



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS APPLICATION NO. 309 OF 2017

RAPID COMMUNICATIONS LIMITED.....APPLICANT

VERSUS

PHOENIX OF EAST AFRICA

ASSURANCE CO. LTD.....1ST RESPONDENT

DANTE PEAK LIMITED.....2ND RESPONDENT

DUBAI BANK LIMITED.....3RD RESPONDENT

RULING

1. This is a ruling in Notice of Motion application dated 18th December, 2017 and filed on the same date by the applicant herein. The same is expressed to be brought under section 3, 3A, 79G and 95 of the Civil Procedure Act and Orders 42 Rule 6(1) and 51 Rule (1) of the Civil Procedure Rules and seeks for;

(a) leave for the Applicant to lodge and appeal out of time against the ruling by Hon J. M. Nang'ea delivered on 17th October, 2017 in Mombasa CMCC NO. 1758 OF 2014;

(B the memorandum of Appeal annexed thereto to be decreed a duly filed;

(c) an order staying the execution of the default judgment entered in Mombasa CMCC No. 1758 of 2014 and all consequential orders pending the hearing and determination of the appeal.

2. The ground upon which this application is premised are that;

(a) the applicant's delay in lodging the appeal was because the Applicant's Director was outside the country and had yet to give instructions to the current advocates

(b) unless orders for stay of execution and leave to file an appeal out of time are granted, the Applicant will suffer irreparable loss and damage as the Respondent will proceed to sell the proclaimed goods and appeal would be rendered nugatory.

(c) The intended appeal has merit and high chances of success.

3. The application is opposed by grounds of opposition filed by the Respondent's advocate as follows;

(a) that the application is devoid of merit and thus and thus an abuse of the court process.

(b) that not sufficient grounds have been given to warrant the court to grant the orders prayed.

(c) that the applicant is guilty of indolence upon which equity frowns

(d) that the application filed herein is omnibus in nature and as such, the orders sought cannot be granted as prayed.

(e) that application has been brought under the wrong provisions of law.

4. On 29th October, 2018 parties were directed to canvass the application by way of written submission whereby the applicant filed theirs on 26th November, 2018 and the Respondents on 27th November 2018 they also embarked on negotiation for an out of court settlement which collapsed.

APPLICANT'S SUBMISSIONS

5. In their submissions, the applicant's advocate has stated that that the time of the ruling on 17th October, 2017, the Applicant was out of the country so that he was unable to give instructions to the current advocate to appeal against the said ruling. And on return, the current advocates were instructed and they made the application.

RESPONDENT'S SUBMISSIONS

6. The respondent seriously contest the averments by the applicants and submits that the explanation by the applicant for their delay in filing of an appeal, is insufficient since the identity of the Director has not been revealed. Also, that the director has not sworn and affidavit stating whether he was authorized to represent the Applicant or for too long he had travelled.

7. That the two affidavits in support of the applicant are sworn by the advocate who is barred from giving evidence of travel as provided. Finally, the fact that the alleged Director's identity has not been disclosed is not a coincidence but by design concealed to the fact that the alleged director is common to both judgment debtor and the objector. Also, the 1st Respondent argues that the two months delay is not only inordinate but unexplained so that the appeal is meant to defeat justice.

ANALYSIS AND DETERMINATION.

8. I have carefully considered the application by the Applicant, the grounds of opposition by the Respondent and the respective submissions and cited law and authorities by either party.

9. The issues that have emerged from the pleadings and submissions are; whether

(a) the Applicant has satisfied the court on the condition for granting leave to appeal out of time.

(b) the applicant has satisfied the conditions necessary for granting of stay of execution of decree pending appeal.

10. The Applicant relied on the decision in **ERNEST ORWA MWAI -VRS- ABDUL G. HASHID & ANOTHER**, CIVIL APPEAL NO 39 OF 1995 while the 1st Respondent relied on the decision in **FAHIM YASIN TWAHA –VRS- TIMAMY ISSA ABDALLA & 2 OTHERS** (2015)

11. On the issue of whether this court should grant extension of time for filing an appeal, the applicable law is section 79G of the Civil Procedure Act. The section provides;

“ Every appeal from a subordinate court to the High court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period anytime which the lower court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree of the order.”

Under the provision to the said section 79G of the Civil Procedure Act,

“An appeal may be admitted out of time if the Appellant satisfied the court that he had a good and sufficient cause for not filing the appeal in time.”

12. According to the supreme court in the case of **NICHOLAS KIPTOO ARAP KORIR SALAT –VRS- IEBC & 7 OTHERS S. C APPLICATION No. 16 of 2014**, laid down the following as the underlying principles that a court should consider in the exercise of discretion to extend time;-

(a) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.

(b) The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

(c) As to whether the court should exercise the discretion to extend time, is a consideration to be made on case basis.

(d) whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

(e) whether there will be any prejudice to be suffered by the Respondent if the extension is granted.

(f) the application should have been brought without undue delay, and

(g) in certain cases, the election petitions, public interest should be a consideration for extending time.

13. In the case of EFRAIM YUSSEF VRS ROSEMARY W. KIHU (2018) eKLR Prof Justice Joel Ngugi stated as follows;

“Our decisional law has now provided guidelines on what constitutes “good cause” for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on case by case party seeking the exercise of the discretion places before the court sufficient material to persuade the court that the discretion should be exercised on its behalf and in their favor”.

14. In applying the above principles, the question therefore is, whether the applicant has shown good and sufficient cause for not filing the appeal in time. It is worth noting that the application was brought in exactly two months after the time had run out.

15. In the case of SIMON ISAAC NGUGI –VRS- OVERSEAS COURIER SERVICES (K)LTD (1998)e KLR and KISYA INVESTMENTS LTD & OTHERS VRS KENYA FINANCES CORPORATION LTD, it was held that ;

“...it is not competent for a party’s advocate to depose to evidentially fact at any stage of the suit”

16. And in the case of KAMLESH M A PATINI VRS NASIR IBRAHIM ALI & 2 OTHERS, CA 354 OF 2004 , the court had this to say on the admissibility of an affidavit sworn by Senior counsel PAUL MUIITE that;

“...there is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client , so to an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information....”

17. The Applicant’s supporting affidavit is sworn by the applicant’s advocate who allege to have instructions that the Applicant’s director is out of the country and could not give instruction on the way forward after the ruling was delivered.

18. In the case of NICHOLAS KIPTOO ARAP RORIR SALAT -VRS- IEBC & 7 OTHERS (Supra), the guiding principle is that extension of time is not a right of a party, but it is an equitable remedy that is only available to a deserving party at the discretion of the court and that the party who seeks for extension of time has the burden of laying the basis to the satisfaction of the court.

The question then becomes;

“ Has the Applicant laid any basis to warrant the extension of time?”

19. The Applicant’s advocate has alleged that the delay in their filing of the appeal was because the Director of the Applicant was out of the country. However, what is in question is that no air - ticket, or copy of a stamped passport has been annexed on the supporting affidavit as evidence of the Director traveling out of the country . Also, the advocate has not even divulged the identify of the Director of the Applicant herein and neither has it divulged whether the Director has even been authorized by the applicant to swear an affidavit on its behalf since the Applicant is a company.

20. For this court to exercise its discretion, then it is incumbent upon the Applicant to lay basis for grant of the extension. In this particular case, the Applicant failed to file an affidavit explained the delay or the excuse by the Appellant’s Director. And even in the letter instructing the current advocate to file an appeal against the ruling, the letter which an explanation on why the appeal has been filed out of time and matter has the supporting affidavit sworn by the Applicant’s advocate on the 14th December, 2017, been annexed to support the application , which in my opinion, renders the same unable to meet the threshold but by the court of appeal in the case of KAMLESH M. A. PATIN -VRS- NASIR IBRAHIM ALI & 2 OTHERS, C .A 354 OF 2004.

