



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

MISC. APPLICATION NO. 438 OF 2017

JITEGEMEE CREDIT SCHEME.....APPLICANT

VERSUS

NAOMI WANJIRU NJOROGE.....RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated 30th October 2017, brought under the provisions of Article 159(2) (d) of the Constitution, Section 7 of the Appellate Jurisdiction Act, Chapter 9 of the Laws of Kenya, Sections 1A, IB, and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and Order 42, Rule 6 and Order 51 of the Civil Procedure Rules, 2010.

2. The Applicant is seeking for prayers that;

(i) The Applicant be granted leave to file its Memorandum of Appeal out of time;

(ii) There be a stay of execution of the orders made by P.N. Gesora (CM) on 13th September 2017 of all and and/or any other proceedings in CMCC 4759/2016 and;

(iii) Upon grant of the stay orders, the Memorandum of Appeal annexed to the Affidavit in support of the application be deemed duly filed and served upon the Respondent on payment of the requisite Court filing fees;

(iv) The costs of the Application be in the cause.

3. The Application is supported by the grounds on the face of it and an Affidavit sworn by Faith Zawadi Kingi, the Legal officer of the Applicant scheme. She deposed that, on 22nd May 2007, the Applicant advanced the Respondent a sum of Kshs. 2,187,000.00 to assist her acquire a motor vehicle registration No. KAY 713F. The motor vehicle was used as security for the loan and registered in the joint names of the Applicant and the Respondent. A chattel mortgage instrument was also registered in favour of the Respondent.

4. The Loan Agreement and the Chattel Mortgage Instrument provided that the Respondent was to pay the loan advanced plus interest amounting to Kshs. 2,844,170, through monthly installments of Kshs 79,003. The Applicant reserved the right to repossess the motor vehicle and sell by public auction or private treaty to recover any outstanding amount in case of default by the Respondent.

5. On 30th January 2009, the Respondent applied for and was granted Kshs. 250,000 by the Applicant as working capital. A chattel mortgage instrument was also executed in favour of the Applicant on 2nd February 2009. That the Respondent further pledged her household items for security for the loan.

6. Subsequently, the Respondent defaulted on repayment of the loan and the Applicant approached her with a proposal to replace the household items with a Motor Vehicle Registration No. KAT 035C, as security for the second loan. The vehicle was then in the Applicant's possession for a period of two months but was released to the Respondent. The Applicant then threatened to attach the Respondent's household items. To the surprise of the Applicant, the Respondent filed suit No. HCCC 388 of 2009, seeking for an injunction to stop the Applicant from attaching her items. The Respondent then fully paid and cleared the outstanding balance of the second loan.

7. However the Respondent failed, refused, neglected and/or declined to service the first loan, as a result, the Applicant repossessed motor vehicle registration No. KAY 713F which was used as security for the loan.

8. Subsequent amended the Plaintiff in the matter HCCC 388 of 2009 and upon service thereof, the Applicant filed their statement of Defence. It is averred that, on 18th July 2016, the High Court transferred the matter to the Chief Magistrates Court and it was assigned a new number, being CMCC 4759 of 2016, and fully heard on 13th September 2017. The Court delivered judgment in favour of the Respondent, where she was awarded a sum of Kshs. 5,000,000 plus interest on general damages plus costs of the suit. The Applicant then applied for thirty (30) days stay of execution and was granted, which expired on 13th October 2017.

9. The Applicant is aggrieved by the decision of the Court and is desirous of appealing against it. It is argued that the intended Appeal has high chances of success and if the stay is not granted, the Applicant will suffer irreparable damage and the Appeal will be rendered nugatory.

10. However, the Respondent opposed the Application based on the grounds of opposition dated 7th November 2017 and filed on 8th November 2017. The grounds state that, the application is defective and an abuse of the Court's process and that the Applicant has not given reasons why the Appeal has not been filed within the legally stipulated time, nor adequate grounds set forth for the Court to exercise its discretion to enlarge time within which to appeal.

11. The Respondent argued that, there is no reason why an Advocate can feign ignorance of express provisions of the law. That no cause has been shown of any mistake on the part of the Advocate, which can be excused by the Court in exercise of its discretion to enlarge time. That the Applicant's desire is to delay and derail the Respondent's right to enjoy the fruits of her judgment. Therefore the Applicant has not approached the Court with clean hands so as to enjoy the equitable relief.

