



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

MISC. CIVIL APPLICATION NO. 157 OF 2019

BETWEEN

KOLA RICHARD.....APPLICANT

VERSUS

ALLOYS OWILA HONGO.....RESPONDENT

RULING

1. By a notice of motion dated 05th August, 2019 and filed on even date brought under Sections 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya and Order 50 Rule 5 of the Civil Procedure Act Cap 21 Laws of Kenya, **KOLA RICHARDS (the Applicant)** prays for orders **THAT:**

1) The Applicant be granted leave to appeal out of time against the whole judgment in Kisumu Chief Magistrate's Court Civil Suit No. 357 of 2008 Alloys Owila Hongo vs Kola Richards dated and delivered on 26th June, 2019

2) Pending the hearing and determination of the intended appeal, there be a stay of execution of decree in Kisumu Chief Magistrate's Court Civil Suit No. 357 of 2008 Alloys Owila Hongo vs Kola Richards on such reasonable terms and or conditions as the court shall deem fit and expedient

2. The application is based on the grounds among others that the Applicant's former advocate did not immediately inform him of the judgment.

3. The application is supported by the affidavit sworn by the Applicant on 05th August, 2019 in which he reiterates the grounds on the face of the application. The deponent avers that there is a moratorium in favour of his insurer Blue Shield Insurance Company suspending all claims against it and further that his intended appeal has high chances of success. Annexed to the affidavit is a copy of the impugned judgment, draft memorandum of appeal and letter dated 05th August, 2019 requesting for copies of proceedings and judgment, and receipt for Kshs. 75/- in respect thereof all **KR 1, 2** and **3** respectively.

4. The respondent opposed the application by way of grounds of opposition dated 16.09.19 and filed on 17.09.19 in which he contends that the application is an abuse of the court process and further that the appeal does not a chance of success.

Analysis and Determination

5. Concerning the first issue of whether the Applicants ought to be granted leave to appeal out of time, the powers of the court in deciding such an application are discretionary and unfettered.

6. The law on extension of time is to be found in Section 95 of the Act which states as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

7. Order 50 of the Civil Procedure Rules on the other hand states that:

“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”

8. The parameters for exercise of court’s discretion were concisely laid out in the case of Mwangi v Kenya Airways Ltd [2003] KLR where the Court of Appeal expressed itself thus: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.

9. Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which states: -

“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 anytime 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”.

10. The impugned judgment was delivered on 26th June, 2019. The Applicant had up to 26th July, 2019 to file the intended appeal. The present application was filed on 05th August, 2019 which is 2 months and 3 weeks outside the time limited for filing an appeal.

11. The Applicant’s assertion that his insurer had gone under is no rational excuse for not filing his appeal. In any case, this was a judgment against him and not against his insurer. Secondly, the Applicant’s attempt to blame his advocate for not informing him about the judgment does not lie for two reasons. One, the Applicant does not disclose when he became aware of the judgment and secondly, he does not explain why he abdicated his responsibility to follow up his matter with his advocate. (See John Gakobo Macharia V Kenya Power & Lighting Company Limited [2009] eKLR).

12. Granted, the 2 months and 3 weeks’ delay though unexplained, this court has power under Section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice.

13. Consequently and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the Applicant by extending time within which the intended appeal should be filed.

14. Concerning the second issue of whether a stay of execution pending appeal ought to be granted, I have considered provisions of Order 42 (6) of the Civil Procedure Rules which provides that:

(2) No order for stay of execution shall be made under sub rule

(1) Unless—

a. The court is satisfied that substantial loss may result to the applicant unless the order is made

b. That the application has been made without unreasonable delay; and

c. 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.

15. Having already addressed the issue of delay, I now turn to determine whether the Applicant has established that he is likely to suffer substantial loss if the order of stay of execution pending appeal is not granted.

16. There are a myriad of cases on what constitutes substantial loss. In Standard Assurance Co. Ltd v Alfred Mumea Komu [2008] eKLR, the Court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

17. Additionally, the court in ABN Amro Bank N.V. v Le Monde Foods Ltd Civil Application No. Nairobi 15 of 2002(UR 11/ 02) held that:

“Each party bears a specific burden regarding proof of substantial loss in a case such as before us.So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply

show what assets he has – such as land, cash in the bank and so on.”

18. The Respondent was awarded general damages in the sum of Kshs. 200,000/-. The Applicant has not demonstrated that the Respondent is not in a position to refund the said sum in the event that the appeal succeeds. (See **Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997**).

19. From the affidavit evidence, I am not convinced that the Applicant has demonstrated that it is likely to suffer substantial loss if the order of stay of execution is not granted.

20. Security is a legal requirement under Order 42 (6) (2) (c) of the Civil Procedure Rules. The Appellant has offered to comply with such reasonable terms and or conditions as the court shall deem fit and expedient to grant for due performance of the decree herein pending the hearing and determination of the appeal.

21. It is not my duty at this stage to determine if the Applicant has an arguable appeal but I am minded, in the interest of justice to exercise this court’s discretion under section 3A of *the Act* to afford the Appellant an opportunity to prosecute his appeal.

22. The upshot of the foregoing is that the notice of motion dated 05th August, 2019 and filed on even date is considered and the same is allowed in the following terms:

1. The Applicant is granted leave to appeal out of time

2. The Applicant is further directed to file the Appeal not more than 30 days from the date hereof

3. There shall be a stay of execution pending the hearing and determination of the intended appeal on condition that the Applicant deposits the total decretal sum in an interest earning account of himself and the Respondent’s advocates not more than 30 days from the date hereof

4. Applicant shall bear the costs of this application

DELIVERED AND SIGNED IN KISUMU THIS 06th DAY OF February, 2020

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - **Amondi/Okodoi**

Applicant - N/A

For the Respondent - N/A