



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC. MISC. APPL. NO. 109 OF 2018

STEPHEN MBATHA MUOKA.....APPLICANT

-VERSUS-

ISUSHO CAPITAL LIMITED.....1ST RESPONDENT

ONESMUS WAMBE NDARUTI.....2ND RESPONDENT

RULING

1. By Notice of Motion dated 28/09/2018, the Applicant seeks:-

1) Spent

2) **THAT** pending the hearing and determination of this Application, there be and is hereby granted a stay of execution of any Ruling, Judgment, Decree, Execution Order and all Consequential Orders in Civil suit No. 163 of 2017.

3) **THAT** this Honourable court be pleased to grant leave to the Defendants/Applicants (proposed Appellants) to appeal out of time against the Judgment made by the Hon. C. A. Mayamba on the 17th of August, 2018 in Civil Suit No. 163 of 2017.

4) **THAT** the said leaves do operate as a stay of all proceedings.

5) **THAT** the draft Memorandum of Appeal be deemed as filed upon leave being granted as per prayer for above and upon payment of the requisite fees thereto.

6) **THAT** costs of this Application and other costs incurred herein consequential to follow the events.

2. The same is anchored on the provisions of Section 1A, 1B, 3A, 63(e) B 67 Order 42, Rule 6, 50 Rule 5, 51 Rule 1 CPR.

3. The Application is based on grounds on the face of the motion and is supported by Supporting Affidavit sworn by Joseph Nyamdemu on 28/09/2018. The Deponent has also sworn a Supplementary Affidavit on 30/10/2018.

4. The Application is opposed via an Affidavit of Stephen Mbatha Muoka sworn on 16/10/2018.

5. Parties agreed to canvass Application via Submissions which they did file and exchanged.

APPLICANT'S SUBMISSIONS

6. The Appellant submits that, under Order 42 Rule 6 (1) and (2) CPR the same stipulates that, for an Applicant to succeed in an application of this nature, he must satisfy the following conditions namely:-

a) **Substantial loss may result to the Applicant unless the order is made.**

b) **The Application has been made without undue delay.**

c) **Such security as to cost has been given by the Applicant.**

7. See **Kenya Power & Lighting Company Limited –Vs- Esther Wanjiru Wokabi (2014) eKLR**. The Appellant contend that, the execution of decree entered in judgment delivered on 17th August, 2018 would create a state of affairs that will irreparably affect and/or negate the very essential core of the Applicants appeal if the same were to succeed to appeal.

8. The Applicant's core business is in the transport sector and execution of the said judgment by the Respondents will essentially cripple the day to day operations of the Applicants.

9. Moreover, the Applicants are apprehensive that if at all the decretal sum is paid to the Respondent, then the same may prove difficult to retrieve or obtain the amounts back from the Respondent in the event the appeal succeeds.

10. The reason being that the Respondent is not a man of means as in his evidence during the hearing of the case at the Trial Court the Respondent testified that he was not able to fully cater for his hospital bill and had been invoiced by Kilome Hospital a total sum of Kshs.280,650/= which he was unable to pay.

11. See **Allan Ngala Mwendwa –Vs- Margaret Wilson Wambua & Another (2017) eKLR, Equity Bank Limited –Vs- Taiga Adams Company Limited (2006) eKLR and ABN Amro Bank, N. V. –Vs-Le Monde Foods Limited – Civil application No. Nbi 15 of 2002.**

12. It is argued that, having shown and proved that the Respondent is not a man of means the evidential burden thus shifts to the Respondent to prove that he is a man of means. So far this averment has not been disputed or denied in any way by the Respondent as such the same stands admitted.

13. The Application before this court was first erroneously lodged before the High Court in Machakos on 30th September, 2018 at which point the duty judge ordered that the file be transferred to the High Court in Makeni where it's being heard now.

14. It is the Applicant's submissions that the delay in filing the Application was occasioned by the fact that the judgment in CMCC No. 163 of 2017 was delivered by the Trial Court in the absence of the Applicants counsel as they were not notified by service of a Judgment Notice of the date when the said judgment was scheduled for delivery, noting that the counsel for the Applicant was not able to attend court on 10th August 2018 when the matter was scheduled for mention to confirm filing of submissions by the parties.

15. Applicants submit that they were advised by the counsel on record that the reason the Applicants counsel was not able to attend court on 10th August 2018 was because she was taken ill. The Applicants counsel however strived to instruct another advocate to hold brief for her in the matter but the said counsel who was instructed failed to attend to the matter as instructed, culminating to these turn of events.

16. The Applicants further submit that the Applicant's counsel only became aware that judgment had been delivered by the Trial Court when they received the Respondent counsel's letter on 3rd September, 2018 seeking approval of the decree.

17. The Respondents' letter is annexed in the Applicants' Supporting Affidavit sworn on 28th September 2018 as annexure "TCL 2". It upon receipt of the letter stated above that the Applicant's counsel wrote to the Respondents counsel (*see annexure "TCL 3" in the Supporting Affidavit of Joseph Nyandemu sworn on 28th September 2018*) seeing details on when the judgment was delivered and requested them to consider granting the Applicants stay by consent pending the Applicant's counsel obtaining a copy of the judgment, notifying the Applicant of the decision and seeking further instructions from its clients thereto.

18. It was not until 18th September, 2018 when the Applicant's counsel received instructions from the Applicant's insurer; Britam Insurance instructing that they should appeal against the judgment (*see annexure "TCL 4" in the Supporting Affidavit of Joseph Nyandemu sworn on 28th September 2018*) by which time the time limit by which to file an appeal had since lapsed.

19. That this Application which was filed promptly upon receiving instructions from their client and thus the delay was further was not inordinate. That the mistake and delay occasioned by the Applicants' counsel should not be visited on the Applicants herein as once the Applicants counsel was aware the judgment has been delivered immediately embarked on taking all the necessary steps and measures to file the application before court within the earliest possible time considering the circumstances herein.

20. On the holdings of **Apoloo, JA in Philip Chemowolo & Anor –Vs- Augustine Kubede (1982 – 88) KAR 103 AT 104**, and **Madan, JA in Belinda Murai & Others –Vs- Amos Wainaina (1978) LLR 2782 (CALL)** as quoted by the Learned Judges of Appeal in **Savings & Loan Kenya Ltd -Vs- Onyancha Bwomote (2014) eKLR** as follows;

"..... the former Chief Justice, Kwasi Apaloo, while still a judge of appeal, stated as follows regarding blunders and mistakes such as those involved in this application:-

"Blunder 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 merit."

"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 exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline."

21. See **Philip Chemowolo & Anor –Vs- Augustine Kubede (1982 – 88) KAR 103 at 1040**. See also **BELINDA MURAI & 9 OTHERS –VS- AMOS WAINAINA CA NO. NAL. 9 OF 1978**.

22. The Applicants have stated at paragraph 12 of the Supplementary Affidavit of Joseph Nyademu sworn on 30th October 2018 that they are willing and ready to deposit the full decretal sum in a joint interest earning account in the names of both the Advocates as security to granting of the stay of execution pending appeal.

23. In the interest of justice that a stay be granted at this stage as the Respondent herein as they submitted earlier is not a man of means and has no known assets that would guarantee security for the Applicants in event the sum awarded is released to the Respondent.

24. In **Butt –Vs- Rent Restriction Tribunal (Supra) Madan JA** as he then observed that where an Applicant has undoubted right of appeal, a large amount of money involved in the dispute between the parties constitute special circumstances meriting the grant of stay of execution pending the hearing and determination of an intended or lodged appeal.

25. On leave to appeal out of time, the principles to be met when one seeks leave to appeal out of time were well laid down in **APA Insurance Limited Vs- Michael Kinyanjui Muturi (2016) eKLR** where the learned judge quoted from the case of **Mwangi –Vs- Kenya Airways Limited** where the court of appeal listed 4 factors which the court ought to take into account in deciding whether or not to grant extension of time to appeal namely:-

- a) **The length of the delay.**
- b) **The reasons for the delay.**
- c) **Possibility, the chances of the appeal succeeding if the application is granted.**
- d) **The degree of prejudice to the Respondent if the application is granted.**

26. On delay, the Applicant reiterates their submissions at (b) above and rely on the authorities as quoted therein to avoid repeating the reasons yet again at this point.

27. On whether the appeal has chances of success it is the Applicant's Submissions that the appeal raises serious critical issues that seek determination by the appeal court. As per the annexed draft memorandum of appeal.

