



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 44 OF 2020

PALM OIL TRANSPORTERS LIMITED.....APPLICANT

VERSUS

JOHNSTONE KIPKOECH BUSIENEI (suing as the administrator of the estate of

ANTHONY KIPKEMBOI KOECH – DECEASED.....RESPONDENT

RULING

PALM OIL TRANSPORTERS LIMITED (the Applicant) by an application dated 2nd April, 2020 supported by the affidavits sworn by **WINNIE KIMANI** and **KIPCHIRCHIR KURGAT ELKANA** seeks the following orders:

- i. THAT leave be granted to the Applicant to file an appeal out of time against the whole judgment in **Eldoret CMCC No. 312 of 2018 JOHNSTONE KIPKOECH BUSIENEI (suing as the Administrator of the Estate of ANTHONY KIPKEMBOI KOECH(DECEASED) –VS- PALM OIL TRANSPORTERS LIMITED.**
- ii. That a temporary order of stay against the judgment/decree in Eldoret CMCC No. 312 of 2018 delivered on 18/10/2019 be granted pending the hearing of this application interpartes and thereafter final disposal and/or determination of the application herein and further pending the hearing and determination of the intended appeal.
- iii. Costs of the application be provided for.

It is premised on grounds that the applicant is aggrieved by the decision of the lower court, and wishes to lodge an appeal, pointing out that the delay in filing the appeal was not intentional, but was occasioned by hitches in the Applicant company's suit motor vehicle insurer. That the issues that occasioned delay have since been resolved and that the Applicant is ready and willing to abide by terms, conditions and/or reasonable orders of this court, including furnishing security for due performance of orders sought and is even ready and willing to deposit the whole of the decretal sum in **ELDORET CMCC NO. 312 OF 2018** in a joint interest earning account in the names of advocates on record.

It is further stated that That the Respondent is trying to over reach the claim **ELDORET CMCC NO. 312 OF 2018** by refusing to reinstate the appeal **ELDORET HCCA NO. 27 OF 2020 PALM OIL TRANSPORTERS LIMITED VS JOHNSTONE KIPKOECH BUS/ENE/ (Suing as the Administrator of the Estate of ANTHONY KIPKEMBOI KOECH - DCD)** and denying the applicant a chance to deposit the decretal sum in **ELDORET CMCC NO. 312 OF 2018** in a joint interest earning account and to proceed with the appeal.

That the Applicant's appeal **ELDORET HCCA NO. 27 OF 2020 PALM OIL TRANSPORTERS LIMITED VS JOHNSTONE KIPKOECH BUS/ENE/ (Suing as the Administrator of the Estate of ANTHONY KIPKEMBOI KOECH - DCD)**, currently stands dismissed, and the statutory time limit for filing an Appeal arising from the suit **ELDORET CMCC NO. 312 OF 2018** has already lapsed. The lament being that since there are no orders of stay of execution in **ELDORET CMCC NO. 312 OF 2018**-the applicant is exposed to a real possibility of execution, and it stands to suffer irreparable loss and damage as the amount is a colossal figure of Kshs. 3,041,043, which if paid shall not be refunded by the respondent who is a man of straw. That in any event, the respondent will not suffer any prejudice if the prayers sought are granted.

The Respondent opposed the said application by filing a replying affidavit and on the 5th February, 2020 parties recorded a consent on the following terms:

- i. That by consent the Application be and is hereby granted leave to file appeal out of time.
- ii. That stay of execution is granted pending the hearing and determination of the appeal on condition that Applicant deposits Kshs. 3,041,043/- in a joint account in the names of both counsels within 30 days.

iii. That in default the appeal stands dismissed and execution to issue.

The applicant concedes that it is before this court once again seeking the very orders that were sought earlier and allowed by consent of the parties for reasons that **Clause 3 of the consent** order came into effect, while the applicant was in the process of complying with the Consent Order. The said clause in the Consent provided that in the event that the Applicant failed to comply with the depositing of the decretal sum in the Joint interest earning account within a period of 30 days the Appeal shall abate.

It is submitted that The Applicant had the intention to appeal out of time and is still is desirous of lodging an appeal out of time, against the judgment of court in **ELDORET CMCC NO. 312 OF 2018**. The Applicant explains the reasons for delay to comply by way of depositing the decretal sum in **ELDORET CMCC NO. 312 OF 2018**, in a joint account, as being that, that they (through their counsel on record) notified the counsel for the Respondent via correspondence the reason for delay and also requested for extension of time to enable the Applicant's insurer to make payment and further prayed for reinstatement by consent, the appeal **ELDORET HCCA NO. 27 OF 2020**. Phone calls were also made by the Applicant's advocates to no avail.

