REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC CIVIL MISC. NO. 87 OF 2018

PAMELA JEBICHII KOSKEI....................PLAINTIFF/RESPONDENT

-VERSUS-

HORIZON COACH CO. LTD..............1ST DEFENDANT/APPLICANT

BASARI CO LTD..................................2ND DEFENDANT/APPLICANT

IRENE MUMBI.................................3RD DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 21/06/2018, the Applicants seeks orders for extension of time and leave to appeal out of time and stay of proceedings and execution of decree in **Makindu CC 114/2015** PM's Court pending hearing and determination of the intended appeal plus costs.

2. The Application is anchored on Sections 1A, 1B, 3A, 79G and 95 Civil Procedure Act and Orders 42 rule 6 (1), Order 50 Rules 5, 6 and Order 51 Rules 1, 3 and 10 (1) and 2 Civil Procedure Rule 2010.

3. The Application is based on grounds on the face of the motion namely *inter alia.*

4. The delay of lodging appeal was occasioned in the process of obtaining judgment delivered on 11/04/2018. Same was to be procured to enable the client to be advised.

5. There is apprehension that execution may be levied any time the Applicants are ready to abide by conditions which court may grant in staying of execution.

6. The Applicants fear that the intended appeal may be rendered nugatory if stay is not granted.

7. They say they are ready and willing to offer security. The application is supported by the affidavit of Pauline Wambui sworn on 21/06/2013 which reiterates the content of the grounds.

8. The 1st Respondent has filed replying affidavit sworn by Pamela J. Koskei on 03/07/2018 to oppose the same application which in short states that the judgment was delivered in presence of Applicant's advocate on 11/04/2018 and the Applicant was advised on same on 16/04/2018. It is not explained why it took over two months to obtain copy of judgment. No evidence of application of the same.

9. Further it is averred that the threshold for grant of stay of execution has not been demonstrated.

10. The parties agreed to file submissions which were filed and exchanged.

THE APPLICANT SUBMISSIONS

11. On application for leave to appeal out of time, the Applicant implores Court to exercise its wide powers under Section 3A of the CPA and admit the appeal herein for hearing and thereafter proceed to hear and determine the same purely on its merits so as to ensure that the ends of justice are met.

12. As was held in **Patel –Vs- E.A Cargo Handling Services Ltd, (1974) E. A 75,** 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.

13. It is submitted that the draft memorandum of appeal annexed to the present application sets out precisely the grounds upon which the Applicants intend to appeal the decision of the lower court.

14. The main ground which the Applicants intend to rely upon is a the excessive award made by the lower court which was not proportionate to the injuries suffered by the Respondent and which was not in tandem with the conventional awards given for similar injuries.

15. The Applicants cite the provisions of Sections “79G and 95 CPA and order 50 Rule (6) and submit that; the exercise of court’s discretion has been the subject of numerous court decisions.

16. The principles governing the exercise of the judicial discretion are:-

> *i. Firstly, there are no limits or restrictions on the judge’s discretion. 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 it by the rules.*
>
> *ii. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.*

17. As explained in the supporting affidavit sworn by Pauline Waruhiu on 9th April 2018, the delay in filing the memorandum of appeal was occasioned by the fact that the judgment delivered in the absence of all the parties and they only learnt of the judgment when they were served with the decree and by the time they could get a copy of the judgment.

18. From the foregoing, the advocate on record was not in a proper position to advise the client fully and comprehensively on time to enable the client issue instructions to appeal and or otherwise act on the judgment.

19. In view of the foregoing explanation, it is their submissions that the Applicants have demonstrated a good and sufficient cause for not filing the appeal on time and the Applicants therefore pray that they be granted leave to file their appeal out of time.

20. As such, it is the Applicant’s submissions that the delay for filing the appeal has sufficiently been explained by the Applicants and the same constitutes a sufficient cause.