21. The deponent in his affidavit of 14th December, 2018 has failed “to disclose and state the grounds for believing the information from the anonymous Director this court finds that the application dated 18th December 2018 has no merit and the same is hereby dismissed with costs to the 1st Respondent”.

22. On the other hand, if this Honorable court were to allow the application for leave in the interest of justice, the consideration would be whether the Applicant would have met the conditions of being granted an order for stay of execution?

23. Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010, stipulates that an application for stay of execution of decree must demonstrate;

(i) That the application for stay has been made without unreasonable delay;

(ii) That a substantial loss may result to the Applicant unless the order is made;

(iii) That such security as the court may order for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant”.

24. As for whether the application has been brought after an unreasonable delay, it is the 1st Respondent's contention that the Applicant has not, to the satisfaction of this court explained the delay in filing the application. The application was filed 2 months after the delivery of the impugned ruling/decreed.

25. I hence agree with Munyao J in the case of **JABER MOHSEN ALI & ANOTHER, -VRS- PRISCILLA BOLT & ANOTHER, E & L No. 200 of 2012 (2014)** e KLR that unreasonable delay depend on the circumstances of the case, where the court stated;

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter”

26. It is therefore the finding of this court that failure by the Applicant to give any evidence in support of its reason for the delay in lodging its appeal, being that the director was out of the country, leaves this court with no option but to find and conclude that there was unreasonable delay on the part of the Applicant.

27. In the case of **NAIROBI COURT OF APPEAL CIVIL APPLICATION No. 6 OF 1979, BUTT -VRS- RENT RESTRICTION TRIBUNAL (1979)** eKLR where the court of Appeal held;

“The power of a court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.....The principal in granting or refusing a stay is if there is no other overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory. Should that appeal court reverse the judge's discretion”.

28. On that account, the Applicant has failed to substitute this ground. They have not demonstrated how they stand to suffer any substantial loss unless the stay sought is granted as per the pre-requisites of order 42 Rule 6 (2) of the Civil Procedure Rules.

29. In the cases of **DAVID BURA & ANOTHER -VRS- VICTORIA MWONGELI KIMWALU & ANOTHER (2017)** e KLR Citing **WINFRED NYAWIRA MAINA VRS PETERSON ONYIESO GICHANA (2015)** e KLR, it was held that;

“ the substantial loss under order 42 Rules 6 of the Civil Procedure Rules especially where money decree is involved lie in the inability of the Respondent to pay back the decretal sum should the appeal succeed .The legal burden of proving this inability lies with the Applicant and it does not shift”.

30. And it is on such grounds alone that the Applicant becomes not a good candidate for grant of stay of execution orders. However, in the interest of justice, this court shall exercise its discretion in favour of the Applicant with the following orders;

(a) There be a conditional stay of execution of the orders of the lower court issued on 17th October, 2017 pending the hearing and determination of this appeal in the following terms;

(i) the applicant do deposit the full decretal sum as security for the due performance of decree;

(ii) the above sums of money to be deposited into a joint interest earning account to be opened by the 1st Respondent and the Applicant's advocate for the respective parties within 30 days from the date of this ruling and to be held until further orders of this court;

(iii) The Applicant to comply, file and see the record of appeal upon the Respondent within 45 days from the date hereof

(iv) In default of order No. 1 above, the application dated 18th December, 2017 by the Applicant for stay of execution pending appeal shall stand dismissed with costs to the Respondent.

31. The 1st Respondents shall have costs of the application dated 18th December, 2017 for stay pending appeal by the Appellant.

It is so ordered.

The ruling is delivered and dated this 4th day of April, 2019 at Mombasa.

LADY JUSTICE D. O. CHEPKWONY