



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 144 OF 2018

TITUS KILONZO MASYA.....PLAINTIFF/RESPONDENT

VERSUS

SALALA LOGISTICS CONSULTANTS

KAMANDE OSCAR NZOMO T/A

SALALA LOGISTICSCONSULTANTS.....DEFENDANTS/APPLICANTS

RULING

1. The Applicant herein has filed a Notice of Motion dated 2/5/2018 seeking the following prayers namely:-

(a) (Spent)

(b) That this court be pleased to grant leave to the Applicants to appeal out of time against the judgement of Hon Y. Shikanda SRM dated the 15/03/2018 in CMCC No. 151 of 2016.

(c) That this court be pleased to stay execution of the decree issued pursuant to the judgement delivered on 15/3/2018 pending the outcome of the intended appeal.

(d) That the costs of the Applications abide the outcome of the intended appeal.

2. The Application is supported by the annexed affidavit of KELVIN NGURE – Deputy Manager Climbs Department of the Applicants insurers sworn on 20/04/2018 and further supported by the following grounds:-

(a) That judgement in CMCC No. 151/2016 was delivered on the 15/3/2018.

(b) That an inadvertent delay ensued in the process of obtaining the real judgement and analyzing the same which delay was unintended.

(c) That by the time the analysis was finalized the 30 days within which an appeal is to be field had lapsed.

(d) That the Applicants are aggrieved by the judgment particularly on liability and now seeks leave to lodge an appeal out of time.

(e) That the instant application is timely made and without undue delay.

(f) The Applicant stand to suffer substantial and irreparable loss and damage as there is a likelihood that the Applicants will be unable to recover the decretal sums awarded herein from the Respondent.

(g) Unless the application is allowed, the intended appeal will be rendered nugatory.

(h) The Applicants have a strong and arguable appeal which has high chances of success.

(i) Application is made in good faith and the Respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs if the application is allowed.

(j) *The Applicants are apprehensive that the Respondent may levy execution against them.*

(k) *The Applicants are ready and willing to comply with such reasonable conditions that the court may grant to enable the Applicants pursue their appeal.*

3. The Application was strenuously opposed. A replying affidavit was sworn by the Respondent's Advocate who raised several grounds of opposition inter alia, that the delay in filing an appeal has not been properly explained; that the intended appeal has no chance of success; that no substantial loss has been established by the Applicants; that the Respondent is a person of means and able to repay the decretal sums in the event of success of appeal and finally that the Application is an abuse of the court process meant to keep away the Respondent from the fruits of the judgement.

Submissions

4. Parties agreed to canvass the Application by way of oral submissions. It was submitted by Kagunda learned counsel for the Applicants that the intended appeal is against judgement on liability and not on quantum of damages. He submitted that the delay to lodge appeal was due to internal discussions between the Applicants and the insurer and by the time a decision was reached to lodge an appeal the statutory period had elapsed. It was further submitted that the intended appeal raises triable issues. Learned Counsel further submitted that the Applicants are ready and willing to abide by conditions to be imposed including depositing decretal sums in any particular account. Finally it was submitted that an order of stay of execution should be granted so as to protect the subject of the appeal.

5. Mr. Mburu learned counsel for the Respondent submitted that the Applicants are guilty of inordinate delay in lodging the appeal since the parties were supplied with copies of judgement as soon as it was delivered. He further submitted that there was no substantial loss established as per Order 42 Rule 6 of the Civil Procedure Rules to warrant stay of execution and that the Application has no legs to stand on and is dead on arrival and that it should be dismissed with costs.

Determination

6. I have considered the Applicant's Application and the Respondent's response as well as the submissions of the learned Counsels. Section 79G of the Civil Procedure Act provides as follows with regard to the time of filing appeals:-

"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty (30) 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 as having been requisite for the preparation and delivery to the Appellant 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."

The judgement of the lower court was delivered on the 15/3/2018 and the appeal if any ought to have been filed by the close of business latest 15/4/2018. The Applicants approached this court on 3/5/2018 which is clearly out of time by dint of the provisions of Section 79G of the Civil Procedure Act. This court has to determine whether or not the delay to file appeal is reasonable or unreasonable. The reasons advanced were that the Applicants were consulting with the insurer and the decision to appeal was reached after the statutory period had elapsed. I find the delay was about three weeks which in my view is a reasonable period. The three weeks after the lapse of the statutory period is not unreasonable delay. The power to extend time is discretionary and should be exercised appropriately on sound reasons. The onus is on the Applicant to furnish reasons why the court should extend the time for lodging appeal out of time. Some of the reasons are on issues to do with the period of delay, reasons for the delay, the chances of the appeal succeeding as well as the degree of prejudice to the Respondent. The reasons for the delay are found to be genuine and not farfetched with a view to prejudicing the Respondent. The Applicant has contested the issue of liability wholly imposed upon them by the trial court and which should be a triable issue in the appeal. The Respondent's circumstances would be catered for by an award of costs. In the premises I find the Applicants should be allowed to lodge appeal out of time.

7. The Applicant has also sought for stay of execution pending the determination of the appeal. This is premised on order 42 Rule 6 of the Civil Procedure Rules which specifies the circumstances under which this court may order stay of execution of a decree or Order pending an appeal. Rule 6(2) lays down the conditions which an Applicant must satisfy the court that he or she stands to suffer substantial loss if stay is not granted and that the Application has been filed without unreasonable delay. The Applicant must also show that he/she is willing to offer such security as may be binding on him/her for the due performance of the decree.

8. As regards the time the Applicants took to lodge the Application for stay, it is noted that the appeal should have been lodged by the 15/4/2018. The Application herein was filed on 3/5/2018 which is about three weeks after the lapse of the statutory period of appeal. I find the Application has been filed without unreasonable delay.

9. As regards the issue whether the Applicants have demonstrated that they stand to suffer substantial loss, it is noted from the Applicants draft Memorandum of appeal that the issue of liability wholly imposed upon the Applicants is contested and the Applicants want the same reduced. In my view this is an arguable ground of appeal. Again the Applicants have argued that they will not be able to recover the decretal sums from the Respondent in the event the appeal succeeds. The decretal sums is about Kshs.1 million which is quite a tidy sum by any standards. The Respondents counsel other than stating the sums would be easily refunded has not furnished any evidence of the Respondent's financial means. In the case of **ILRAD =VS= KINYUA [19990] KLR 406** the court held as follows:-

"We have considered what Mr. Sehimi has said. However, we must observe that the onus was upon the Respondent to rebut by evidence that the claim that the intended appeal if successful would be rendered nugatory on account of his (Respondent's) alleged impecunty."

10. As regards the issue of security, I note the Applicants have indicated that they are ready and willing to abide by the conditions to be

imposed such as depositing of the decretal sums into a proposed account. I find the same shall take care of the Respondent's concerns.

11. In view of the foregoing I find the Applicants have satisfied the requirements of orders 42 Rule 6 for the Civil Procedure Rules as well as Section 79G of the Civil Procedure Act. The Application dated 2/5/2018 is allowed in the following terms:-

(a) The Applicants to file appeal within 14 days from the date hereof.

(b) The Applicants to deposit the entire decretal sum in a joint interest earning account in the names of the Advocates of both parties herein within the next thirty (30) days failing which the stay shall lapse.

(c) The costs shall abide the outcome of the appeal.

Orders accordingly.

Dated and delivered at Machakos this 4th day of June, 2018.

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D. K. KEMEI

JUDGE

In the presence of:

Kagunda – for Applicant

Kamende for Mburu for the Respondent

Josephine – Court Assistant