



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISC. CIVIL APPLICATION NO. 127 OF 2018

LAWRENCE KARAU KAROCHO.....APPLICANT

VERSUS

DIRECTLINE ASSURANCE CO. LTD.....RESPONDENT

RULING

1. Before me is a Notice of Motion filed on 14th June, 2018 expressed to be brought under Section 3(a), 79(g), 95 &100 of the Civil Procedure Act seeking orders that:
 - a) time be extended and/or enlarged for purposes of filing an appeal against the ruling and decision of **Wachira, CM** made on 21st June, 2017.
 - b) the memorandum of appeal annexed to the motion be deemed as properly filed and/or on record upon payment of the requisite court fees.
2. The application is based on the key grounds that the intended appeal raises an important legal issue and that it is in the interest of justice that the court determines whether liquidated claims arising from accident claims should go for formal proof or not.
3. The application is supported by the affidavit sworn by **Gachoka Mwangi**, the Applicant's Advocate. He deposed that he filed a liquidated claim on behalf of the Applicant herein and after full trial, a decree was issued to the tune of KShs. 865,410/=. He deposed that the defendant in the primary suit failed to pay and he was forced to file a declaratory suit against the insurance company (the Respondent herein); that when the said defendant failed to enter appearance, he requested for final judgment which the court refused to enter, directing that hearing by way of formal proof be conducted. He stated that the Applicant was aggrieved by the said refusal and subsequently filed judicial review proceedings, but was advised to file an appeal instead. That by that time, the period prescribed for filing an appeal had run out. Hence this application.
4. The Respondent opposed the application through an affidavit sworn by **Elizabeth Waichigo** the Respondent's Head of Claims. She deposed that the application is bad in law, misconceived and without merit as the subject matters had already been settled by consent. The Respondent reiterated that the Applicant had filed a civil suit seeking damages for pain and suffering and that judgment was entered in his favour in the sum of for KShs. 703,100/=. That thereafter he filed a declaratory suit and a default judgment was then entered but later set aside following the Respondent's application.
5. She deposed further that subsequent to ensuing negotiations between respective counsel, a consent was entered into and KShs. 780,339/= deposited into the Applicant's account, and the matters marked as settled. She contended that they were shocked to learn that the Applicant now desires to file an appeal over the same matters. She urged the court to dismiss the application.
6. The court directed that the application be canvassed by way of written submissions. The Applicant's advocate restated the background to the application and contended that even though the matters are already settled, there is no bar to the High Court pronouncing itself on the procedural step in regard to whether or not liquidated claims arising out of road accidents should go to formal proof.
7. On the behalf of the Respondent, counsel asserted that there must be an end to litigation and cited in support the case of **Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others (2007) eKLR**. Counsel contended that the Respondent has already satisfied the judgment of the trial court and should be discharged from further participating in this matter which involves incurring attendant costs.
8. It was submitted that judicial resources should be used prudently and that an appeal at this point will be an academic exercise. Finally, counsel submitted that the point of law being raised in the appeal has already been pronounced upon by superior courts. The cases of Kenya

Commercial Bank Ltd vs Joshua Aggrey Oburi & Another Civil Appeals No. 199,200 & 201 OF 1999; Fidelity Insurance Company v Hussein M. Ali t/a Crescent Service Station (2015) eKLR; and Rosemary Wanjiru Kungu v Directline Assurance Company Limited (2017) eKLR were cited to support his submission that declaratory suits are not liquidated claims and that where a default judgment has been entered, it was not final and the suit had to proceed subsequently by way of formal proof. for formal proof.

9. The court has considered the matters canvassed in respect of the application. There is no dispute that the declaratory suit **No.65 of 2017 Lawrence Karau Karocho v Directline Assurance Co. Ltd**, brought to enforce the decree issued in the primary suit **No. 15 of 2015 Lawrence Karau Karocho v Public Trustee**, was settled by the consent, duly signed by the respective advocates, dated 19th March 2018. The consent filed in **Civil Suit No. 65 of 2015** states in part:

“Kindly record the following orders by consent of the parties herein

BY CONSENT

- 1. THAT this matter be and is hereby marked as settled.**
- 2. THAT there be no orders as to costs.”**

The consent is annexed to the Replying affidavit as annexure “EW 9”.

10. The application is brought primarily under Section 79 G of the Civil Procedure Act. Section 79G of the Civil Procedure Act provides that:

“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.”

11. A successful applicant must demonstrate “good and sufficient cause for not filing the appeal in time.” In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari material* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“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 generally the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

12. While the discretion of the court is unfettered, an Applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the invocation of the court’s discretion in his favor.

13. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state *inter alia* that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

- 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
- 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**
- 7.”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR**.

14. The Applicant has not stated in his affidavit when the decision from which he intends to appeal was given. The memorandum of appeal attached to the affidavit states that the decision was rendered on 21st June 2017. There is no explanation for the delay in between that date and October 2017 when the Applicant first approached the court by way of a judicial review in Miscellaneous Civil Application No. 619/2017 which it seems, was amended in May 2018 before it was argued. The directions by **Mativo J**, on the said application alleged at paragraph 7 of the supporting affidavit have not been exhibited before the court.

15. The Respondent's material which is not controverted indicates that between January 2018 and February 2018 the Applicant's counsel was engaged in negotiations with the Respondent's advocates that culminated in the payment of the agreed sum of KShs.780,339.00 to the former advocates, and the consent dated March 19th March 2018. It is not clear why the Judicial Review Application No. 619 of 2017 lay unprosecuted in this period and until the amendments thereof in May 2018. Thus, in my view, in the circumstances of this case no proper explanation has been given for the delay between the date of the decision and the filing of the instant application, a period of about 2 years. It seems to me that the Applicant only moved with some alacrity upon receipt of the payment of the decretal sum pursuant to the consent.

16. The Applicant argues that by his proposed appeal he desires to have the High Court pronounce itself on an important procedural step, namely, whether liquidated claims arising from road accidents are distinguishable from other liquidated claims and should therefore proceed to formal proof after a default judgment is entered.

17. To my mind, the Applicant having entered into a consent to settle the lower court suit consented to the total resolution of the entire cause. Until such consent is set aside, it does not seem tenable that the Applicant can revisit any administrative or other decision of the trial court prior to the consent. It matters not that the Applicant is not seeking any orders relating to that consent. The dispute herein was between the two parties before the court and the fact that a similar issue "will keep recurring in future" cases as stated by the Applicant to my mind cannot justify the re-opening of a dispute settled by consent. And worse, to the prejudice of the Respondent who has fulfilled his end of the bargain by making the necessary payment to the Applicant under the terms of the consent.

18. I agree with the Respondent's assertion that as far as they are concerned, the proposed appeal appears an academic exercise and that the merit of the proposed appeal as disclosed in the grounds of appeal is debatable. The Respondent having settled the decretal sum should not be saddled with further costs in defending an appeal whose outcome has neither a bearing on the resolved case, nor of any interest to the Respondent.

19. In this regard, the Applicant should not be allowed to have his cake and eat it: having received full payment he ought not to be allowed to continue to engage the Respondent in further litigation over the settled causes. It is in the public interest that litigation must come to an end, and the court's limited time resource cannot and should not be frittered away through the agitation of what on all accounts appears, for purposes of this case, to be an academic point.

20. In light of the foregoing the court must refuse to exercise its discretion in the Applicant's favor. The application filed on 14th June 2018 is dismissed with costs to the Respondents.

DELIVERED AND SIGNED AT KIAMBU THIS 7TH DAY OF NOVEMBER 2019

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C. MEOLI

JUDGE

In the Presence of:

Applicant – No appearance

Respondent – No appearance

Court clerk - Ndege