



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**MISCELLANEOUS CIVIL APPLICATION NO 430 OF 2018**

**RAJA MATERIAL SUPPLIERS.....INTENDED APPELLANT**

**VERSUS**

**JOSEPH KIARIE WAGURAH.....RESPONDENT**

**(Being an application for stay of proceedings and leave to appeal against the Ruling and the Order of Hon E Wanjala (Ms), Resident Magistrate (RM) at the Chief Magistrate's Court at Milimani in CMCC No 7603 of 2016 delivered on 23<sup>rd</sup> January 2018)**

**BETWEEN**

**JOSEPH KIARIE WAGURAH.....PLAINTIFF**

**VERSUS**

**RAJA MATERIAL SUPPLIERS.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Applicant's Notice of Motion application dated 7<sup>th</sup> August 2018 and filed on 10<sup>th</sup> August 2018 was brought pursuant to the provisions under Section 7 of the Appellate Jurisdiction Act, Chapter 9, Sections 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act, Chapter 21, Order 42 Rule 6(1) and (2) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of law. Prayer No (2) was spent. It sought the following remaining orders:-

**1. THAT the Applicant be granted leave to appeal against the Ruling and the Order of Hon E Wanjala (Miss), Resident Magistrate, delivered on 23<sup>rd</sup> January, 2018 at the Chief Magistrate's Court sitting in Nairobi in Civil Suit No 7603 of 2016, Joseph Kiarie Wagurah vs Raja Material Supplies.**

**2. Spent.**

**3. THAT pending the hearing and determination of the Applicant's Appeal this honourable court be pleased to order stay of proceedings in Nairobi CMCC No 7603 of 2016, Joseph Kiarie Wagurah vs Raja Material Supplies.**

**4. THAT pending the hearing and determination of the Applicant's Appeal, this honourable court be pleased to set aside the Ruling and Order of Hon E Wanjala (Miss), Resident Magistrate delivered on 23<sup>rd</sup> January 2018.**

**5. THAT this honourable court do grant such further, other and/or consequential orders that this Honourable court deems fit and just to grant so as to ensure that the Applicant's intended Appeal is not rendered nugatory.**

**6. THAT costs of this application be in the Appeal.**

2. The Applicant's Written Submissions and List of Authorities both were dated 11<sup>th</sup> October 2018 and filed on 15<sup>th</sup> October 2018 while those of the Respondent were both dated and filed on 5<sup>th</sup> November 2018.

3. When the matter came before the court on 6<sup>th</sup> November 2018, the parties requested it to render its decision based on their Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

### **THE APPLICANT'S CASE**

4. The Applicant's present application was supported by an Affidavit of Ramesh Lalji Rabadia, that was sworn on 7<sup>th</sup> August 2018.

5. The brief facts of this case were that the Respondent filed a Complaint dated 1<sup>st</sup> November 2016 on 3<sup>rd</sup> November 2016. Subsequently, on 4<sup>th</sup> October 2017, he filed a Notice of Motion application dated 3<sup>rd</sup> October 2017 seeking leave to file suit out of time and that the Complaint filed on 3<sup>rd</sup> November 2016 be deemed as having been duly filed. On 23<sup>rd</sup> January 2018, the Learned Trial Magistrate Hon E Wanjala (Mrs) RM allowed the said application as prayed.

6. The Applicant was aggrieved by the said Ruling which it intends to appeal. Its contention was that the Learned Trial Magistrate erred in allowing the said application as the Respondent's claim was for material damage and not a tort as envisaged under Sections 4 (2), 27 and 28 of the Limitations of Actions Act Cap 22 (Laws of Kenya) as was held in the case of **Emmanuel Kidah Ruhengeri vs Sadry Dala [2017] eKLR**.

7. It submitted that it had established a *prima facie* case as was envisaged in the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**. It also pointed out that it had established that it had an arguable appeal, which was the only thing it was required to demonstrate as was held in the case of **Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another [2018] eKLR**, and that since it had demonstrated the same, he was entitled to the order of leave to appeal out of time.

8. It added that it filed its present application three (3) months after it obtained the court order of 23<sup>rd</sup> November 2018 which eight (8) months after it had been delivered. It was emphatic that since the Respondent had never taken steps to fix the matter for Pre-Trial Directions, he would not suffer any prejudice.

9. It placed reliance on Section 95 of the Civil Procedure Act that empowers the court to enlarge time where the time prescribed for doing something had expired. It was its further averment that if the proceedings in the lower court were not stayed, it would be greatly prejudiced and its Appeal rendered nugatory. It stated that it was in the interests of justice that its application be allowed as prayed.

### **THE RESPONDENT'S CASE**

10. In opposition to the said application, on 1<sup>st</sup> October 2018, Caren Nada Jaguga, the Legal Officer of Fidelity Shield Insurance Co Ltd swore the Replying Affidavit on behalf of the Respondent. The same was filed on even date.

11. The Respondent's case was that the Learned Trial Magistrate exercised her discretion judiciously because his claim was not a material damage claim but rather, one based on negligence. He relied on the case of **Tom Onyango vs Kenyatta National Hospital [2016] eKLR** wherein it has held that:-

**“Section 27 of the Limitations of Actions Act clearly lays down that in order to extend time for filing the suit, the action must be founded on tort...”**

12. He referred this court to the case of **Nicholas Korir Arap Salat vs IEBC & 7 Other [2014] eKLR** where the principles of filing an appeal out of time were set out. He was categorical that there had been inordinate delay in the Application filing the present application and that the Applicant had not demonstrated any sufficient reason for the delay and urged this court to dismiss the application.

### **LEGAL ANALYSIS**

13. This court carefully analysed the parties' respective Written Submissions and noted that the two (2) issues that had been placed before it for determination were:-

**1. Whether the Applicant should be granted leave to file its Appeal out of time;**

**2. Whether its Appeal would be rendered nugatory if the proceedings in the lower court were not stayed.**

14. The Applicant's contention was that the Learned Trial Magistrate ought not to have allowed the Respondent's application for extension of time to file suit out of time because the Respondent's claim was a material damage and not a negligence claim causing personal injury to the Respondent as was envisaged in Section 27 of the Limitation of Actions.

15. As both parties were not agreed as to the interpretation of Section 27 of the Limitations of Actions Act, this court found this to have been an arguable point of law that would be best resolved in an appeal. It's only then that a court would be able to render its determination as to whether Section 27 of the Limitations of Actions Act was applicable in claims such as that had been brought by the Respondent.

16. It is undisputed that there was delay on the part of the Applicant in bringing the present application. Although the order it intended to appeal from was given on 23<sup>rd</sup> January 2018, it was only issued on 23<sup>rd</sup> April 2018. It did not adduce any evidence to demonstrate why it did not extract the order earlier or what caused the delay in extracting the same. Once it obtained the order on 23<sup>rd</sup> April 2018, it only filed this present application four (4) months later. The explanation of the cause of delay in its Written Submissions was inadequate.

17. Having said so, this court took cognisance of the fact that every person is entitled, as envisaged under Article 50 of the Constitution of Kenya, to have a fair trial. The said Article 50 of Constitution of Kenya provides as follows:-

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

18. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enforce its rights must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction in an appeal.

19. Appreciably, **“equity aids the vigilant and not the indolent.”** However, it was the view of this court that the Respondent would not suffer any prejudice if the Applicant was allowed to appeal out of time. If he suffered any prejudice, then he did demonstrate the same. He had in fact not set down the suit for hearing.

20. Accordingly, having considered the parties affidavit evidence, their respective Written Submissions and the case law they each relied upon, this court came to the firm conclusion that there would be more injustice in the Appellant being denied an opportunity to ventilate its case on merit.

21. In view of the fact that the appellate court was being asked to determine whether the Respondent’s claim was properly before the Trial Court, a lot of judicial time would be wasted if at the conclusion of the Appeal herein, the Applicant was successful. The most prudent thing therefore would be to stay the proceedings in **Nairobi CMCC No 7603 of 2016 Joseph Kiarie Wagurah vs Raja Material Supplies**.

### **DISPOSITION**

22. For the foregoing reasons, the upshot of this court’s Ruling was that the Appellant’s Notice of Motion application dated 7<sup>th</sup> August 2018 and filed on 10<sup>th</sup> August 2018 be and is hereby granted in terms of Prayer Nos (1) and (3) therein. The Applicant is hereby directed to file its Memorandum of Appeal within fourteen (14) days from today.

23. It is so ordered.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of February 2019**

**J. KAMAU**

**JUDGE**