12. The Parties agreed to dispose of the Application by filing written submissions. The Applicant's submissions dated 14th November 2017, were filed on 15th November 2017. The submissions addressed two issues; leave to file an Appeal out of time and the threshold for grant of stay of execution.

13. On the issue of leave, the Applicant submitted that, they have demonstrated good cause and sufficient reasons why the Appeal was not filed within the stipulated time being that; the subordinate Court delivered its judgment on 13th September 2017, and the certified copy of the judgment obtained on 13th October 2017. That according to the stipulated time, the period for filing of the Appeal expired on 13th October 2017 and the inability to prepare the Memorandum of Appeal within the stipulated period was due to pressure of work and Applicant's Advocates on record were therefore unable to file the Appeal within the stipulated time due to inadvertence on their part.

14. The Applicant made reference to the provisions of Section 79G of the Civil Procedure Act and to the decisions in the cases of;

(a) *Bamburi Special Product Ltd vs Richard K. Samoei t/a Sondu Services Station (2017) eKLR* ,

(b) *Aviation Cargo Ltd vs St. Mar Freight Services Ltd(2014) eKLR*

(c) *Joseph Njuguna Muniu vs Medicino Giovanni (1998) eKLR*

(d) *Edward Kamau & Another vs Hannah Mukui Gichuki & Another (2015) eKLR*

15. On the issue of stay of execution, the Applicant reiterated that, it has an arguable Appeal based on the grounds of Appeal as stated in the Memorandum of Appeal annexed to the Affidavit in support of the Application. That, it is clear that the Applicant is a micro-financial institution and is in a position to offer any security which the Court may order deposited. To the contrary, there is nothing to show that if the Respondent is paid the decretal amount and the Appeal succeeds, she will be in a position to refund the money.

16. That a sum of Kshs. 5,000,000 is quite substantial and the onus of proving the ability to pay lies on the Respondent. Section 211 of the Evidence Act was cited, where it is provided that when any fact is especially within the knowledge of any party, the burden of proving or disproving that fact is upon the party. Further reference was made to the cases of;

(a) *Gyka Fuel Mart Ltd vs Bwana Mshiri Sungura (2013) eKLR*;

(b) *Barclays Bank of Kenya vs Evans Ondusa Onzere Civil Application No. 271 of 2008*;

(c) *Selestica Limited vs Gold Rock Development Limited (2015) eKLR*

17. Finally, the Applicant submitted that, it is entitled to the orders sought, as it has a right to be heard based on the provisions of Article 25(c) and 50(1) of the Constitution. That in the case of; *Edward Kamau & Another vs Hannah Mukui Gichuki (supra)*, the Court held that, the right of Appeal is a Constitutional right which is a cornerstone of the rule of law. The denial of that right amounts to denial to access justice guaranteed under Article 48 of the Constitution.

18. In response, the Respondent submitted that, the Affidavit sworn by Faith Zawadi Kingi does not set out the reasons why the Appeal was not filed within 30 days. That she basically analyses the case in the magistrate's court and the evidence adduced by the Applicant in that Court. That it is noteworthy, that on 13th September 2017, when the decision of the Court was read, the Applicants were present and sought for a 30 days stay of execution which was granted, and therefore they have not offered any good grounds why they did not file the Appeal on time to warrant the Court to exercise its discretion in extending time in the filing of the Appeal.

19. On the issue of stay of execution, the Respondent submitted that, the Applicant has not demonstrated the loss they will suffer if the orders sought are not granted. That the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules, requires that the Applicants must

demonstrate: the loss they will suffer if the orders are not given, that they have filed the Application without unreasonable delay and offer security for due performance of the decree. Reference was made to two cases;

(a) Tana and Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio and 3 Others (2015) eKLR

(b) Rebecca Munga Sokera & Another vs Lazarus Mukindia (2016) eKLR.

20. The Respondent urged the Court to balance the interest of the parties: that is the Respondent who has a judgment and should be allowed to enjoy the fruits thereof, and the Applicant who has a right to Appeal, but has failed and neglected to file the Appeal on time.

