



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPLICATION NO. 67 OF 2017

KENYA ALLIANCE INSURANCE CO. LIMITED.....APPLICANT

Versus

JULIUS REM MUTABARIRESPONDENT

RULING

[1] The significant orders sought in the Motion dated 19th December 2017 are;

(1) Leave to appeal out of time the ruling delivered on 2nd November 2017; and

(2) Temporary stay of proceedings in PMCC NO. 10 OF 2017 JULIUS REM MUTABARI vs. KENYA ALLIANCE INSURANCE COMPANY LIMITED pending the hearing and determination of this appeal.

[2] The application is expressed to be brought under the provisions of Section 1A, 1B, 3 and 3A of the Civil procedure Act CAP 21 Laws of Kenya and Section 79G & 95 of the Civil Procedure Act 2010 and Order 42, Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules. It is premised upon grounds set out in the motion and supporting affidavit sworn by Antony Kariuki on 21st December 2017. The core argument in support of the prayer for leave to appeal out of time are: One; that the delay in filing the appeal was occasioned by the applicant's inability to obtain the ruling on time. They explained the delay. That they sought to obtain a copy of the ruling on the same day but it was not typed. They consistently followed up on it but was only able to obtain a copy on 8th December 2017. The advocates forwarded it to the applicant on 11th December 2017 and after perusal by the legal department, the applicant was dissatisfied with the ruling and instructed their legal counsel to appeal. Thus, the delay in lodging the appeal was purely inadvertent and is excusable and has been satisfactorily explained. Two; that the appeal has high chances of success, for, it is challenging the Court's jurisdiction to try the suit on a contract with an arbitration agreement between the parties.

[3] On stay of proceedings, the Appellant stated that they are apprehensive that the impugned suit may proceed for hearing and determination, thus rendering the appeal nugatory.

[4] The application was canvassed by way of written submissions. The applicant's in their submissions supported their arguments by referring to the case of **NICHOLAS KIPTOO ARAP KORIR SALAT vs. IEBC & 7 OTHERS**, SC APPL 16/2014 and **AVIATION CARGO SUPPORT LIMITED vs. ST. MARK FREIGHT SERVICES LIMITED [2014] eKLR** on the principles that a court should consider in the exercise of discretion to extend time. Further, they referred to the case of **MURSAL GULIED & 2 OTHERS vs. DANIEL KIOKO MUSAU [2016] EKLR** that pointed out that a delay of about 25 days after the expiry of time to file an appeal was not inordinate.

Referral application was rejected

[5] The application was opposed through a replying affidavit sworn by Julius Rem Mutabari on 16th January 2018. He deposed *inter alia* that the applicant's application to have the matter referred to arbitration was dismissed on 2nd November 2017. Instead of appealing against the ruling the applicant filed its defence on 6th December 2017 together with the list of witnesses, exhibits et cetera and took a date by consent for hearing. According to the Respondent, this conduct shows that the application for leave to appeal out of time was an afterthought. He averred further that he has information that there are negotiations going on between the applicant and another company to have a merger and possible name change to defeat the interest of justice. He stated that the applicant is almost in a financial crisis; has not settled any claim for the last 3 years and has dismissed most of the staff. There is no policy attached and signed by both parties to show that there was an agreement to refer any dispute to arbitration. Hence the application should be dismissed.

[6] The Respondent submitted but reiterated what he had deposed in his affidavit. He added however that, the applicant has not annexed a certificate of delay to show that there was delay in supplying the proceedings and ruling by the lower court.

DETERMINATION

[7] Section 79G of the Civil Procedure Act 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 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.”

[8] Accordingly, courts have discretion to allow an appeal out of time provided that the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. See the case of **AVIATION CARGO SUPPORT LIMITED vs. ST. MARK FREIGHT SERVICES LIMITED [2014] eKLR** where the Court of Appeal expressed as follows:

“The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.”

[9] The Applicant has explained that the impugned ruling was delivered on 2nd November 2017. They sought out the order but they got it on 8th December 2017; expiry of 30 days to file appeal was on or about 1st December 2017. The advocates forwarded the ruling to their clients on 11th December 2017 who gave instructions to appeal on 15th December 2017 and they filed this current appeal on 21st December 2017.

[10] The question to ask is whether the delay herein is inordinate and therefore inexcusable. There is no specific measure of what amounts to inordinate delay. However, the court should be able to discern delay which is unacceptable- one that is prolonged and unexplained. Such would be inordinate delay. I am content to cite the persuasive case of **MURSAL GULEID & 2 OTHERS vs. DANIEL KIOKO MUSAU [2016] EKLK** where Muriithi J stated:

“The application for extension of time was filed on 26th February 2016 about 25 days after the expiry of time. I do not consider that a delay for a period of 25 days is inordinate, even if the court disregarded the explanation given by Counsel in submissions that the advocate who held their brief did not inform them of the ruling date. However, it is not the respondent’s fault that the applicants were on 28th October 2015 before the trial court represented by an advocate who did not report back to them on the matter of the date for which ruling was reserved.”

[11] Applying the test, the applicants have explained the delay to the satisfaction of the court. The amount of delay will not prejudice administration of justice. Here, I admire the opinion by Chesoni J (as he then was) in the case of **Ivita vs. Kyumbu** that the test should be: whether, despite the delay, it is still possible to do justice for all the parties in the suit. Therefore, I allow the Appellant to file appeal in 30 days of today. There is, however, no sufficient material to enable the court to determine the request for stay of proceedings. I will say nothing about that aspect. No orders as to costs.

Dated, signed and delivered in open court at Meru this 19th day of July 2018

F. GIKONYO

JUDGE

In the presence of:

J. Mwangi advocate for Maloba advocate for appellant

Mr. Ondieki advocate for Respondent

F. GIKONYO

JUDGE