**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISC. CIVIL APPLICATION NO. 337 OF 2018**

**EDWARD KIMANI MUNGAI.....APPLICANT**

***VERSUS***

**1. SYNERGY INDUSTRIAL CREDIT LIMITED**

**2. TITUS WANDAO KIMONDO**

**3. STEPHEN NJENGA MBUGUA.....RESPONDENTS**

**RULING**

1. The applicant has filed a notice of motion dated 25th September, 2018 seeking the following orders:

a) Stay of execution of the ruling and orders issued by the Chief Magistrate's Court at Machakos on 11th July, 2018 in **Machakos CMCC No. 776 of 2013 Edward Kimani Mungai v. Synergy Industrial Credit Limited & 2 others** pending the hearing and determination of the intended appeal.

b) Extension of time to file an appeal to this court against the ruling delivered by the Chief Magistrate's Court at Machakos on 11th July, 2018 in **Machakos CMCC No. 776 of 2013 Edward Kimani Mungai v. Synergy Industrial Credit Limited & 2 others.**

2. The motion is based on the grounds on the body of the motion and the supporting affidavit of Gibson Maina Kamau who is the Legal Affairs Manager of Messrs. Heritage Insurance Company Limited. He stated that the company filed **Machakos CMCC No. 776 of 2013** Edward Kimani Mungai v. Synergy Industrial Credit Limited & 2 others under its right of subrogation seeking special damages of KShs. 2,015,923/-being the cost of repair, assessor's fees, investigator's fees and towing charges incurred in preparing the applicant's motor vehicle registration number KBK 283J due to an accident that occurred on 11th August, 2010. That the respondents thereafter filed a preliminary objection dated 18th November, 2016 to the effect that the suit is fatally defective as the verifying affidavit was not sworn by the plaintiff and that the plaint should thus be struck off as being incompetent. That pursuant to the directions issued on 27th March, 2018 the parties agreed to proceed with the preliminary objection by way of written submissions and subsequently the parties filed their respective submissions. That the matter was subsequently scheduled for mention on 30th May, 2018 to confirm filing of submissions and to obtain a ruling date. That there was an inadvertent and erroneous failure to diarize the scheduled ruling on the 11th July, 2018 as the advocate holding brief erroneously indicated that the ruling would be on 11th September, 2018 occasioning failure of the advocate to attend court. That the advocates discovered that the ruling had been delivered on 11th September, 2018 without notice to the applicant and or their advocate. That the applicant being aggrieved by the judgment intends to appeal to this court. That the appeal has high chances of success and ought to be given an opportunity to ventilate the same on merit failing which it shall forever be driven from the seat of justice. He stated that the applicant is a reputable insurance company and as such there is no undue prejudice which stands to be suffered by the respondents since the applicant is capable of honouring the award of this court. That the applicant is ready and willing to abide by any such orders as to security as may be ordered by this court for the due performance of such decree or order as may be deemed to be untimely binding on it.

3. The applicant submitted that it was discovered that the ruling had been delivered on 11th July, 2018 when the applicant's advocate attended court on 11th September, 2018 and upon such discovery filed the motion thereby there was no delay. It was submitted that the applicant stands to suffer loss in the sense that without the affidavit on record the applicant will be driven away from the seat of justice as the issues will never be presented before the court on merit and secondly that the insurer having instituted the suit in the name of the insured to recover the expenses incurred in repairing the insured motor vehicle out of damages caused by the negligence of the respondents. That a colossal sum of KShs. 2,015,923/- from its working capital was expended as at 8th August, 2013 and if stay is not granted, the suit against the respondent is not sustainable. That consequently, the sum used in repairing the insured's vehicle will be irrecoverable from any source whatsoever. In support of the argument the applicant cited **Antoine Ndiaye v. African Virtual University (2015) eKLR** quoting with approval **Tropical Commodities Suppliers Ltd & others v. International Credit Bank Ltd** and **Bungoma HC Misc. Application No. 42 of 2011 James Wangalwa & another v. Agnes Naliaka Cheseto** as quoted in **Paul Karuga Njuguna v. Housing Finance Company of Kenya Limited and another (2017) eKLR**. On the issue of security, it was submitted that the nobility in the applicant's readiness to abide

by the orders on security serves as an assurance to the respondents that they will suffer no loss in case the appeal does not succeed and the applicant cited **K.B. Sangani & sons v. Dorothy Munini Mutisya & Jackline Ndinda (suing as the legal representatives of the estate of Jackson Mutuku Mutisya -deceased (2018) eKLR**. It was submitted that the failure to attend court arose from an honest mistake of the advocate that should not be visited on him. In this regard, the applicant cited **Fatuma Anab Mohamed Haji & 5 others v. Asha Abdullahi & 3 others (2017) eKLR** and **Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 others Supreme Court Application No. 16 of 2014**. It was further submitted that the prejudice that will be suffered by the applicant cannot be overstated. That without the orders sought, the insurer suing in the name of the applicant under the principle of subrogation will not be able to maintain the suit from which this application stems.

