REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

MISCELLANEOUS CIVIL APPL. NO. 51 OF 2020

SHADRACK MUEMI NGUNGU.....PLAINTIFF/RESPONDENT

VERSUS

MOSES WANGAI.....1ST DEFENDANT

ANTHONY KURIA RIANUI.....2ND DEFENDANT/APPLICANT

R U L I N G

1. The Applicant's application dated 23/04/2020 principally seeks two prayers; firstly, an order to enlarge time within which to lodge the intended appeal against the ruling delivered on the 30/01/2020 in **Kangundo SPMCC No. 208 of 2018 - Shadrack Mueni Ngungu –vs- Moses Wangai & Anthony Kuria Rianui** and secondly, stay of execution of the decree pending the determination of the intended appeal.

2. The application is supported by the affidavit of Simon Kioko Deputy Legal Manager of the Applicant's Insurer sworn on even date where he deponed inter alia: that they were not aware of the existence of the proceedings since no summons to enter appearance were served; that they only got to know of the suit upon being notified by the Respondent's Advocates over payment of decretal sums; that upon the delivery of the lower court's ruling they sought to lodge appeal but could not do so in time due to the loss of the relevant underwriting file containing all documents relating to the matter; that instructions to lodge appeal were dispatched to their lawyers on 25/02/2020 but however the messenger dispatched failed to deliver letter of instructions in good time as it reached their lawyers on 10/03/2020; that the inadvertent mistake should not be visited on the Applicants; that the delay is purely inadvertent and not inordinate and that this court do enlarge time for lodging an appeal; that the Applicants are ready and willing to abide by such terms as this court may impose pending the hearing and determination of the intended appeal.

3. The application is opposed. The Respondent filed a replying affidavit sworn on 11/05/2020, wherein he deponed inter alia; that the Applicants Insurer had been duly served with the statutory notice; that the Applicant has not attached a copy of the ruling sought to be appealed against; that the Applicants have not demonstrated what substantial loss they stand to suffer if stay is not granted; that there is no correlation whatsoever between the misplacement of the underwriting file by the Insurer and the filing of the intended appeal; that the Applicants have been indolent and should not be allowed to deny the Respondent from accessing the fruits of the judgement.

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

5. Learned counsel for the Applicant raised two issues for determination namely; whether the Applicant is entitled to an extension/enlargement of time to lodge the intended appeal and secondly, whether an order of stay of execution of the decree in **Kangundo SPMCC No. 208 of 2018** should be granted pending the determination of the intended appeal.

Learned counsel sought reliance in the provisions of Section 79G and 95 of the Civil Procedure Act as well as order 50 Rule 6 of the Civil Procedure Rules. Reliance was placed in the case of **Mwangi –Vs- Kenya Airways limited [2013] eKLR** where factors were laid down as a guide to a court when handling applications of this nature. On issue of period of delay, it was submitted that the present application has been made 55 days after the trial court's ruling which is not inordinate. On the issue of reasons for delay it was submitted that the Applicants have furnished the same namely that there was misplacement of the underwriting file and inadvertent mistake by the Insurer's messenger who delayed to deliver the letter of instructions to the Advocates. Reliance was placed in the case of **Philip Chemwolo & Another –Vs- Augustine Kubende [1982 – 88] KAR 103.**

On the arguability of the appeal, counsel submitted that the same raises triable issues worthy of determination as per the Memorandum of Appeal. Finally, it was submitted that the Applicants have duly met the conditions imposed by Order 42 Rule 6 of the Civil Procedure Rules.

6. Learned counsel for the Respondent submitted that no satisfactory explanation was given as to why it took the Applicants that long to file the appeal. Reliance was placed in the cases of **Dolphin Coaches limited –Vs- Benson Kamau Migwi & another [2008] eKLR, Nicholas**

Kiptoo Arap Korir Salat –Vs – IEBC & 7 Others [2014] eKLR and **Maree Ahmed & Another –Vs- Leli Chaka Ndoro [2017] eKLR.** It was submitted that the application herein was only made after the Applicants Insurer was served with summons to enter appearance on 9/03/2020 and therefore raises questions as to the bonafides of the alleged letter of instructions by the Applicants Insurer to the Advocate on 10/03/2020. It is the Respondent's contention that the Applicants deputy legal manager is guilty of non-disclosure of a material fact namely the existence of a declaratory suit being **Kangundo SPMCC No. 37 of 2020**. Due to the aforesaid non – disclosure of material facts, it was submitted that the application should be dismissed. Finally, it was submitted that the Applicants have not shown any substantial loss to be suffered if the application is not granted.

7. I have considered the rival affidavits and submissions plus the cited authorities. The issues for determination are whether the Applicants are entitled to an extension of time to lodge an appeal and whether orders of stay of execution can be granted.

8. Section 79G and 95 of the civil procedure Act is the law applicable in deciding whether the prayer to enlarge time to file an appeal is merited. They provide as follows:

> 79G - "*Every appeal from a subordinate court to the high court shall be filed within a period of thirty (30) 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 satisfied the court that he had good and sufficient cause for not filing the appeal in time."*
>
> *95 - "When 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 originally fixed or granted may have expired."*

The power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis and while not a right it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the court sufficient material to persuade it that the discretion should be exercised in their favour. Certain principles guiding the courts in such applications have been laid down in the cases of **Nicholas Kiptoo Arap Korir Salat –vs- IEBC & 7 others [2015] eKLR** and **Mwangi – Vs- Kenya airways limited [2003] KLR as follows:**

> ***(a) The period of delay.***
>
> ***(b) The reasons 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.***
>
> ***(f) The effect if any on the administration of justice or public interest if any is involved.***

I will now consider the Applicant's application for extension of time against these factors.

