



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC. CC. MISC. NO. 83 OF 2018

LUCY JOAN NYAKI.....APPLICANT/PLAINTIFF

-VERSUS-

COAST BUS (MSA) LTD.....RESPONDENT/DEFENDANT

RULING

INTRODUCTION

1. By a Notice of Motion dated 14/06/2018, the applicants seeks for orders for extension of time for filing an appeal and stay of execution pending appeal under the cited provisions.

2. The Application is based on grounds on the motion that;

- Judgment herein was delivered on 9th May, 2018 and the 30 days within which an appeal is to be filed have since lapsed. The instant application was lodged on 20/6/2018 a delay of 40 or so days.

- The Applicant is only aggrieved by the award of Kshs. 879,720/- thus the intention to appeal. He seeks leave to appeal and stay pending appeal. The applicant says that the delay was occasioned by late transmission of instructions to appeal to the advocate. The delay is said to be inadvertent and not inordinate.

- The Applicant stands to suffer substantial and irreparable loss and damage as there is a real likelihood that the Respondents will proceed and execute the said judgment and decree.

- The appeal will be rendered nugatory if orders are not granted and finally the appeal has chances of success. The Applicant is ready and willing to comply with such reasonable conditions as this court may grant to enable the applicant pursue its intended appeal.

3. The Application is supported by the affidavit of Chris Kabita sworn on 13/06/2018 which reiterates the content of the grounds stated above.

4. The application is opposed by the Respondent and a replying affidavit has been filed and sworn on 29/06/2018 which state that the liability was agreed at 90 to 10% in Respondent's favor. The Respondent avers that the application has no merit and ought to be dismissed.

5. However the Respondent proposes the entire decretal amount be deposited in court or ½ of amount be paid as a condition for stay.

APPLICANT'S SUBMISSIONS

6. Under Section 59 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya, it is provided that;

"Where in a written law time is prescribed for doing an act or taking proceedings, and power is given to a court or other authority to extend that time, then unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed."

7. The above provision of Section 59 of Cap 2 is replicated by Order 50 Rule 6 of the Civil Procedure Rules which provides that;

"Where a limited time has been fixed for doing act or taking any proceedings under these Rules or by summary notice of the

court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, provided that the costs of any application to extent such time and of any order made thereon shall be borne by the parties making such application unless the court orders otherwise.”

8. In addition, Section 95 of the Civil Procedure Act is clear that;

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by the act, the court may, in its discretion, from time to time, enlarge such period even though the period originally fixed or granted may have expired.”

It is the Defendants/Applicants’ prayer that this court is empowered by the law to entertain an application of this nature. **Havelock j.** (as he then was) summarized the principles governing the exercise of court’s discretion in **Esther Wamaitha Njihia & 2 Others –Vs- Safaricom Limited [2014] eKLR** as follows:-

“There is abundant authority as to just when and in what circumstances, a court should exercise its discretion. Such, of course, is not limited to any particular application before court. I received some assistance in this regard from the Haji Ahmed Sheikh case (supra) cited to me by the Defendant. In that case, Gachuhi JA reviewed the cases cited to him and found as follows:

“The powers of the court in dealing with application under order IX rule 10, is to do justice to the parties. In Pithon Waweru Maina –Vs- Thuku Mugiria, Civil Appeal No. 27 of 1982 (unreported) (ibid) (porter, Kneller, J.J.A and Chesoni, Ag. J.A.) Potter, J.A. in quoting Duffus, P., in Patel –Vs- E.A. Cargo Handling Services Ltd., (1974) E.A. 75 stated at page 1 of his judgment this:

‘There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just’.....The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.’

In the same appeal Kneller, J.A. quoting Harris, J. in Shah –Vs- Mbogo and Another, (1967), E.A. 116 at 123 BC on the principles governing the exercise of the court’s discretion to set aside a judgment obtained ex-parte stated:

‘The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who had deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.’

10. As to whether this Application and the annexed affidavits are incompetent as opposed by the Respondent, it is the Defendants/Applicants submission that the said ground is misinformed and void as it lacks reason and ground to find this application incompetent.

11. The application is made within the provisions of the law and in the form required by the law under Order 51 of the Civil Procedure Rules, 2010 and thus the application is properly lodged under the correct provisions of the law and thus the Applicants are properly before this court and the oppositions on ground of incompetence and wrong provisions of law are baseless and unsubstantiated.

12. The Applicants reiterate affidavits supporting the application are too drawn as required by Order 19 of the Civil Procedure Rules, 2010 and therefore the Application is well within the correct provisions of the law.

13. As to whether the Applicants deserve the discretion of this court to grant them more time to comply with court orders, the Applicants submit that the Applicants are willing to comply with the court orders and conditions that this court may grant to enable the Applicant pursue its intended appeal.

14. The Applicants have therefore demonstrated willingness and/or intention to fully comply with said court orders and it is the Applicants prayer that this courts discretion to enlarge time be invoked to their favor.

15. The conditions for grant of orders to extend time to appeal out of time were set in the case of the Court of Appeal in **MWANGI –VS- KENYA AIRWAYS LTD [2003] KLR**. They include the following:-

- a. **The period of delay;**
- b. **The reason for the delay;**
- c. **The argue-ability of the appeal;**
- d. **The degree of prejudice which could be suffered by the Respondent is the extension is granted;**
- e. **The importance of compliance with time limits to the particular litigation or issue; and**
- f. **The effect if any on the administration of justice or public interest if any is involved.**

16. The delay in the instant matter was about 10 days which is not inordinate. The reason is also understandable as the insurance had to

transmit instructions to the advocate and human error at times causes people to forget.

17. The court is willing to forgive the omission in view of the period of delay which is very little.

18. The court has also noted that the issues of leave is very feebly opposed.

19. The Respondent focused on the fruit of the judgement by proposing to get whole amount deposited in interest earning account and/or procuring half to his advantage pending appeal.

20. Thus the court finds application for leave has merit.

21. On the application for stay, the conditions for threshold for grant for the same thereof are set out in Order 42 Rule 6 (2) of Civil Procedure Rules namely:-

2) No order for stay of execution shall be made under sub-rule (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.

22. The Respondent has proposed that, the entire decretal amount be deposited in court or ½ of amount be paid as a condition for stay however the court notes that the proposal by the Respondent on conditional stay is not contested by the Applicant.

23. Thus court makes the following orders:-

1) Leave for filing appeal out of time is granted. Same to be filed and served within seven days.

2) Stay of execution is granted on condition that Kshs.400,000/= is paid to the Respondent within 30 days and in default execution to issue.

3) Costs in the main cause.

Orders accordingly.

SIGNED, DATED AND DELIVERED THIS 17TH DAY OF OCTOBER 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE