



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISC. APPLICATION NO.7 OF 2019

LUCY CHERONO SELIM (Suing as the Administratrix and or Personal Representative of the Estate of the Late FRANCIS KIPKORIR SELIM).....PLAINTIFF/RESPONDENT

VERSUS

VICTONELL ACADEMY.....DEFENDANT/APPLICANT

RULING

1. Before me is an application dated 14th February 2019 brought by way of Notice of Motion under Order 22 Rule 22 (1) & (2) , Order 42 Rule 6, Order 50 Rule 6, and Order 51 Rule 1 & 2 of the Civil Procedure Rules 2010, and section 1A, 3A, 79G and 95 of the Civil Procedure Act (Cap.21) Laws of Kenya. The prayers for my consideration are prayer 2 and 4 which state as follows:-

“2. That this honourable court be pleased to extend time and grant leave to the defendant/applicant to lodge a Memorandum of Appeal out of time against the judgment and decree entered on the 4th December 2018 against the defendant by the Honourable S. M. Mokua, Chief Magistrate, Kericho Law Courts.

3.

4. That this Honourable Court be pleased to stay execution of the judgment/decree and any other consequential orders issued against the defendant in Kericho Chief Magistrate’s Court, Civil Case No.112 of 2012, pending the hearing and determination of the intended appeal.”

2. The application has grounds on the face of the Notice of Motion, that the trial court awarded general damages of kshs.2,350,000/- in a judgment delivered in December 2018 without Notice to the applicant, that such was the reason for delay in filing the appeal and that the appeal has strong arguable points, and that if the stay is not granted the applicant would suffer irreparable loss and damage.

3. The application was filed with a supporting affidavit sworn on 14th February 2019 by Caroline Kimeto the Head of Legal of Britam General Insurance Company (K) Ltd. It is deponed in that affidavit that Britam General Insurance were the insurers of the motor vehicle. The deponent deponed to matters on information given by counsel for the defendant/applicant about delivery of judgment and delay in filing an appeal.

4. The application is also supported by the affidavit of Anthony Gikara Kihianyu Counsel for the defendant/applicant in which it was deponed that judgment was delivered on 4th December 2018 without notice to the applicant or counsel, and that the applicant was now seeking leave to appeal out of time, because counsel learnt of the judgment only on 24th January 2019, and that the appeal had good grounds. The intended Memorandum of Appeal was also filed with the application.

5. The application is opposed through a replying affidavit sworn by Lucy Cheron Selim on 21st March 2019 in which it was deponed that the defendant/applicant failed to attend the trial court despite several notices issued, that the applicant failed to attend court and raise any issues, and that the applicant did not meet the requirements of Order 22 and Order 42 of the Civil Procedure Rules.

6. The application proceeded by filing written submissions. Both counsel for the parties filed written submissions on 24th April 2019.

7. I do not have copy of the trial court file, thus I am not privy to the actual sequence of the events in the trial court, and who attended court and who did not, and on which dates.

8. Though there is an affidavit signed by an official of the Insurance Company filed in the application, I will ignore it as the insurers are neither the litigants herein, nor are they listed in the case as interested parties, and cannot thus be penalized by this court as to costs and other

consequences in these proceedings. If they want to be parties, even interested parties, they should come on record. It is only them that their document or affidavit will be considered by this court.

9. That said, each side has filed their affidavits and it is not in dispute that the defendant or his counsel did not attend court for judgment. The plaintiff/respondent says that the defendant/applicant's advocate was served with notices but never bothered to attend court, and annexed documents of service, which have not been disputed. I have considered all these factors.

10. One of the requests of the applicant is for leave to appeal out of time. The defendant/applicant's counsel says they came to know about the judgment of the trial court on only 24th January 2019 and this application was filed on 15th February 2019. I do not want to deny a party a chance to be heard in court. In the spirit of fair trial and dispensing substantive justice under Article 159 of the Constitution therefore, I will grant the applicant leave to appeal out of time.

11. The other substantive prayer is for stay of execution of decree pending the hearing of the appeal. Order 42 Rule 6 of the Civil Procedure Rules provides the parameters to be considered by a court in determining such an application for stay. This court has jurisdiction to determine such an application as the appellate court, whether or not the trial court dismissed such an application.

12. Was the application filed without unreasonable delay? The judgment was given on 4th December 2018, while the application was filed on 15th February 2019. Though the applicant's counsel says that judgment was delivered without them being given notice, the respondent replied by making serious allegations that notices were issued but the applicant and counsel did not attend court. That affidavit of the respondent was not challenged by the applicant's counsel in any way by filing of a further affidavit. It thus appears to me that any delay in filing the application for stay of execution was actually caused by the applicant. Therefore the delay cannot be said not to be unreasonable. On that account alone, the application for stay will not succeed.

13. As to whether the applicant will suffer substantial loss if stay is not granted, I find no substantial loss to be suffered by a person or counsel who deliberately fails to attend court without explanation offered even in the present application. If there is any loss it will have been self-inflicted, and in my view cannot in those circumstances be described as substantial loss.

14. I note that the applicant has offered to provide security, but the application for stay of execution will fail because of inordinate delay caused by the applicant, whose justification they have not explained to this court.

15. In conclusion, I grant leave to the applicant to appeal out of time. The appeal will be filed within 30 days from today. The request for stay of execution of decree is hereby declined.

Dated and delivered at Kericho this 7th October 2019.

GEORGE DULU

JUDGE