



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 118 OF 2018

SALOME ALICE AKINYI.....APPELLANT

VERSUS

ARIDEMPTA VERONICA OOKO.....1ST RESPONDENT

EDDY OTIENO OKELLO.....2ND RESPONDENT

RULING

INTRODUCTION

1. The Appellant's Amended Notice of Motion application dated 4th June 2018 and filed on 5th June 2018 was brought pursuant to the provisions of Order 42 Rule 6 and Order 50 Rule 6 of the Civil Procedure Rules. Section 3A & 63 (e) of the Civil Procedure Act (Cap 21) Laws of Kenya and all relevant provisions of the law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT this honourable court be pleased to grant leave to the appellant/applicant to file a memorandum of appeal out of time.

4. THAT the annexed draft memorandum of appeal be deemed filed.

5. THAT the costs occasioned in this application be provided for.

2. The Appellant's Written Submissions were dated 26th July 2018 and filed on 27th August 2018 while those of the Respondents were dated 9th July 2018 and filed on 12th July 2018.

3. When the matter came up in court on 5th November 2018, the parties requested it to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

4. The Appellant's Supporting Affidavit and Further Affidavit were sworn on 4th June 2018 and 11th May 2018 respectively.

5. In the Judgment that was delivered on 15th December 2017, the Respondents were awarded Kshs 687,387/= general damages and Kshs 187,378/= special damages. The Appellant paid the Respondents General Damages only. She did not pay the special damages which she contended, were awarded on the basis of invoices and not receipts and further because the Respondents' insurer had in fact paid the said special damages.

6. It was her contention that she filed her present application timeously, that she was ready to comply with orders of security on costs on the special damages. She stated that she would suffer irreparable harm or loss if a stay of execution was not granted in the event her Appeal

succeeded because the Respondents' means were unknown. She pointed out that her intended Appeal had high chances of success and that it was in the interest of justice that her application be allowed.

THE RESPONDENT'S CASE

7. In response to the said application, the 1st Respondent swore a Replying Affidavit on 16th May 2018. The same was filed on 21st May 2018.

8. She admitted that the Appellant's advocates wrote to her lawyers informing them that a sum of Kshs 100,000/= ought not to have been allowed, which her advocates conceded to.

9. It was her averment that the sum of Kshs 687,378/= was inclusive of both General and Special Damages and that the Appellant had since paid her the decretal sum. She asserted that what was pending was the costs which the Appellant had refused to pay. She pointed out that the present application served no purpose as it was seeking a stay of execution of the award for Special Damages which she had already been paid. She was categorical that the same had been overtaken by events.

10. She said that her advocates informed the Appellant's advocates of the delivery of judgment on 16th November 2017 and that instead of appealing within thirty (30) days, they paid her the decretal sum. She contended that there had been inordinate delay in filing the Appeal herein.

11. She therefore urged this court to dismiss the Applicant's present application.

LEGAL ANALYSIS

12. It was evident from the Appellant's present application and her Written Submissions that she was seeking an order for stay of execution pending appeal and an order that she be granted leave to file an appeal out of time.

13. She relied on the case of **Surinder Kumari Meridatta vs Kenya Commercial Bank & 3 Others [2005] eKLR** where the principles of granting a stay of execution were re-emphasised as follows:-

- 1. Substantial loss may result unless the stay is given.**
- 2. The application for stay had been lodged without delay.**
- 3. The application has furnished security for due performance.**

14. This is a position that the Respondents' advocates agreed with and relied on the cases of **Across Africa Safaris Ltd vs Musa Matu Riunga [2006] eKLR** and **Northwood Services Ltd vs Mac & More Solution Ltd [2015] eKLR** to augment their case.

15. Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows:-

“No order for stay of execution shall be made under subrule (1) unless-

- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
- b. 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.”**

16. As was rightly pointed out by both parties, an applicant seeking a stay of execution must demonstrate:-

- a. That he will suffer substantive loss if the order of stay was not granted;**
- b. That he had filed his application for a stay of execution timeously; and**
- c. That he was willing to provide security.**

17. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.

18. Having said so, this court found itself in agreement with the Respondents that since they had been paid the decretal amount in full, the issue of execution did not arise. The Respondents could not therefore execute a judgment that had been fully settled. In fact, the Respondents said that they had no intention of executing. The application for a stay of execution pending appeal was thus misplaced and could not be granted.

19. Notably, courts must refrain themselves from giving orders that would have no legal effect. In any event, the only prayer sought in the

present application was only pending the hearing of the application herein which has since been overtaken by events.

20. Turning to the issue of filing an appeal out of time, the Appellant submitted that she had a right to fair trial and protection of the law as given under Article 50 and 159 of the Constitution of Kenya, 2010. It was her argument that if she was not granted leave to appeal, then that would amount to substantial loss.

21. The Respondents contended that she first filed a Notice of Motion application seeking the aforesaid orders on 9th March 2018 which was over four (4) months after the judgment was delivered on 9th November 2017. They were categorical that there was unreasonable delay in filing the application and pointed out that equity aids the vigilant and not those who slumber.

22. Notably, 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.”

23. 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 enjoy the fruits of his judgment 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.

24. It is correct as the Respondents submitted that **“equity aids the vigilant and not the indolent.”** However, it was the view of this court that although the Applicant had delayed in filing her appeal, the delay of four (4) months in bringing the application seeking leave to file an application out of time was not inordinate.

25. From the facts that she gave, her insurers only noted the double payment long after it had made payment. This could have caused the delay in filing of the Appeal herein.

26. Going further, as the Respondents had already been paid the decretal sum, this court did not see any prejudice to be suffered by the Respondents if the Appeal against the aforesaid judgment was heard and determined on merit. If they had suffered any prejudice, then they did not demonstrate the same to this court.

27. 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 her case on merit.

DISPOSITION

28. For the foregoing reasons, the upshot of this court’s Ruling was that the Appellant’s Amended Notice of Motion application dated 4th June 2018 and filed on 5th June 2018 is hereby granted in terms of Prayer No (3) therein. The Appellant is hereby directed to file her Memorandum of Appeal within fourteen (14) days from today. Costs shall be in the cause.

29. It is so ordered.

DATED and DELIVERED at NAIROBI this 14th day of February 2019

J. KAMAU

JUDGE