That, the Respondent's counsel declined the Applicants request for extension by consent on the time for making depositing the decretal sum, refused to participate in the opening of joint account after the 5th day of March, 2020 and declined too, the reinstatement of the appeal **ELDORET HCCA NO. 27 OF 2020**.

This court is urged to consider the decision of the Court of Appeal in **MWANGI VS KENYA AIRWAYS LTD [2003] KLR** where the court set out some of the parameters for consideration in granting leave as follows:

- 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 the extension is granted**
- e) **The importance of compliance with time limits to the particular litigation or issue; and**
- f) **The effect if any on the administration of justice or public interest if any is involved;**

and stated further that the stated requirements were not exhaustive in themselves noting that a judge had an unfettered discretion and so long as the discretion was exercised judicially such that, a judge would be perfectly entitled to consider any other factor outside those listed above so long as the factor is relevant to the issue being considered. In this regard, the applicant implores this court to consider that that instructions to appeal against the Judgment in question were issued via email to the Applicant's advocates in their Eldoret branch office, on 31/10/2019 and as can be noted in the annexed affidavit of Counsel **KIPCHIRCHIR KURGAT ELKANA**, he explains that he became aware of the said instructions on 20/11/2019 when the instructing client called to find out the status of the appeal. This was 2 days after the 30 days' period required to prefer the appeal.

The applicant's counsel immediately commenced the process of seeking leave to appeal out of time and filed an application **ELDORET HCC MISC APPLICATION NO. 202 OF 2019 PALM OIL TRANSPORTERS LIMITED VS JOHNSTONE KIPKOECH BUS/ENE/ {Suing as the Administrator of the Estate of ANTHONY KIPKEMBOI KOECH - DCD}** which was eventually determined by consent of parties on 5/2/2020 and subsequently appeal **ELDORET HCCA NO.27 OF 2020**

Meanwhile, Jubilee Insurance Company (being the insurer of the Applicant's suit motor vehicle - in **ELDORET CMCC NO. 312 OF**

2018), released the decretal amount which was deposited in the Applicant's advocates account through Electronic Funds Transfer Remittance Advice and gave instructions that the court be moved appropriately to enable the applicant file the intended appeal and the monies be used as security for stay of execution pending the determination of the appeal.

It is further contended that, the applicant has an arguable appeal which is demonstrated in the intended Appeal, vide the annexed draft Memorandum of Appeal raises numerous grounds impugning the Judgment of the trial magistrate and which are triable issues and are neither frivolous or vexatious.

The applicant points out that there was partial compliance which was done within the agreed time limits - that being the filing of the Appeal

And this court should find that the said reasons are excusable and humbly requests this court to consider and exercise its own discretion and allow the prayers sought for in the applicant's application.

As regards the prayer for stay of execution pending appeal, it is submitted that that the delay was not inordinate and/or unreasonable and its apprehension that if the orders are not granted, then that appeal may be rendered nugatory is premised on the fact that the Judgment award of **Ksh. 3,048,541.75**, is a colossal sum and further, that the Respondent has no resources and if any, probably meagre. In support of this, the applicant points out that no affidavit of means or any form of evidence has been presented by the Respondent to demonstrate his financial worth/status/liquidity.

The applicant further points out that the records in **ELDORET CMCC NO, 312 OF 2018**, that the Deceased therein was a business man

making {as per the trial court's finding) approximately Kshs. 20,000/- per month and further that the Respondent was one of his dependants without any known meaningful economic activity/ source of income, and it is reasonable to deduce that the respondent is a man of straw who would not be able to refund the decretal sum in the event the intended. In support of this argument the applicant relies on the case of **National Industrial Credit Bank Limited Vs Aquinas Francis Waska & Another {UR) Nairobi Civil Application No. 238 of 2005** wherein it was stated thus: -

This court has said before and it would be repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them.

Once an applicant expresses apprehension that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge”

The applicant also expresses willingness to have the same furnished as security for due performance of orders sought including making a deposit of the entire amount in a bank account in the joint names of the two firms of Advocates or by securing the same in any other manner this court may prescribe.

The Respondent opposed the said application by filing a replying affidavit and on the 5th February, 2020 parties recorded a consent on the following terms:

- i. That by consent the Application be and is hereby granted leave to file appeal out of time.**
- ii. That stay of execution is granted pending the hearing and determination of the appeal on condition that Applicant deposits Kshs. 3,041,043/- in a joint account in the names of both counsels within 30 days.**
- iii. That in default the appeal stands dismissed and execution to issue.**

It is pointed out that the Applicant never complied with the terms of consent and the Respondent through his Advocates wrote a letter to the Applicant's Advocates information then that they never complied with the terms of the consent and due to that the appeal stood dismissed.

As a result of the Applicant failure to comply with the terms of the consent dated 5th February, 202 the Appeal stood dismissed and the Respondent was to proceed with execution as per the said consent and that is the reason why the application filed the current application.

