REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT MISC. CIVIL APPLICATION CASE NO. E42 OF 2021

JONATHAN KYANGU KISILU AND MARY NZIOKI KYALU

(Suing as the legal representatives of the Estate of

KYALUMA KYANGU (Deceased)..PLAINTIFF/RESPONDENT

VERSUS

MOMBASA FRESH COMPANY..1ST DEFENDANT/APPLICANT

FAULU KENYA DEPOSIT TAKING MICRO FINANCE LTD.....2ND DEFENDANT/APPLICANT

MUITHYA KITUO..3RD DEFENDANT/APPLICANT

R U L I N G

1. By a ***Notice of Motion*** dated ***10th May 2021*** brought under ***Sections 1A, 1B, 3A, 3G & 95 of Civil Procedure Act and Orders 22 Rule 22, 46 Rule 6, 50 Rule 6 and 51 Rules 1 & 3 of Civil Procedure Rule*** seeking the following orders/reliefs: -

i. Spent

ii. That this Honourable Court be pleased to grant the Applicant leave to file an appeal out of time.

iii. That this Hon. Court be pleased to order a stay of execution of the judgement delivered by the Trial Court on 25th march 2021 in Mutomo Civil Suit No. 50 of 2019 pending the hearing and determination of this appeal.

iv. That this Hon. Court be pleased to order that security for the entire decretal amount be furnished by way of a bank guarantee.

v. Spent

vi. Spent

vii. Costs of the application abide the outcome of the appeal.

2. This application is grounded on the following listed grounds namely: -

a. The judgement herein was delivered on 25th March 2021 and the Respondent was awarded Kshs. 2,160,000 as general damages and Kshs. 129,900 as special damages less 30 % liability, leaving amount payable at Kshs. 1,812,930 with costs and interest.

b. That the Applicants being dissatisfied with the judgement sum intend to file an appeal to challenge the same.

c. That the time within which the judgement dated 25th March 2021 can be appealed according to statute has since lapsed.

d. That the Applicants have just given us instructions to appeal the said judgement after perusal of the same.

e. That no stay of execution was granted in this matter as the date of the judgement had been inadvertently mis-diarized and unless stay of execution is granted, the Defendants/Applicants' application to appeal out of time and consequent appeal will be rendered nugatory and the Defendants/Applicants will suffer irreparable loss and damage.

f. That the mistake of an advocate should not be visited on an innocent client.

g. That the decree is for a substantial sum of money and if paid to the Respondents, the Defendants/Applicants are apprehensive that they will not be able to recover the whole sum.

h. That the Defendant/Applicants herein, are ready, willing and able to secure the entire decretal amount by way of a bank guarantee to be deposited in this honourable court.

i. That this application will not occasion any prejudice to the Plaintiff/Respondent.

j. That this application has been done without any unreasonable delay.

k. That it is in the interest of justice the application be granted as prayed.

3. This application has been supported by an affidavit sworn by Deputy Claims Manager at Direct Line Assurance Ltd. Mr. Kelvin Ngure on 10th May, 2021.

4. The deponent avers that he has sworn an affidavit in support of this application by dint of their rights of subrogation under what he terms as relevant policy of insurance at common law and the right to defend, settle or prosecute claims in the insured's name.

5. He depones that the judgement in the lower Court was delivered on 25th March 2021 where the Respondent was awarded Kshs. 2,160,000 as general damages and Kshs. 129,900 as Special damages plus costs and interest and that liability of the applicant was held to be 70% with the respondent shouldering 30% liability.

He further avers that; they ran out of time in filing intended appeal due to mistakes attributed to unnamed counsel who failed to attend court during the delivery of the judgement.

6. He says that they did not seek any stay during delivery of judgement due to absence of Counsel.

7. In their written submissions dated 13th October 2020, the applicants submit that the delay in filing appeal on time was occasioned by delay on their part in issuing instructions to their advocate to file the same. They have relied on the case of ***Kenya Power and Lighting Co. versus Rose Anyango and Another [2020] eKLR*** where the court allowed extension of time to file an appeal and opined that instructions to an advocate need not be in writing.

8. They submit that the Respondent will not suffer prejudice if the extension of time is granted. They relied on ***Nicholas Arap Korir Salat versus Independent Electoral and Boundaries Commission and Others [2013] eKLR*** where the court observed *inter alia* that where procedural infraction causes no injustice to a party, the same should be overlooked in pursuit of administration of justice.

9. They submit that their intended appeal raises arguable and serious issues and have relied in the decision of ***Kenya Revenue Authority versus Sidney Keitany Changole & 3 others***.

10. They aver that the Respondents have not demonstrated that they have the means to refund in the event they are paid, and the appeal succeeds. On that score, they rely on ***Edward Kamau & Another versus Annah Mukui Gichuki & Another [2015] eKLR.***

11. The Respondents have opposed this application through a replying affidavit sworn by mary Nzoki Kyangu on 18th May 2021 and grounds of opposition dated 15th May 2021.

12. The Respondent have termed this application as an abuse of court process and have faulted the applicants for having not taken any steps to prosecute their appeal.

13. They further aver that the applicants were aware about the date of delivery of the judgement in the lower court but failed to turn up in court. They aver that the nature of security offered in form of bank guarantee is unacceptable because the money would still be beyond the control of this court as the same can be terminated by either of the parties.

14. The deponent states that she is a farmer and is able to refund the amount and states that the applicants should offer suitable security arguing that the applicants had offered to pay Kshs. 743,000 to them and have the balance deposited in court.

15. In their written submissions, the Respondents aver that the applicants have not given a satisfactory explanation to explain the delay in filing appeal.

They further contend that the Appllicants are not contesting liability but only have an issue with quantum.

16. This court has considered this application and the response made. The application basically invokes the provisions of ***Order 42 Rule 6(1) & (2) & Order 50 Rule 6 of the Civil Procedure Rules.***

17. [**Order 42, rule 6.**] ***Stay in case of appeal.***

> **6. (1) ''No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.''**

In this instance it is clear that there is no appeal yet. The applicant is seeking for enlargement of time the file an appeal under ***Order 50 Rule 6 of Civil Procedure Rules*** which provides: -

> **''Power to enlarge time [Order 50, rule 6.] 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: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.''**

18. On the question of whether the applicant has demonstrated sufficient case to justify extension of time to file their appeal out of time and further Orders of stay of execution, this court finds that this application is standing on shaky grounds.

Section 79 G provides: -

> **''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.''(Emphasis added).

19. As I have observed above enlargement of time is essentially a discretionary matter. The Applicant must show sufficient cause discretionary and this court has to be persuaded that there is indeed a sufficient cause. ***Subsection 2 of Order 42 Rule 6*** fetters the exercise of that discretion in favour of an applicant who is required to fulfill the following conditions namely: -

> i. He/She must demonstrate that a substantial loss may result unless stay is granted.
>
> ii. An offer of security for the due performance of decree sufficient cause.

In ***Nicholas Kiptoo Arap Korir Salat versus IEBC & 7 Others [2014] eKLR*** the Supreme Court laid out elaborate principles applicable in extension or enlargement of time for a party to do an act or carry out a step within specified timeline.

The supreme court observed the following in relevance to the matter at hand: -

> **- ''This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a court should consider in exercise of such discretion: -**
>
> > **1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court**
> >
> > **2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court**
> >
> > **3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis;**
> >
> > **4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**
> >
> > **5. Whether there will be any prejudice suffered by the respondent if the extension is granted.''**

20. In this matter it is uncontested that the judgement was delivered on 25th March 2021. This instant application was filed on 11th May 2021 which was beyond the 30 days stipulated under ***Section 79G of the Civil Procedure Act,*** to lodge an appeal.

21. In situations where a party finds himself/herself on a spot because of failure to appeal on time despite desire to do so, he or she must give

good reasons why there was delay in the first place. Now let me consider the reasons advanced by the applicants. They aver that they did not attend court on 25th March 2021 because of mistake of Counsel. They have however, not given the name of the said Counsel and how they eventually got to know when the judgement was delivered and its details.

22. In my considered view, the applicants have made a vain attempt to explain delay by roping in one Kelvin Ngure who avers that he is Deputy Claims Manager at Direct Line Assurance Ltd. This attempt however is a bit feeble because of what he depones in paragraph 2 of the supporting affidavit to this application where he avers;

> **‘‘I am informed by our advocates on record……..that judgement in the said suit was delivered on 25th March 2021 whereby no stay of execution was sought as the Defendant’s advocates had mis-diarized the court date hence they were not present during the delivery of the judgement.’’**

The above averment presents two issues which I find to weaken the applicants cause in this application.

> i. In the first place, the deponent does not say who that advocate is that failed to diarize or wrongly diarized the date of judgement in the lower court. A court’s discretion is exercised in favour of a party is candid and demonstrates good faith.
>
> ii. The applicants have not stated why the offending advocate has not sworn an affidavit to say, look I made an inadvertent mistake owing to an excusable mistake. How then can this court know if the applicants’ reasons for delay are well founded in the absence of such an affidavit?

23. In ***Kenya Power & Light Company (Supra)*** the court was of the opinion that there was no legal requirement that instructions to an advocate must be in writing. While I am persuaded by the finding by the court, the facts and circumstances in that case are different to the one we have in this application. In that case, the applicant was late in filing the application by one day. The court was also cognizant and took judicial notice of the fact that Covid-19 had just hit the county and restrictive measures were issued by the government on 16th March 2020. That together with the downscaling of court processes which the court noted threw all persons in a spin of uncertainty as to how services were to be rendered. The issue of the pandemic affecting filing of the application was specifically pleaded by the applicant’s counsel as such the court took it into considerations. The Applicant was also a party to the proceedings in the trial court.

24. In the present application, the delay has been attributed to other reasons being failure to diarize the correct date of delivery of judgement by counsel. It is important to note that the delay has not been explained by the applicants in this matter. It has been explained by a person, who was not a party to these proceedings in the trial court and is still not a party to this suit. Even though the deponent has stated that he is duly authorized to swear the affidavit and make averments by dint of his rights under the doctrine of subrogation, his reliance on that doctrine is misplaced.

25. The deponent of the affidavit as a representative of the insurer of Motor vehicle number KCG 148R can only participate in these proceedings and file pleadings on behalf of the applicants seeking to explain the delay once the insurer settles the claim against its insured. From the pleadings, one is not able to tell whom the motor vehicle belonged to and how they are connected to the deponent, Kelvin Ngure or Direct Line Assurance Co. Limited. The deponent despite invoking the doctrine of subrogation, is a stranger to these proceedings and this court’s position is based on the legal position exemplified hereunder: -

Paragraph 490 of the Halsbury’s Laws of England 4th Edition 2003 Reissue Volume 25 sets out the circumstances under which the doctrine of Subrogation applies in the following terms: -

> **‘‘Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss… in so far as the assured has been indemnified by that payment for the loss.’’**
>
> **In Kenya Power & Lighting Company Limited versus Julius Wambale & Another [2019] eKLR** in case similar to the one before this court Githua J held;
>
> > **‘‘The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby, usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party. The action must however be instituted in the name of the insured with his consent and must relate to the subject of the contract insurance.’’**

26. In light of the above cited authorities, it is clear that an insurer can only step in the shoes of the insured after it has settled the amount awarded by the court on behalf of its client. There is no evidence presented in this court indicating who among the three applicants was insured by Direct Line Assurance Co. Ltd and/or if all the 3 applicants were insured. That aside, there is no suggestion that the decretal amount has been paid in the instant case in the lower court for the right of subrogation to accrue to the Claims Manager or any other officer from the insurer to swear affidavit on behalf of the insured. The attempt by the insurer to explain the delay of filing the appeal on time when it was not a party in the proceedings in the trial falls short of the condition set under ***Section 79 G of the Civil Procedure Act.*** He is simply not privy to the reasons for the delay and is not in a good position to explain the reasons for the delay.

27. The suit at the Lower Court certainly was between the applicants and the Respondents and they are the only parties affected by the

outcome of the suit. When one looks at the averment made under paragraph 6 of the affidavit sworn by Kelvin Ngure in support of this application, it gets unclear as to who the applicant is because the deponent states.

> ‘‘**the applicant has just given us instructions to appeal the said judgement after perusal of the same**.’’

28. So the question is, who is the applicant giving instructions to the deponent to appeal and how did that applicant learn about the judgement and when he avers under paragraph 10, that the ***‘‘applicant/defendant’’*** is willing to deposit security? Who is willing to deposit security? Is it the applicants? Or the insurer?

29. It is apparent therefore, whichever way one looks at this application, it is obviously unsustainable. It was quite inadvisable for the insurer to depone on facts within the domain of parties to the suit. The insurer avers that it wishes to appeal against the decision of the trial court purportedly under the doctrine of subrogation but it has not yet settled the claim on behalf of the insured. The right under the doctrine of subrogation therefore has not yet crystalized.

30. Having found that the only affidavit in support of the application as provided under ***Order 51 Rule 3*** has been sworn by a person who is not a party to these proceedings, this application has been left with no legs to stand on as was held in ***Kenya Power & Lighting Co. versus Julius Wambale & Another [2019] eKLR***. In ***P.M.M Private Safaris versus Kevin Isatia [2006] eKLR*** the court was faced with a similar situation and it held: -

> **‘‘………the insurer is not a party to the proceedings…hence the affidavit is sworn by a stranger to the proceedings….. The Insurance sector clearly misleads the insured to believe that he/she the insured is represented by a Counsel who is not answerable to the insured……’’**

31. In the light of the above, it is clear that by exercising the right to subrogation before settling the claim, the insurer came into the proceedings herein prematurely and I must find that the affidavit in support of this application is fatally defective for having been sworn by a stranger in the proceedings. To that extent this application is unsustainable.

32. There is also another anomaly which I must make observation albeit in obiter. The description of parties in this miscellaneous application leaves a lot to be desired because at this stage we only have applicants) and Respondent(s). There are no plaintiffs or Defendants properly so called and to describe parties as Plaintiffs on one hand and defendants on the other is a bit confusing and the applicant’s counsel ought to have been a bit neat and clearer in the description of parties. However, this application has not failed on this ground but because the counsel is likely to approach this court on similar applications or appeals, this court found it proper to put the record straight. If the application was made in the lower court, then the description of parties in the manner presented would have been in order but at this appellate stage, parties should be described in their true character.

Having said that, this court, for the aforetasted reasons, finds this application untenable. The only just option is to strike it out which I hereby do with costs rather than to dismiss it altogether.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 11TH DAY OF NOVEMBER, 2021

HON. JUSTICE R. K. LIMO

JUDGE