief Magistrate’s Court. I raise this query because the respondent attached an email addressed to the applicant’s advocate, dated 8th June, 2020 which shows that the judgment was supplied to the applicant’s advocate on that stated date. The applicant did not deny receipt of that judgment by that email on 8th June, 2020. The applicant therefore did not rebut the presumption that it received the judgment as far back as June, 2020. It therefore could follow that the reason given for not filing an appeal within the prescribed period fails to meet the requirements of the proviso to Section 79G of Cap. 21. The applicant should, in the least have filed the appeal within 30 days from 8th June, 2020. Having failed to do so, the application must and does fail. It does not assist the applicant to argue that it has a Constitutional right to file an appeal when in fact the applicant has failed to file that appeal within the prescribed period. Such an argument was made in the case **DIPACK KENYA LIMITED VS. WILLIAM MUTHAMA KITONYI (2015) eKLR** the court respondent as follows:-

“32. The Applicant however contended that it has a constitutional right to appeal. However, in VELJI SHAHMAD VS. SHAMJI BROS. AND POPATLAL KARMAN & CO. [1957] EA 438, it was held that:-

‘In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgment has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgment which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgments should be brought within the prescribed time and no extension of time should be granted except under very special circumstances.’”

10. I concur with the above holding.

11. In addition to my holding above, I additionally find that the application must fail because the applicant did not file an appeal which was to be admitted out of time. The proviso of **Section 79G of Cap 21** specifically requires an appeal to, in the first instance, be filed and the court, after such filing to grants leave for the appeal to be admitted out of time. It is clear that the words used in that proviso do not provide that the leave would be granted for an appeal to be filed out of time. No, not at all. What it provides is that an appeal filed out of time may under that proviso be admitted out of time. This interpretation was adopted by Justice Emukule (as he then was) in the case **GERALD M’LIMBINE VS. JOSEPH KANGANGI (2008) eKLR** thus:-

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court’s process under section 79B which says:-

“79B Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily”

It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to Section 79G of the Civil Procedure Act except upon the existence and perusal of the appeal to be “admitted” not to be “filed out of time.” Admission presupposes that the appeal has been filed and will be “admitted” for hearing after a judge has established under Section 79B that there is “sufficient” ground for interfering with the decree part of a decree or order appealed against.

To allow the Applicant’s Motion would be to defeat entirely the requirements of Section 79B of the Civil Procedure Act and indeed Section 79G itself upon which the Applicant relies – the requirement for a Certificate of Delay in the preparation and delivery to the appellant of a copy of a decree or order. The Applicant’s motion is bereft of such explanation or certificate. Default by the Applicants former advocate would then have seen properly anchored on such certificate.”

12. The prayer, therefore, for leave to file an appeal out of time for the reasons set out above fails. Having failed, there is no basis for granting stay of execution.

DISPOSITION

13. For the reason set out above, the notice of motion dated 3rd November, 2020 is dismissed with costs. The stay of execution of **Thika Chief Magistrate’s Civil Case NO. 1231 of 2016** granted in this matter is hereby lifted, vacated/set aside.

RULING DATED AND DELIVERED AT KIAMBU THIS 4TH DAY OF NOVEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Nancy

For Applicant: Ms. Mutinda

For Respondent : Miss Maina

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE