



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 425 OF 2018

SAMWEL KAROGU MUTHONI.....APPLICANT

VERSUS

FEDERAL INVESTMENTS LTD t/a

FEDERAL FINANCING LTD.....1ST RESPONDENT

NATIONAL TRANSPORT AND SAFETY AUTHORITY.....2ND RESPONDENT

RULING

INTRODUCTION

1. The Applicant's Notice of Motion application dated and filed on 8th August 2018 was filed pursuant to the provisions of Sections 79G and 95, 1A, 1B & 3B of the Civil Procedure Act and Order 43 rule (1) (u) of the Civil Procedure Rules, Section 10 of the Judicature Act (Cap 8 of the Laws of Kenya), Rule 3 of the High Court (Practice and Procedure/Rules) and Article 159 (2) (b) (d) and (e) of the Constitution of Kenya 2010 and all other enabling provisions of the law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT the honourable court be pleased to extend or enlarge time and the Applicant be granted leave to file an Appeal out of time against the whole Ruling and Order of Senior Resident Magistrate's Court at Nairobi (Makau A N, SRM) delivered on 29th June, 2018.

4. THAT the Memorandum of Appeal annexed hereto be deemed as duly filed and served.

5. THAT the cost of this Application be in the cause.

2. The Applicant's Written Submissions were dated 18th October 2018 and filed on 19th October 2018 while those of the 1st Respondents were dated and filed on 2nd November 2018. The 1st Respondent never filed any response to the Applicant's Notice of Motion.

3. When the matter came before the court on 5th 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 and Further Affidavit of his advocate, Ignatius Mutiatis, sworn on 8th August 2018 and 18th October 2018 respectively. The Further Affidavit was filed on 19th October 2018.

5. The Applicant had purchased Motor Vehicle Registration Number KBB 159R (hereinafter referred to as "the Subject Motor Vehicle") but had not yet effected ownership into his name. The 1st Respondent subsequently transferred the Subject Motor Vehicle into its name.

6. The deponent stated that the Vehicle Inspection Report had expired that the Applicant he could only obtain a Certificate of Inspection upon presentation of a log book. He added that the subject Motor Vehicle was currently grounded and that the Applicant was incurring huge financial losses. He said that since the subject Motor Vehicle was likely to be disposed of, the Applicant would suffer irreparable harm as it was his sole source of income.

7. The Defendant denied having been indebted to the Respondent (**sic**). It was his contention that even if he was still in default, the proper process of law ought to have been followed in alienating the subject Motor Vehicle.

8. He pointed out that although his firm of advocates obtained the certified copies of the proceedings, on 25th July 2018, they were issued with a copy of the Ruling on 2nd August 2018 which was past the time allowed for lodging an appeal.

9. He asserted that they could not formulate the grounds on the Memorandum of Appeal within the statutory time limit because they were relying on the said order. He averred that the Learned Trial Magistrate erred when he declined to issue a Certificate of Delay on the ground that the certified copies of the proceedings and order were issued on time.

10. He further stated that his firm inadvertently filed a Notice of Appeal in the lower court so as not to be barred from filing an appeal instead of to filing a Memorandum of Appeal at the High Court. It was his contention that the mistakes of an advocate, which in this case was occasioned by administrative lapses in transmitting the file from the firm of M/S Mutuma Gichuru & Associates who were previously acting for the Applicant to their firm, should not be visited on the Applicant.

11. In addition, he pointed out that the intended appeal lay as of right and had high chances of success. He was emphatic that the delay in filing the present application was not inordinate.

12. It was the Plaintiff's case that it was in the interest of justice that the application herein be allowed as prayed as it was not an abuse of the court process.

THE 1ST RESPONDENT'S CASE

13. In response to the Applicant's present application, the 1st Respondent's director, David Matu Githua swore his Replying Affidavit of 4th October 2018. The same was filed on even date.

14. The 1st Respondent's termed the Applicant's present application an afterthought, an abuse process, designed to delay the process of law, mischievous, brought in bad faith and calculated cause it extreme injustice and prejudices.

15. It added that the said application did not raise sufficient grounds why this court should interfere with the order that was made on 29th July 2018.

16. It therefore urged this court to dismiss the same.

LEGAL ANALYSIS

17. The Applicant relied on the cases of **APA Insurance Ltd vs Michael Kinyanjui [2016] eKLR** and **Phillip Keipto Chemwolo & Another vs Augustine Kibende [1986] eKLR** where the common thread was that a party would not suffer the penalty of not having his case determined on merit merely because a blunder had occurred.

18. He also relied on the case of **Mursal Guleid & 2 Others vs Daniel Kioko Musau [2016]** where Mureithi J granted leave to an applicant to file his appeal out of time.

19. He was emphatic that an appeal against the decision of the Learned Trial Magistrate delivered on 29th June 2018 lay as a matter of right as stipulated in Section 75 (1) (h) of the Civil Procedure Act and Order 43 Rule 1 (1) (u) of the Civil Procedure Rules. He submitted that the Learned Trial Magistrate misapprehended and misapplied the law on ownership of Motor Vehicles and hence, his appeal had high chances of success.

20. It was his submission that the Defendant would not suffer any prejudice as he had repaid the loan in full and interest thereon. However, he submitted that he was the one who continued to suffer prejudice as the 1st Respondent had never executed the orders of the lower court or re-impounded the subject Motor Vehicle.

21. On its part, the 1st Respondent pointed out that the Applicant had not demonstrated the factors to be considered by courts while exercising their discretion as to whether or not to grant a party leave to file an appeal out of time. In this regard, he relied on the case of **Mwangi vs Kenya Airways Ltd [2003] eKLR** to buttress its argument.

22. It added that the Applicant had not demonstrated what loss, if any he would suffer if his application was not granted because the said Motor Vehicle had already changed hands and consequently, he had no arguable appeal with high chances of success.

23. It further submitted that discretion of the court is exercised according to fixed and settled rules and that the party who seeks an equitable remedy must behave equitably as was held in the case of **Haywood vs Cope [1858] 25 BEAV 140**.

24. It was also its submission that parties have a duty to further the overriding objectives as provided for in Section 1A (3) of the Civil Procedure Act by complying with the directions and orders of the court.

25. From the facts that have been provided by the Applicant, it was not clear what his relationship with the 1st Respondent was. The 1st Defendant only elucidated on their relationship in its Written Submissions. It stated that on 6th October 2017, it advanced the Applicant a loan in the sum of Kshs 390,400/= whereupon he submitted his log book as security for the loan. The said loan was to be repaid in twelve (12) monthly instalments of Kshs 32,534/=. When he defaulted in repaying the loan, the 1st Respondent repossessed the subject Motor Vehicle but returned it to him later after he committed himself to repaying the loan.

26. From the Ruling of the Learned Trial Magistrate, it was evident that the Applicant had applied for injunctive relief against the Respondents. However, his application was dismissed on the ground that he had not met the threshold set out in the case of **Giella vs Cassman Brown & Co Ltd [1973] EA 358.**

27. An appeal therefore lay as a matter of right as was correctly submitted by the Applicant. Indeed, Order 43 Rule 1 (u) of the Civil Procedure Rules provides as follows:-

(1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act- (u)

Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);

28. Section 75 (1) (h) of the Civil Procedure Act further stipulates as follows:-

An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted any order made under rules from which an appeal is expressly allowed by rules.

29. Going further, every person is entitled to have a fair trial under Article 50 of the Constitution of Kenya. 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.”

30. 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.

31. Appreciably, **“equity aids the vigilant and not the indolent.”** However, it was the view of this court that a delay of about two (2) months in bringing the application seeking leave to file an appeal out of time was not inordinate.

32. From the facts of the case, there was a dispute as to whether or not the Applicant had completed repaying the loan that was allegedly advanced to him by the 1st Respondent. The 1st Respondent did not attach any documentary evidence to demonstrate that there were any loan arrears on the part of the Applicant or the circumstances under which it transferred the subject Motor Vehicle in its name.

33. These were issues that would best be resolved in hearing an appeal of the decision of the Learned Trial Magistrate on merit. This court did not see any prejudice that the 1st Respondent would suffer any prejudice if the Appeal against the decision of the Learned Trial Magistrate was heard and determined on merit. If it had suffered any prejudice, then it did not demonstrate the same to this court.

34. 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 Applicant being denied an opportunity to ventilate his case on merit.

DISPOSITION

35. The Applicant’s Notice of Motion application dated and filed on 8th August 2018 is granted in terms of Prayer No (3) therein. The Applicant is hereby directed to file his Memorandum of Appeal within fourteen (14) days from today. Costs shall be in the cause.

36. It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of February 2019

J. KAMAU

JUDGE