On the issue of period of delay, it is noted that the application has been brought 55 days after the expiry of the statutory period within which to lodge the appeal. It is my considered view that such a period is not that inordinate and I am inclined to excuse the same in the interest of justice. On the reasons for the delay, the Applicants have claimed that their underwriter's file was misplaced and that the insurer's messenger blundered by delaying to relay the instructions letter to their advocates. As to whether the blunders were genuine I leave it to the conscience of the Applicants since it has been averred by the Respondent that the applicants were jolted into action after being served with summons to enter appearance on 9/03/2020 vide a declaratory suit No.37 of 2020 at Kangundo law courts. It is thus not possible to tell whether the applicant's instructions to their advocates was in regard to the appeal or the declaratory suit. However, I am alive to the fact that human beings are not infallible and do make mistakes from time to time and which must be judged as against that prism. In the Court of Appeal case of **Philip Chemwolo and Another –Vs- Augustine Kubende [1982 – 88] KAR 103** Apaloo JA held as follows:

> "***Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits ..... I think the broad equity approach to this matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said exist for the purposes of deciding the rights of the parties and not for the purposes of imposing discipline."***

The deponent in the Applicants supporting affidavit has deponed that he highly regrets the error and beseeched the court to understand the Applicants predicament. On the arguability of the appeal, I note that the Applicants have disclosed three grounds of appeal against the trial court's ruling. The said grounds raise pure points of law which in my view are arguable. As regards the degree of prejudice to be suffered by the Respondent, it is noted that the Respondent is yet to execute the decree. In fact, it has since emerged that the Respondent upon securing a judgement vide the primary suit proceeded to file a declaratory suit namely **Kangundo SPMCC No. 37 of 2020** which is now pending determination. Hence if the Applicants seek to lodge appeal against the ruling in the primary suit, I find no prejudice will be suffered by the Respondent who is already on track pursuing his remedies. On the other side of the coin the Applicants should also be allowed to ventilate their appeal if any. This also ties up with the issue of administration of justice in which every party to a cause should be given their day in court to ventilate their respective claims without any hindrance.

9. Having established that the Applicants merit an order for extension of the period to lodge appeal, the next issue for determination is whether an order of stay pending determination of the appeal should be granted. In the case of **Antoine Ndiaye –Vs- African Virtual University [2015] eKLR** the court gave the guiding principles for stay orders in semblance with order 42 Rule 6 of the Civil Procedure Rules as follows:

(a) ***The application was brought without undue delay.***

(b) Security for costs has been furnished for the due performance of the decree that may be binding upon the Applicant.

(c) Substantial loss will be occasioned to the Applicant if the order is not granted.

10. I have looked at the application lodged by the Applicants. With regard to the issue of undue delay and as analyzed above, the delay is not inordinate. With regard to the issue of substantial loss, I am unable to find the substantial loss that the Applicants shall suffer save only that their right to be heard on appeal will be extinguished if the order is not granted. However, it has transpired that the Respondent upon securing the judgement in the primary suit has filed a declaratory suit against the Applicants insurer. In fact, the Respondent has not taken any precipitate action such as executing the decree and hence the clamour for an order of stay by the Applicants appear to be misplaced. The Applicants Insurer is expected to defend itself in the declaratory suit and it seems this has prompted it to nudge the Applicants to pursue an appeal against the ruling of the trial court as part of its defence strategy. That is perfectly within their rights to do so since it is their house that they intend to organize. Since there is no evidence of execution of the decree I do not see how the Applicants stand to suffer substantial loss if the order of stay is not granted. It is also instructive to note that the Applicants appear to have failed to disclose the existence of the declaratory suit while lodging the present application. The applicants were expected to act in good faith by letting the court know of all the facts surrounding the case so as to enable this court make the appropriate orders. The Applicant had rushed to court through the certificate of urgency and claimed that the Respondent was out to execute the decree yet they knew that the Respondent had only moved to the second level namely institution of a declaratory suit. Indeed, the said declaratory suit is yet to be determined so as to generate a decree if any. I am satisfied that there was no cause for alarm in the first place and thus the claim that the Applicants will suffer substantial loss is not convincing and therefore an order of stay ought not to have been granted in the first place. On the issue of security, I note that the Applicants are ready to furnish the same. However, in view of my finding that an order of stay ought not to have been granted in the first place, I find that there is no need for the Applicants to furnish security. On the whole I find only condition number (a) has been satisfied by the Applicants while the rest are not and thus the prayer for stay pending appeal is not merited in the circumstances.

11. In the result it is my finding that the Applicants Application dated 23/04/2020 partially succeeds. The following orders are made:

(a) The Applicants be and are hereby granted fourteen (14) days within which to file and serve their memorandum of appeal.

(b) The rest of the prayers in the application namely 3, 4, and 5 are ordered dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Machakos this 4th day of June, 2020.

D. K. Kemei

Judge