



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT MISC. APPLICATION NO. 87 OF 2019

BUSCAR EA LTD t/a STARWAYS EXPRESS1ST APPLICANT

JOSEPHAT MBUVI..... 2ND APPLICANT

VERSUS

PATRICK NGALA RIZIKI.....RESPONDENT

RULING

Introduction

1. The application for determination is dated 12/03/2019 and was filed under Certificate of Urgency. It is brought under Sections 1A, 1B, 3A, 75, 78 79G and 95 of the Civil Procedure Act, Orders 50(4), 51 (1) and 42 Rule 6 (1) of the Civil Procedure Rules 2010. It seeks the following orders: -

a) **THAT** this Honorable Court be pleased to grant leave to the Applicants to appeal out of time against the judgment of Hon. J.D Karani delivered on 07/11.2018 in Makindu PMCC No. 269 of 2017; Patrick Ngala Riziki –vs- Buscar (E.A) Ltd & Another.

b) **THAT** there be a stay of execution in Makindu PMCC No. 269 of 2017 pending the hearing and determination of the intended appeal to be filed by the Applicants in terms of the draft appeal annexed to the application.

c) **THAT** costs of this application be provided for.

2. The application is supported by the grounds on its face and, the supporting affidavit of Gedion Muthoka Musya sworn on 26th November 2018.

3. The principal grounds are that;

a) The Applicants were represented by the firm of Kairu & McCourt advocates which had been instructed by the Applicants' insurance company-Directline Assurance Company.

b) The judgment sum in Makindu PMCC No. 269 of 2017(primary suit) was Kshs 4,732,449.80/= out of which the insurance paid Ksh 3,000,000/= the policy limit.

c) After payment of Ksh 3million, the Applicants' advocates had no further interest in the matter and the Applicants only learnt about the total judgment sum when their motor vehicles were proclaimed and the time for appealing had run out.

d) That the balance of the judgment sum is substantial and since the Respondents earnings are unknown, the Applicants might not be able to recover it if the appeal succeeds.

e) The Applicants are willing to abide by any reasonable conditions imposed by the court.

4. The application is opposed through a replying affidavit sworn on 25/03/2019 by the Respondent. He deposes that the Applicants were personally served with summons to enter appearance in the primary suit and were therefore aware and ought to have been vigilant on it's progress. He contends that the application is an afterthought solely aimed at delaying his enjoyment of the fruits of a regular judgment.

5. The application was canvassed by way of written submissions.

6. I have considered the application, the supporting affidavit thereto, the replying affidavit as well as the rival submissions.

The Applicants' Submissions

7. On whether the firm of Joseph. Mwangela & Co. advocates is properly on record for the Applicants, it was submitted that the provisions of Order 9 of the Civil Procedure Rules are not applicable to matters not filed in the trial court such as the current application. They submit that the application is merited and urge the court to grant the orders sought.

The Respondent's Submissions

8. The Respondent submits that the application is a nonstarter for failure to comply with the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules. According to the provision, change of advocate or intention to act in person after judgment has been passed shall not be effected without an order of the court.

9. He relies *inter alia* on **S.K Tarwadi –vs- Veronica Muehlemann (2019) eKLR** where it was held;

“In my view, the essence of Order 9 rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgment has been delivered and then sack the advocate and either replace him with another or act in person. The provision is therefore an important one and cannot be wished away. Indeed, Order 9 does not foresee how rule 9 can be sidestepped...”

10. He also submits that the Applicants are seeking to appeal against a judgment that was delivered four months ago and have not offered any plausible reasons as to why they did not appeal within time. He urges the court to dismiss the application.

Determination

11. On whether the firm of Joseph. M. Mwangela & Co. advocates is properly on record for the Applicants, contrary to the Applicants' submissions, it is trite that unless a party effects change of advocate in accordance with the provisions of Order 9 of the CPR, the advocate on record at the trial will be deemed to be on record on appeal or subsequent proceedings.

12. **Order 9 Rule 5 of the CPR, 2010** provides as follows;

“A Party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in court in which such cause or matter is proceeding and served in accordance with Rule 5, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

13. **Order 9 Rule 9 of the CPR, 2010** provides that;

“Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

a) Upon an application with notice to all the parties; or

b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

14. From the above provisions, change of advocate is two-fold; with an order of the court or without. In this case, an order of the court was required because judgment had already been passed. It is generally accepted that the provisions of Order 9 Rule 9 of the (CPR) are meant to protect advocates to safeguard their fees from their clients. The firm of Kairu & McCourt was instructed by Directline Assurance Company and it is therefore the responsibility of the insurance company to settle the firm's fees.

15. It has not been denied that the said firm of advocates was retained by the Applicant's insurers. Accordingly, there is no issue of fees between the Applicants and the firm of Kairu & McCourt Advocates. In my view, although the firm of Joseph M. Mwangela & Co. Advocates is not properly on record in terms of Order 9 Rule 9 Criminal Procedure Rule, no prejudice has been occasioned to the Respondent. Each case should be considered on its own merits such as this circumstance.

16. On whether the application is merited, this Court has been called upon to exercise its discretion to grant leave to the Applicant to lodge the appeal out of time. In **Leo Sila Mutiso –vs- Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)**; the Court of Appeal stated as follows with regard to how such leave should be exercised.

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.

17. The judgment was delivered on 07/11/2018 and this application was filed on 13/03/2019, approximately 4 months later. The law requires appeals from subordinate courts to the High Court to be filed within 30 days from the date of the decree or order appealed against. After

lapse of the statutory period, the delay in this matter is about 3 months.

18. The Applicants explained that they were represented by Advocates instructed by their insurer who abandoned them after executing the instructions of the insurer. That they were therefore not aware of the decretal sum until the auctioneers went calling. I am alive to the tendency of litigants to relax and not be vigilant about their cases whenever they have legal representation. In the absence of evidence to show that the Applicants were given case updates by the firm of Kairu & McCourt, my view is that they should be given the benefit of doubt, and a chance to exercise their right of appeal.

19. On whether the appeal has chances of success, I note that the Applicants are challenging the quantum of damages awarded by the trial court which in my view makes the appeal arguable. At this stage, arguability of the appeal is all that an Applicant is required to demonstrate. The totality of the foregoing is that the Applicants deserve leave to appeal out of time.

20. As for stay of execution it's a fact that the Respondent has received a sum of Kshs.3 million as part of the decretal sum. The judgment has not been set aside and there is a sum of Kshs.2,463,115/= pending. Since the appeal is challenging the award on quantum, room ought to be given in the event of a successful appeal.

21. I therefore find the application to be merited and grant leave to file appeal out of time and stay of execution on the following conditions:

i. Appeal to be filed within 20 days.

ii. The balance of the decretal sum to be secured through a bank guarantee within 30 days.

22. Costs to be in the cause.

Orders accordingly.

DELIVERED SIGNED AND DATED THIS 12TH DAY OF JUNE 2019, IN OPEN COURT AT MAKUENI.

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H. I ONG'UDI

JUDGE