



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL CASE NO. 127 OF 2019

AGGREY KIPLAGAT KIMAIYO.....APPLICANT

-VERSUS-

ANDY FORWARDERS SERVICES LTD.....RESPONDENT

RULING

1. The application for determination is dated 20/09/2019. It was filed under certificate of urgency and is brought under sections 1A, 1B, 3A & 95 of the Civil Procedure Act, Orders 22, 42 Rules 4 & 6, Order 50 Rule 6 & Order 51 of the Civil Procedure Rules, Article 159 (d) of the Constitution of Kenya and all other enabling provisions of the Law. It seeks the following orders;

a) That this Hon. court be pleased to extend time and grant leave to the Applicant herein to lodge an appeal against the judgment of Hon. Mayamba (PM) in Kilungu PMCC No. 110 of 2016 delivered on 16/08/2019 and the draft memorandum of appeal annexed hereto be deemed as duly filed with leave of court.

b) That upon granting prayer (c) above, this honorable court be pleased to stay the execution of the judgment/decree obtained in Kilungu PMCC No. 110 of 2016 pending the full hearing and determination of the appeal subject to this application.

c) That costs of the application abide the outcome of the appeal.

2. The application is supported by the grounds on the face of it and the supporting Affidavit sworn on the same day by Anthony Kariuki, the Legal Officer of Kenya Alliance Insurance Company Ltd. He also swore a further affidavit on 08/10/2019. He deposes that judgment of Kshs.1,086,730/= was entered in favour of the Respondent on 16/08/2019 and he filed this application on 20/09/2019, one day after lapse of the 30 days allowed for appeal.

3. He attributes the delay to the late supply of the typed copy of the judgment which judgment was necessary to inform his decision on whether or not to prefer the appeal. It's also his deposition that he is ready and willing to abide by the conditions of court on provision of security, that no prejudice will be suffered by the Respondent if leave is granted and that the appeal has high chances of success.

4. The Respondent opposed the application through a replying affidavit sworn on 07/10/2019 by Regina Ireri, the Legal Officer of Heritage Insurance Company Ltd. She deposes that grant extension of time to appeal is not a matter of right and the delay has not been sufficiently explained. That the Applicant's letter asking for the judgment from the registry was written 5 days before expiry of the 30 days period and as such, the delay was caused by the Applicant and not the court registry. It's her deposition that the Applicant slumbered on it's right and does not deserve the discretion of the Court.

5. The application was canvassed by way of written submissions.

6. The Applicant submits that the proviso to section 79G of the Civil Procedure Act gives leeway for a dissatisfied party to appeal out of time upon giving sufficient cause for the delay. It also submits that precedent has developed a number of factors to aid the courts in exercising the discretion. It cites the court of Appeal decision in **Mwangi –vs- Kenya Airways Ltd (2003) KLR** as quoted in **Kiambu High Court Misc. Civil Application No. 108 of 2017; Samuel Mwaura Muthumbi –vs- Josephine Wanjiru Ngugi & Anor** where the factors were said to be;

a) The period of delay

b) The reason for the delay

c) The arguability of the appeal

- d) The degree of prejudice which could be suffered by the Respondent if extension is granted.
- e) The importance of compliance with the time limits of the particular litigation or issue and
- f) The effect if any of the administration of justice or public interest if any is involved.

7. The Applicant further submits that it has advanced sufficient reasons for the delay which was for only one day hence not inordinate. It submits that the intended appeal on both liability and quantum is arguable and with high chances of success as per the attached draft Memorandum of Appeal. It also submits that it has demonstrated willingness to furnish reasonable security and that no prejudice will be occasioned to the Respondent. As for the time limits, it has cited the case of **Mwaura Muthumbi (supra)** where it was held that;

“Lastly, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not in themselves a core substantive value.”

8. The Respondent submits that the delay would not have been there if the Applicant had requested for copy of the judgment earlier. It contends that the Respondent was the author of its own misfortune and cites the case of **Annah Mwihaki Wairuru –vs- Hannah Wanja Wairuru** where the Court of Appeal declined an application of this nature and stated as follows;

“The discretion exercisable under rule 4 of this Court is unfettered. The main concern of the court is to do justice between the parties. Nevertheless, the discretion has to be exercised judiciously, that is on the sound factual and legal basis.”

9. The Respondent submits that the application does not meet the set threshold and prays for its dismissal.

10. Having considered the application, the supporting affidavit, the replying affidavit and the rival submissions, I find the only issue for determination to be whether the Applicant should be allowed to appeal out of time or not.

11. Extending the time within which to appeal is a question of discretion and the factors to be considered by courts in exercising the discretion have been aptly captured by the Applicant. It is evident that the Applicant requested for copies of judgment a few days before expiry of the required 30 days period and it is not in dispute that the period of delay was one day.

12. While it is true that the delay would have been averted if the request had been made earlier, it is also true that there would have been no delay if the judgment was ready on the day the request was made. Further, a delay of one day cannot be said to be inordinate. It is therefore my considered view that the reason for delay has been sufficiently explained.

13. From the draft memorandum of appeal, the Applicant intends to appeal against both liability and quantum and I have particularly noted the various issues of law raised which in my view make the intended appeal arguable. I do agree with the holding in the case of **Mwaura Muthumbi (supra)** that, all what an Applicant needs to show at this stage is arguability-not high probability of success.

14. As for prejudice, I am unable to see any that will be suffered by the Respondent by allowing the Applicant to appeal out of time.

15. I therefore grant the Applicant leave to file appeal out of time. The appeal should be filed within 14 days.

16. There shall be stay of execution pending the hearing and determination of the intended appeal on condition that:

- i. The Applicant pays the Respondent Kshs.300,000/= through its advocate within 14 days.
- ii. The balance of the decretal sum will be secured through a bank guarantee to be deposited within 30 days with the Respondent’s counsel.
- iii. Non-compliance with the conditions will vacate the order granting stay of execution.

17. Costs in the cause

Orders accordingly.

Delivered, signed & dated this 4th day of February, 2020, in open court at Makueni.

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H. I. Ong’udi

Judge