



**REPUBLIC OF KENYA**

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

**MISC APPLICATION NO. 199 OF 2018**

**RESOLUTION INSURANCE LIMITED.....APPLICANT**

**VERSUS**

**E M A.....RESPONDENT**

**AND**

**THE NAIROBI WOMEN'S HOSPITAL..... INTERESTED PARTY**

**RULING**

The applicant was the 1<sup>st</sup> respondent in the case filed by the claimant herein before the HIV Aids Tribunal. After the hearing, the Tribunal delivered a judgment in favour of the claimant. The claimant then moved to execute the judgment in her favour when the 1<sup>st</sup> respondent by way of two separate applications applied for a stay of execution and also review of the said judgment.

An order for a stay of execution for 30 days was made while the application for review was dismissed. By the time the review application was dismissed the 1<sup>st</sup> respondent had ran out of time to file an appeal. There is now before me an application by way of Notice of Motion under Sections 65 and 95 of the Civil Procedure Act and Order 50 Rule 5 of the Civil Procedure Rules for Orders that, there be a stay of execution of the said judgment and also that leave be granted to appeal out of time.

The Interested Party herein who was also a party in proceedings before the Tribunal has already filed an appeal against the judgment of the Tribunal. Except for the award in favour of the claimant against the Interested Party, the proceedings related to both the applicant and the Interested Party.

The application which is dated 27<sup>th</sup> and filed on 29<sup>th</sup> of March, 2018 is supported by an affidavit sworn by the Managing Director of the applicant alongside grounds set out on the face of the application. There is also a Memorandum of Appeal dated 27<sup>th</sup> March 2018 annexed thereto.

The order sought by the applicant is discretionary which discretion should be exercised judicially. The application is opposed and there is a replying affidavit sworn by the claimant . Both counsel have addressed the court on the application.

It is true that there are timelines prescribed in the rules within which parties should take appropriate steps in litigation. It is also true that parties are expected to observe such timelines because as stated in the case of **United Arab Emirates Vs. Abdelghafar & Others 1995 IRLR 243** the court stated as follows,

**“The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met....”**

In the same case, it was observed that the rights of the person seeking such a relief should be considered in making any decision. It was stated,

**“A plaintiff should not in the ordinary way be denied an adjudication of his claim on its merit because of a procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate....”**

Several considerations come into play when courts consider applications of this nature and more so, the need to deliver substantive justice without causing prejudice to any of the parties. In that regard therefore, the court has to address the reasons for delay in filing an appeal in time, whether or not the court has been moved without delay, and whether or not such a failure was caused by the party or the legal

representative. In addition, the court has to consider the effect on either party if such a relief is either granted or denied.

The Supreme Court of Kenya has had occasion to consider such a situation in **Application No. 16 of 2014**, in the case of **Nicholas Kiptoo Arap Korir Salat vs. IEBC & Others (2014) e KLR.**

In setting out the principles to be applied for extension of time, the learned judges identified seven such principles as follows,

**“1. Extension of time is not a right of a 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 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 on 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 respondents if the extension is granted;**

**6. Whether the application has been brought without undue delay; and**

**7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

In the instant case, the claimant before the Tribunal has a judgment in her favour and anxious to execute the same. On the other hand, the applicant has a right of appeal with a desire to exercise the same. I have noted the steps taken by the applicant after the judgment of the Tribunal was delivered.

It is clear to me that those were overt expressions of efforts to challenge that judgment. They may be considered missteps but cannot be dismissed as deliberate actions on the part of the applicant to delay the filing of appeal. By the time those efforts were exhausted, time had run out by about one month and a few days. The filing of the application to lodge the appeal out of time is yet another expression by the applicant to exhaust the avenues available to it.

The circumstances obtaining in the proceedings leading to the present application, vindicate the applicant in that the delay cannot be said to be inordinate. Sufficient explanation has been offered by counsel to the satisfaction of the court. Counsel receive instructions from the parties. Internal bureaucracy on the part of the 1<sup>st</sup> respondent has been blamed for the apparent delay. That however should not deny them the right of appeal.

The effect of granting the relief sought is to ensure access to justice on the part of the applicant, but at the same time blocking the claimant's right to enjoyment of the fruits of the judgment, albeit temporarily, if the appeal fails.

In the delicate exercise of balancing the interest of both parties, I observe that timelines, though important, are not cast in stone and the driving principle is to do justice to the parties. I have looked at the Memorandum of Appeal annexed to the application. The applicant has an arguable appeal. Whether or not it will succeed is not within my province to address. More importantly however is that, the applicant has made a deposit into the court of the entire decretal sum which should be an assurance to the claimant that in the event the appeal fails, access to the proceeds of the judgment in her favour is guaranteed. In the event, no prejudice can be said shall be visited upon the claimant if the order is granted in favour of the 1<sup>st</sup> respondent.

Baring all those factors in mind, I am persuaded to exercise my discretion in favour of the applicant, which I hereby do, and grant leave to file the appeal within 14 days from the date of this ruling. It follows that the execution of the judgment of the Tribunal shall be stayed pending the hearing and determination of the appeal.

The claimant however, shall have the costs of this application.

***Dated, signed and delivered at Nairobi this 10<sup>th</sup> of April, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**