28. On whether the Respondent stands to suffer any prejudice, the Applicant's submission is that the Respondent would not be prejudiced in any way if leave to appeal out of time is granted. This is because the Applicants are willing and ready to deposit the decretal sum in a joint account pending the hearing and determination of the Applicants intended appeal. See **Waljees Ltd -Vs- Ramko [Imjabjao Bigerere Tea Estate Ltd (1871) EA 188.**

RESPONDENTS' SUBMISSIONS

29. The Respondent submits that, in the judgment of the court annexed by Applicants as TCL 1, it is clear from the court record that both parties were absent at the time of delivery of the said judgment, the Respondent's Advocates herein were diligent enough to find out the outcome of the said judgment and further went ahead to notify the Applicants Advocates through their letter dated 3rd September 2018 annexed as TCL 2 in the affidavit in support of the Application.

30. The said letter was done sixteen (16) days before the lapse of the thirty (30) days within which the Applicants had the right of appeal. The Applicants have not explained what efforts they made to file an appeal within the said fourteen (14) days before the lapse of time.

31. In the affidavit in support of the application herein, the deponent at paragraph 9 further states that their advocates herein received instructions to file an appeal and refers to annexure "TCL 4" as the instructions given to their advocate to file an appeal.

32. What the deponent avoids to mention is that; at no point were they informed of the judgment herein by the advocates herein as he would want this court to believe as no evidence is given of such communication.

33. The instructions purportedly given to the advocates to file an appeal does not emanate from any of the Applicants herein. The said instructions to appeal was given on 18th September 2018, whereas the application herein was filed 4th of October 2018 a period of twelve (12) days after the instructions were given.

ISSUES ANALYSIS AND DETERMINATION

34. After going through the materials before the court, I find the issues are;

- *Whether the application is meritorious?*

- *What is the order as to costs?*

35. On application for leave to appeal out of time, the principles to be met were well laid down in **APA Insurance Limited -Vs- Michael Kinyanjui Muturi (2016) eKLR** where the learned judge quoted from the case of **Mwangi –Vs- Kenya Airways Limited (Supra)** where the court of appeal listed 4 factors which the court ought to take into account in deciding whether or not to grant extension of time to appeal namely:-

i. The length of the delay.

ii. The reasons for the delay.

iii. Possibility, the chances of the appeal succeeding if the application is granted.

iv. The degree of prejudice to the Respondent if the application is granted.

36. The Applicant has explained that the delay in filing the Application was occasioned by the fact that the judgment in CMCC no. 163 of 2017 was delivered by the Trial Court in the absence of the Applicants counsel as they were not notified by service of a judgment notice of the date when the said judgment was scheduled for delivery, noting that the counsel for the Applicant was not able to attend court on 10th August 2018 when the matter was scheduled for mention to confirm filing of submissions by the parties.

37. The Applicants counsel only became aware that judgment after it had been delivered by the Trial Court when they received the Respondent counsel's letter on 3rd September, 2018 seeking approval of the decree.

38. It was not until 18th September, 2018 when the Applicants counsel received instructions from the Applicant's insurer; Britam Insurance instructing that they should appeal against the judgment (see annexure "TCL 4" in the Supporting Affidavit of Joseph Nyandemu sworn on 28th September 2018) by which time the time limit by which to file an appeal had since lapsed.

39. The Respondent concedes that the judgement was delivered in absence of the both parties. Further instructions to appeal was given on 18th September 2018, whereas the application herein was filed 4th of October 2018 a period of twelve (12) days after the instructions were given.

40. The court observes that in the circumstances the duration of delay is not inordinate nor is there demonstrated prejudice likely to be suffered by the Respondent if leave is granted.

41. On application for stay, the Applicant has demonstrated that he has met the threshold set out in Order 42 R 6 CPR on grant of stay pending appeal and as Respondent has not contested the same in the submissions, the court finds just to balance interests of the parties herein.

42. Thus the court makes the following orders;

1) Leave is granted to file appeal out of time and same to filed and served within 14 days from dates herein.

2) The stay of execution of the Trial Court decree is granted on condition that 50% of the decretal amount is paid to the Respondent pending appeal.

3) Costs in the main appeal.

DATED, DELIVERED, SIGNED THIS 13TH DAY OF FEBRUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE