



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO.42 OF 2019

BETWEEN

SANLAM GENERAL INSURANCE CO. LIMITED.....APPELLANT

AND

AUTOXTREME.....RESPONDENT

RULING

1. By a notice of motion dated 19th March, 2019 brought under Order 50 Rule 1, Order 40 rule (1)(a) and (4) of the Civil Procedure Rules and Sections 1A, 3A and 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya, the applicants pray for orders that

1) This court be pleased to grant leave to extend time limited for filing the appeal herein

2) That pending the hearing and determination of this appeal, the Honourable Court be pleased to order the release of motor vehicle registration no. KCF 754Z-HINO TRUCK

3) Costs be in the outcome of the Appeal

2. The application is based on the grounds among others that:

- a) The delay was occasioned by the fact that the parties were negotiating but the negotiations have not been fruitful
- b) The motor vehicle is a commercial vehicle from which the insured earns Kshs. 20,000/- daily
- c) The Applicant is ready and willing to deposit the disputed sum in court to secure the release of the vehicle

3. The application is supported by the affidavit worn on 29th March, 2019 by Mercy Oburu who describes herself as a senior legal officer of the Applicant in which he reiterates the grounds on the face of the application. In addition, it is averred that there has arisen a dispute concerning Kshs. 2,527,191.95 which the Respondent's claims on account of repairs to the subject motor vehicle which sum the Appellant disputed on the ground that the fitted parts were substandard and the Respondent held on to the motor vehicle as lien pending payment.

4. The application is opposed by way of a replying affidavit sworn on 08th April, 2019 by Trishul Vijay Chohan the director and sole proprietor of the Respondent who avers that the applicant has not appealed against the dismissal of a similar application dismissed by the lower court on 25th October, 2018. The Respondent further avers that the delay in filing the appeal is inordinate and that the Applicant as neither demonstrated that it has applied for proceedings nor that the appeal will if filed be rendered nugatory if the orders sought are not granted.

5. When the application came up for direction on 09.04.19, I directed that the application be disposed off by way of written submissions which the parties dutifully filed.

Issue for determination

6. The main issue for determination is whether the applicants ought to be granted leave to appeal out of time.

7. The Applicant holds the view that the delay in filing the appeal though inordinate was caused by the fact that parties were negotiating and urges the court to exercise its discretion under Section 79G of the Civil Procedure Act. In support thereof, Applicant places reliance on **Stanley Kahoro Mwangi & 2 others v Kanyamwi Trading Company Limited [2015] eKLR**; **Nicholas Kiptoo Arap Korir Salat v. The Independence Election & Boundaries Commission & 7 Others, [2014] eKLR** and **Monica Malel & Another v Republic & 2 Others [2009] eKLR**.

8. Applicant asserts that the draft memorandum of appeal discloses an arguable appeal with a high probability of success and has placed reliance on **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi [2018] eKLR**.

9. The respondent faults the Applicant for bringing this application more than 6 months from 25.10.18 when the impugned ruling was delivered and for not sufficient cause for the delay. Reliance **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65**, **Ratman vs. Cumarasamy [1964] 3 All ER 933**; **Savill vs. Southend Health Authority [1995] 1 WLR 1254 at 1259**, **Alibhhai Musajee vs. Shariff Mohammed Al-Bet Civil Appeal No. 283 of 1998 and Velji Shahmad vs. Shamji Bros. and Popatlal Karman & Co. [1957] EA 438**.

Analysis and Determination

10. The main issue for determination is whether the applicants ought to be granted leave to appeal out of time. The powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered.

11. The law on extension of time is to be found in Section 95 of the Act which states as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

12. Order 50 of the Civil Procedure Rules on the other hand states that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed”

13. The parameters for exercise of court’s discretion were concisely laid out in the case of **Mwangi v Kenya Airways Ltd [2003] KLR** where the Court of Appeal expressed itself thus:-

“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”.

14. In determining this application; I will endeavor to address each of the principles laid down in the above cited case.

i. Length of delay

15. Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which states: -

“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 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 or order”.

16. The ruling from which the Applicant proposes to appeal against was delivered on 25.10.18. The applicants had up to 25.11.18 to file the intended appeal. The present application was filed on 29.03.19 which is about 4 months outside the time limited for filing an appeal.

ii. Reason for delay

17. The Applicant’s assertion that the filing of the appeal was delayed by negotiations between the parties has not been proved and neither is it a reasonable cause for failure to file an appeal in time.

iii. The chances of appeal succeeding if the application is granted

18. Determining at this juncture that the appeal does or does not raise triable issues will amount to deciding on a matter not before this court. All that this court needs to determine at this juncture is whether the applicant has a *prima facie* case that is triable. (See **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others** (Supra).

19. I have considered the issues raised in the memorandum of appeal and I have no doubt that they are triable.

iv. The degree of prejudice to the respondent if the application is granted.

20. The issue between the parties herein is a money issue. The Applicant has offered to deposit the disputed sum to secure the release of the vehicle and it is therefore unlikely that the Respondent is likely to suffer prejudice if the orders sought are granted.

21. Although the three months' delay has not been explained to the satisfaction of the court, this court has power under Section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

22. Consequently and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the applicants.

23. As a result, the notice of motion dated 19th March, 2019 is allowed on the following terms:

1. The applicant is granted leave to appeal out of time

2. The Applicant is further directed to deposit Kshs. 2,527,191.95 in an interest earning account in the name of both advocates

3. The Respondent shall within 3 days of the Applicant's compliance with order (2) above release motor vehicle registration no. KCF 754Z-HINO TRUCK to the Applicant

4. Costs shall be costs in the Appeal

DATED, DELIVERED AND SIGNED ON THIS 03RD DAY OF OCTOBER 2019

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For the Applicant - N/A

For the Respondent - Mr Aboke/Mr Odeny