21. At the close of the arguments by the parties, I have considered the Application, the Affidavit in support and the grounds in opposition. I have also considered the submissions and I find that, the issues that arise for consideration are;

(i) *Whether the Applicant has met the legal requirements for grant of an order for extension of time within which to file an Appeal;*

(ii) *Whether the Applicant has met the prerequisite for grant of an order for stay of execution; and*

(iii) *Whether the orders sought should be granted.*

22. In relation to extension of time to file an Appeal, the provisions of Section 79 of the Civil Procedure Act (Cap 21) Laws of Kenya provides as follows;

“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 satisfied the court that he had good and sufficient cause for not filing the appeal in time.”

23. It is clear from the provisions that the Appeal herein should have been filed within thirty days of the date of the judgment. It is not in dispute that the judgment herein was delivered on 13th September 2017. The Appeal therefore should have been filed by 13th October 2017. That was not done. Therefore it is incumbent upon the Applicant to satisfy the Court that they had a good and sufficient cause for not filing the Appeal in time.

24. The grant of the order to extent the time within which to file an Appeal is within the Court’s discretion (See the case of; Aviation Cargo Ltd vs St. Mar Freight Services Ltd). Similarly in this regard, the Supreme Court in the case of; Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others, SC App. 16 of 2016, laid down the following principles that a court should consider;

a. 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;

b. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

c. As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case basis;

d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

e. Whether there will be any prejudice to be suffered by the respondents if the extension is granted;

f. The application should have been brought without undue delay; and

g. In certain cases, like election petitions, public interest should be a consideration for extending time.

25. The question that arises is whether the Applicant herein has advanced good and sufficient cause for not filing the Appeal in time. I have gone through the Affidavit sworn by Faith Zawadi Kingi, and I note that from paragraph 1 to 29, she deposes to the background facts leading to the filing of the suit, the subsequent hearing of the suit and the delivery of the final decision by the subordinate court on 13th September 2017. From paragraph 29 to 31, she deposes on matters relating to the merits of the intended Appeal. Finally paragraph 32 and 33, deals with the plea to the Court to grant the orders sought based on the averments in the Affidavit. Therefore as rightly observed and submitted by the Respondent, there is nowhere the deponent has stated in the Affidavit in support of the Application from 1 to paragraph 33 the reasons why the Appeal was not filed within time.

26. However, upon further perusal of the documents annexed to the Affidavit, I noted an Affidavit sworn by Mwachio Lynnete Manga, an Advocate practicing in the firm of Njuguna, Kahari & Kiai Advocates who deposed that the firm came on record on behalf of the Appellant/Applicant on 16th January 2016. On 15th September 2016, they wrote to the Applicant informing her of the outcome of the judgment. She instructed them to file an Appeal to the High Court, and then applied for copies of the proceedings and judgment vide a letter dated 11th October 2017. A typed copy of the judgment was received on 13th October 2017. Hence she was unable to prepare a

Memorandum of Appeal at that time due to pressure of work. It was argued that it is trite law that mistakes of an Advocate should not be visited on a client, she urged the Court to grant the orders sought.

27. The issue that arises is whether, first and foremost, the Court should consider the reasons advanced in an Affidavit “annexed” to the Affidavit in support of the Application, as properly presented to the Court for consideration. This is taking into account the fact that, the reasons are not reflected in the Affidavit in support of the Application. Secondly, if the Court were to admit the reasons advanced, whether they are good and sufficient.

28. In considering these issues, I note that an Affidavit sworn in support of an Application, amounts to factual evidence in support of, any facts advanced outside it would generally not be considered, unless the deponent makes reference to and relies further to the annexed Affidavit. That is not even the case herein.

29. Be that as it were, in the interest of justice, I will admit and consider the averments in the Affidavit sworn by Mwachio Lynnete Manga. She avers that failure to file the Appeal out of time was due to “pressure of work”. Is this sufficient reason? In my considered opinion, No. An Advocate who is a Legal officer, is presumed to understand the legal provisions of the law and the need to comply with the same. The provisions of Section 79G of the Civil Procedure Act, clearly provides that an Appeal should be filed within thirty days. The Counsel cannot therefore just wish away non-compliance by arguing that the mistake of a Counsel should not be visited upon the client. It must be understood that justice is balanced on a scale and the mistake of a Counsel should not be visited upon a successful and/or prejudice a party to litigation. Generally, the reasons advanced for the delay in filing the Appeal in time are lame.

30. As regards the issue of stay of execution, the provision of order 42 Rule 6(2) of the Civil Procedure Rules states as follows;

“No order for stay of execution shall be made under subrule (1) unless;

(a) The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

31. It follows from this position that, the Applicant must demonstrate three things; they will suffer substantial loss, they filed the Application without delay and they have offered security for due performance of the decree. The Applicant herein avers that the Respondent does not have the capacity to refund the sum awarded if the Appeal succeeds. The Respondent did not answer to this averment. However, the Court held in the case of; National Industrial Credit Bank Ltd vs Aquinas Francis Wasike, Civil Application No. 238 of 2005, the Court of Appeal held that; it is unreasonable to expect an Applicant as herein to know details of the resources of the Respondent or lack of them. That once the Applicant expresses reasonable fear that the Respondent will be unable to pay back the decretal sum, the burden shifts to the Respondent to show what resources he has since the matter is within his knowledge.

32. It suffices to note that, from the pleadings and the judgment in the subordinate Court, the subject matter of the suit was founded on a default by the Respondent to service a loan facility advanced to her by the Applicant. The decretal sum ordered herein arose out of what the Court find to be unlawful mode of realization of security. Be that as it were, the Court has no evidence that the Respondent would be able to refund the decretal sum if the same were paid and the Appeal succeeds.

33. The Applicants have offered to provide whatever security the Court may order. In this regard as rightfully submitted by the Respondent, the duty of the Court is to balance the interest of the parties to safeguard the Plaintiff’s right to enjoy the fruit of the judgment and at the same time allow the Applicant the opportunity to canvass the intended Appeal.

34. I now consider the issue of delay in filing the Application. I note that this Application was filed on 30th October 2017, which is within a period of one and half months from the date of delivery of judgment, and about 17 days after receipt of certified copy of the proceedings and judgment. I do not find any unreasonable and/or undue delay that would prejudice the Respondent.

35. Finally, I take cognizance of the provisions of Section 48 of the Constitution, that provides that; the state shall ensure access to justice to all persons and Article 50 which provides that, every person has a right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a Court. Similarly, Article 159(2) provides that; in exercising judicial authority, the courts shall be guided by the principles inter alia that, justice shall be administered without undue regard to procedural technicalities, basically, upholding, the need to consider substantial justice as against “technicalities.”

36. It is against this background that I hold that, to deny the Applicant the opportunity to canvass the Appeal on the ground that the reasons advanced by its Advocates lacks merit, will amount to an injustice to the Applicant. However, the Law firm that causes the delay that prejudices the rights of the opposite party should be made to pay for it in their personal capacity to ameliorate the circumstances of the offended party.

37. It is clear from the record of the subordinate court, that when judgment was delivered on the 13th September 2017, the Applicant was represented by the Learned Counsel holding brief for the Learned Counsel Mr. Makori, while the Respondent was represented by Ms. Ndung’u holding brief for Ms. Mwachio. Ms. Mwachio depones that she only applied for the typed copies of the proceedings vide a letter dated 11th October 2017 and received a typed copy of the judgment of 13th October 2017. Why did the Advocate take so long to apply for the proceedings? Even then, it is clear that they were supplied with the proceedings within two days of application of the same and so the delay to file the Appeal out of time therefore is solely on the Applicant’s Advocates.

38. In conclusion, I allow the Notice of Motion dated 30th October 2017 in the following terms;

(i) The Applicant is granted leave to file the Appeal out of time and in that regard the Memorandum of Appeal annexed to the Affidavit and marked as annexure 'A' shall be deemed duly filed and served upon the Respondent on payment of the requisite Court payment fees. The same should be paid within 48 hours of this order;

(ii) There shall be stay of execution pending the hearing and determination of the Appeal herein on condition that the Applicant will deposit the total decretal sum being an amount of Kshs. 5,000,000 in a joint interest earning account in the names of the Advocates representing the parties. The deposit shall be made within 15 days of the date of this order;

(iii) In default of compliance with the orders hereinabove (i) and (ii), the stay order will stand vacated without further reference to the Court;

(iv) The Applicant's Advocates who have honoured to the mistake leading to the delay in filing the Appeal, shall pay the Respondent costs of this Application, and compensation for inconvenience caused by the delay in filing the Appeal within time, costs for both assessed at an all-inclusive sum of Kshs. 20,000.

39. It is so ordered.

Dated, delivered and signed in an open Court this 11th day of June 2018

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Mbaragu for Ms. Mwachio for the Applicant

Ms. Makori for the Respondent

FredCourt Assistant