4. In opposition thereto, Philip M. Mulwa advocate for the respondents swore a replying affidavit filed on 5th November, 2018. He contended that the motion has not demonstrated any sufficient reasons for stay of execution or extension of time to file an appeal. That the motion is an afterthought and is aimed at circumventing the court's process and is an outright abuse of the court process. He stated that the applicant is being dishonest in purporting that the decision of the trial court was given without notice when the date of delivery was actually given in court in the presence of both parties' advocates. He stated that the applicant's conduct at all material times of the suit demonstrates lack of interest and utter indolence in expediting the disposal of the suit despite the applicant having dragged the respondent to court. That owing to the applicant's inertness, the main suit had been dismissed for want of prosecution on 17th May, 2017 and that the applicant moved the court eight months later seeking for a review of the orders when the respondents were lenient enough to consent to a compromise of the application. That the applicant's conduct depicts lack of interest in this claim which gives rise to substantial risk to fair trial of this matter since the respondent's witnesses have since left employment and cannot be traced to give evidence if the suit is reinstated. That if at all the applicant's counsel was vigilant, it is quite irreconcilable that it took him over two months after the delivery of the trial court's orders to file this application. That the application has not met the requirements of order 42 rule 6 to warrant the grant of the orders sought. That this court is enjoined by the provisions of Article 159 (2) (d) of the Constitution to ensure that justice is not delayed and that it is served to all the parties. The respondents sought to rely on the averments in the affidavit as their submission.

5. I have given due consideration to this application, replying affidavit and the submissions. In dealing with an application for leave to file appeal out of time, the court's concerns is whether or not sufficient reason for delay in filing the appeal has been given by an applicant. Section 79G of the Civil Procedure Act Cap 21 which is the proviso on appeals provides:

> ***"Every appeal from a Subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***
>
> ***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."*** (Emphasis own)

5. The applicant indicated that the date of delivery was issued in court in the presence of an advocate who was holding brief and who wrongly diarized the date as 11th September, 2018 and not 11th July, 2018. That it is on the 11th September, 2018 that the applicant's advocate discovered that the ruling had in fact been delivered. Upon the said realization, the applicant's advocate filed this motion on 25th September, 2018. I note that the respondents have not rebutted the fact that there was counsel holding brief for the advocate in conduct of the matter on behalf of the applicant on the day a date for ruling was given. In the circumstances, I find that sufficient reason has been given for the failure to file an appeal within the prescribed time.

6. On stay of execution, I am of the view that the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute. This is so that the rights of an appellant who is exercising his/her right of appeal, are safeguarded and the appeal is not rendered nugatory in the event it succeeds. The success of an intended appellant and that of the party who should not be deprived of his judgment are in so doing however weighed by the court so that none of the parties is in the end prejudiced. The court in the case of **M/s Portreitz Maternity v. James Karanga Kabia, Civil Appeal No. 63 of 1997** in dealing with the issue stated as follows:

> ***"That right of appeal must be balanced against an equally weighty right of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right."***

7. An applicant is therefore required to establish that the application herein has been filed timeously, that it stands to suffer substantial loss if orders of stay is not granted and that it can furnish security. (Order 42 Rule 6 of the Civil Procedure Rules, 2010). The applicant herein discovered about the delivery of the ruling on 11th September, 2018 and the motion was filed on 25th September, 2018. In those circumstances, I find that the motion was timeously filed.

8. On whether or not the applicant stands to suffer substantial loss, it was the Applicant's position that if the orders sought are not granted, its appeal shall be rendered nugatory. That the insurer suing in the name of the applicant under the principle of subrogation will not be able to maintain the suit from which this application stems. That a colossal sum of KShs. 2,015,923/- from its working capital was expended as at 8th August, 2013 and if stay is not granted, the suit against the respondent is not sustainable. That consequently, the sum used in repairing the insured's vehicle will be irrecoverable from any source whatsoever. Bearing in mind this fact and that the purpose of a stay is to secure the substratum of an appeal in order not to render an appeal nugatory, I find that the applicant has established that he is likely to suffer loss.

9. On security, the applicant stated that he is willing to abide by this court's order as to security and I find that Order 42 rule 2 (c) has been satisfied. I have perused the applicant's plaint in the lower court and note that it claims a sum of about Kshs 2 million. The respondents in their defence have not made a counterclaim against the applicant save for an order of dismissal of the suit with costs. Hence I find the respondent's concerns at the moment lies in costs. Going by the claim, I find that costs should range in the region of about Kshs 200,000/. This should be sufficient to assuage the respondent's concerns.

10. In the result I find merit in the applicant's application dated 25th September 2018. The same is allowed in the following terms:

***a) The applicant is hereby granted stay of execution of the ruling and orders in Chief Magistrate's Court at Machakos on 11th July, 2018 in Machakos CMCC No. 776 of 2013 Edward Kimani Mungai v. Synergy Industrial Credit Limited & 2 others.***

***b) The applicant is hereby granted fourteen (14) days leave to file an appeal against the aforesaid ruling out of time.***

***c) The applicant to deposit the sum of Kshs 200,000/ in a joint interest earning account in the names of the advocates for the parties herein within the next thirty (30) days from the date of this ruling failing which the stay shall lapse.***

***d) Costs hereof shall abide the outcome of the appeal.***

Orders accordingly.

**Dated and delivered in Machakos this 16th day of July, 2019.**

**D. K.KEMEI**

**JUDGE**