The respondent in the submissions refers to the case of **CHAIRMAN CO-OPERATIVE TRIBUNAL & 8 OTHERS EX-PARTE MANGEMENT COMMITTEE KONZA RANCHING & FARMING CO-OPERATIVE SOCIETY LTD (2014) eKLR**, Odunga (J) referred to the words of Kimaru (J) in **STEPHEN SOMEK TAKWEYI & ANOTHER –VS- DAVID MBUTHIA GITHARE & 2 OTHERS NAIROBI (MILIMANI) HCC NO. 363 OF 2009** where it was stated thus on the present issue:

“... the court has an inherent jurisdiction to preserve the integrity of the judiciary process. When the matter is expressed in negative it is said that there is inherent power to prevent abuse of the court. In the civilized legal process, it is the machinery used in the court of law to vindicate a man's rights to enforce his duties. It can be used properly and instance of this when it is diverted from proper purpose and is used with some ulterior motive for some collateral one or to gain some collateral advantage which the law does not recognize as a legitimate use of the process. But the circumstance in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes on the extrinsic evidence only but if and when it is shown to have happened it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instance. Others attract the res judicata rule but apart from and independent of those there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings or put an end to it”.

The orders which are sought by Applicant herein are similar to those in **Misc Civil Application No. 202 of 2019** which was compromised by a consent recorded by the parties herein on the 5th February, 2020 which the Applicant never complied with its terms and hence the appeal stood dismissed. It is contended that the Applicant has not sought for the setting aside of the consent order where they would need to give reasons they would need to give reasons for the setting aside of the consent. In this regard the respondent cites the case of **Kenya Commercial Bank Ltd –Vs- specialized engineering Co. Ltd (1982) KLR 485** where Harris J. held inter alia that

“1. A consent order entered into by counsel is binding on all parties to the proceedings and is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court set aside an agreement.

2. A duly instructed Advocate has implied general authority to compromised and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his Advocate unless such limitation was brought to the notice of the other side.”

ANALYSIS AND DETERMINATION

The background to this matter is that the Respondent filed the suit **ELDORET CMCC NO. 312 OF 2018; JOHNSTONE KIPKOECH BUSIENEI {Suing as the Administrator of the Estate of ANTHONY KIPKEMBOI KOECH {Deceased) VS. PALM OIL TRANSPORTERS LIMITED** as against the Applicant claiming for general damages, special damages and costs arising out of a fatal

accident that occurred on 27th October, 2017 along Eldoret-Nakuru road. After a full trial judgment was entered in favour of the respondent as against the applicant as follows:

Liability 50%: 50%

Pain and Suffering 50,000/-

Loss of Expectation of Life Kshs. 150,000/-

Loss of Dependency Kshs. 5,440,000/-

This worked out to 20,000 x 2/3 x 34 X 12, add Special damages Kshs. 77,000/- to give a SUB - TOTAL Kshs. 2,858,750/- Less 50% contribution Kshs. 2,858,750/-, resulting to a GRAND -TOTAL Kshs. 2,858,750/-

Party and Party Costs were later assessed at Kshs. 182,293: making the DECRETAL SUM to be -Kshs. 3,041,043.

It is not in dispute that the parties, subsequently entered into a consent that determined the said application and which was recorded in court on 5/2/20 and adopted as an order of the court. The factors to be considered in a scenario such as the present one, was well discussed in **MWANGI VS- KENYA AIRWAYS LTD [2003] KLR** to include, but not limited to

- 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 the extension is granted
- e) The importance of compliance with time limits to the particular litigation or issue; and
- f) The effect if any on the administration of justice or public interest if any is involved;

To the above, is added another twist- that in-fact matters would not have reached this point had the applicant honoured the terms of the consent. I concur with the respondent's submissions that the consent of 5th February, 2020 is binding and the honourable court cannot interfere with the same as it has not been varied by another consent nor has the Applicant made any prayer to have the same set aside. Indeed, what the Applicant has done, is to bring a similar application to that which they failed to comply with its terms after a compromise by consent. In my view, all the lamentations that the applicant is now woefully waxing about only demonstrate an indolent spirit of a litigant who is bent on determining the pace at which this matter should move. The offers being made regarding security for due performance, are in my view a panic mode upon realizing the price it has to pay for not acting timeously. Indeed, it would offend all equitable principles of fairness to allow the applicant to have two bites of the cherry, and even though equitable principles are as long as the Chancellor's foot, even that foot eventually finds a shoe to stop it from growing, and this is one such instance. The upshot is that the application lacks merit and is dismissed with costs to the respondent.

E-Delivered and dated this 11th Day of June 2020 at Eldoret

H.A. OMONDI

JUDGE