STAY OF EXECUTION

21. The pertinent questions for determination in an application for stay of execution are:-

> ***Whether the Defendants/Applicants have demonstrated that substantial loss will occur unless stay is granted;***
>
> ***Whether the Application has been made without unreasonable delay; and***
>
> ***Whether the Defendants/Applicants are ready to furnish such security as shall be sufficient to satisfy and decree that might ultimately be binding on the Applicant?***

22. In support of the present application Pauline Waruhiu in her affidavit filed herein specifically stated that the Applicants are ready, able and willing to furnish the court with such reasonable security as this Honourable Court may deem fit.

23. The Applicant is willing to deposit the entire decretal amount in court or in a joint interest earning account. On the other hand the Respondent’s means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the Applicant’s appeal succeeds since the Respondent has not disclosed nor furnished the court with any documentary evidence to prove his financial standing.

24. The Respondent herein is the only one who can specifically show that he has means to repay the decretal amount if the court allows the filing of the memorandum of appeal and the said appeal succeeds.

25. Judgment in this case was delivered in favour of the Respondent against the Applicant for general damages of a sum of Kshs.1,203,000/= plus costs and interest as from the date of the judgment together with liability of 80%.

26. It is Applicant submission that this is a substantial sum and in the event that the Respondent is unable to repay the decretal sum, the appeal will be rendered nugatory and the Applicant exposed to irreparable damage since the subsequent decree would be no more than a paper decree.

27. In the circumstances, this is a suitable case where this court should exercise its discretion and order stay of execution.

28. On the issue of security, they submit that the Applicant has already stated in the supporting affidavit to the application that they are willing to furnish reasonable security as the court may deem fit.

29. Therefore, the Applicant has satisfied all the conditions set out in Order 42 rule 6, and thus prays that her application be allowed.

30. The Respondent No. 1 filled and served the submissions.

THE 1ST RESPONDENT SUBMISSION

31. The 1st Respondent submission is in threefold:-

i. Invocation of the wrong procedure;

ii. Defective supporting affidavit;

iii. Failure to meet the threshold for grant of orders sought.

i) Invoking the wrong procedure

32. The Respondents submit that, the substantive section on the motion's prayers is Section 79 G which does not provide for filing an application to seek leave to appeal out of time. The procedure, as provided in the proviso, is to file the appeal and then seek to have it admitted out of time. See the case of **GERALD M' LIMBINE –VS- JOSEPH KANGANGI (2008) eKLR** thus the application is un-procedural and for dismissal.

33. The defect is a jurisdictional prerequisite, thus the Applicants cannot be aided by Article 159 (2) (d).

34. In support the 1st Respondent relies on the Supreme Court decision in **PATRICIA CHEROTICH SAWE –Vs- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC) & 4 OTHERS (2015) eKLR** at page 6 where the court held as follows:

> *"(31) Although the Appellant involves the principle of the prevalence of substance over form, this Court did signal in **Law Society of Kenya –Vs- The Centre for Human Rights & Democracy & 12 others,** Petition No. 14 of 2013, that "Article 159 (2) (d) of the Constitution is not a panacea for all procedural shortfalls." **Not all procedural deficiencies can be remedied by Article 159; and such is clearly the case, where the procedural step in question is a jurisdictional prerequisite." (emphasis added.)***

35. In **Martha Wambui -Vs- Irene Wanjiru Mwangi & Another [2015] eKLR** held,

> ***"In my view, the use of the term "admitted" connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time …"***

36. See also **Apa Insurance Limited –Vs- Michael Kinyanjui Muturi [2016] eKLR.**

37. In respect of the first defect, it is submitted that, the Deponent states that she swears the Supporting Affidavit in her capacity as the claims director at Directline Assurance Company Limited.

38. It is deposed that the said company is the insurer of motor vehicle registration number KBV 225X, at whose instance the suit is being defended. This is not true as from annexures 'PJK – 2' and 'PJK – 4' it is clear that the motor vehicle insured by Directline is motor vehicle registration number KBM 688J.

39. Certainly, there is no nexus between the deponent and motor vehicle registration number KBV 225X. Clearly, the Deponent lacks capacity to depose to the Supporting Affidavit.

40. In any event, Directline is not a party to the suit and it has not been deposed that the Applicants have authorized the deponent to swear the affidavit on their behalf.

41. It is trite law that a deponent who swears an affidavit in a representative capacity must establish such capacity and authorization. The Deponent has not established such capacity or authorization.

42. The second defect is that the affidavit was sworn in Nairobi but commissioned in Machakos. Accordingly, the commissioning is in improper by dint of Section 5 of the Oaths and Statutory Declarations Act. The provision provides:

> *Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made. (Emphasis provided)*

43. This is a defect that cannot be remedied by order 19 Rule 7 of the Civil Procedure Rules. This is because it affects the veracity and probative value of the averments, which goes to the substance of the affidavit.

44. Without a proper commissioning, the averments are akin to unsworn evidence. In any event, Order 19 Rule 7 being subsidiary legislation cannot override the mandatory provisions of an Act of parliament.

45. In similar instances, such affidavits have been struck off. For instance, in **<u>REGINA MUNYIVA NTHENGE –VS- KENYA COMMERCIAL BANK LTD (2005) eKLR</u>**.

ii. <u>Failure to meet the threshold for grant of orders sought.</u>

46. It is submitted that, Applicants have not satisfied the criteria for grant of the orders sought. The Applicants seek two substantive orders:-

a) Extension of time to appeal, and

b) Stay of execution of the judgment and decree in Makindu PMCC No. 114 of 2015.

a) <u>Extension of time.</u>

47. The Applicants seek extension of time to appeal the judgment delivered on the 11/04/2018 by the Honorable J. D Karani. The instant application was filed on the 22/06/2018, more than 2 months from the date of judgment. Evidently, the Applicants are out of time.

48. The Applicants depose in paragraph 4 of the Supporting Affidavit that their advocates were not served with a judgment notice, and thus the advocates were not in court when the judgment was delivered.

49. It is further deposed in paragraph 5, that the Plaintiff/Applicants' advocates (sic) have not had the benefit of studying the said judgment, the quantum of damages awarded to the plaintiff/Applicants (sic) are excessive. In paragraph 7, it is deposed that the Applicants' advocates have applied for a copy of the judgment with a view of filing the appropriate memorandum of appeal.

50. The delay, it is deposed in paragraph 6, was inadvertent on the part of the Applicants' advocates. Further, the delay was not deliberate as the advocates were not in a position to advise their clients accordingly without a copy of the judgment.

51. The Applicants are not genuine in their averments, and are deliberately misleading the court. As evident from paragraph 17 of the Replying Affidavit, the Applicants' advocate was present when the judgment was delivered.

52. From the copy of the judgment (annexure 'PJK – 7'), a Mr. Osioma was present when the judgment was delivered. As is evident from annexure 'PJK – 5', the said Mr. Osioma practices in the firm on record for the Applicants.

53. The criteria for extension of time was laid out by the Supreme Court in **<u>NICHOLAS KIPTOO ARAP KORIR SALAT –VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMMISSION & 7 OTHERS (2014) eKLR.</u>** At page 16, the court set seven principles that a court should consider:-

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 for 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.

b) <u>Stay of Execution</u>.

54. The Applicants seek stay of execution of the judgment delivered on the 11/04/2018 pending the hearing and determination of the application.

55. The 1st Respondent submits that the Applicants have not met the conditions under Order 42 Rule 6. In order for the court to allow the application for stay of execution, the court must satisfy itself that;

a) The application has been made without unreasonable delay;

b) Substantial loss may result to the Applicant unless the order is made and;

c) The Applicant has furnished security for the due performance of the decree being appealed from.

56. The 1st Respondent submits that the Applicants have not satisfied any of the three conditions. The detailed submissions follow hereunder.

57. **Security,** relating to this condition, the Applicant is required to furnish security for the due performance of the decree. The Applicants have failed to furnish such security.

58. Nowhere in the supporting affidavit have the Applicants offered any security for the due performance of the decree.

59. **Balancing parallel positions,** however if the court is minded to grant the stay, the 1st Respondent submits that the stay should be on just terms. The court has a duty to balance the parallel positions of the parties.

60. In this regard, the court of appeal **KENYA SHELL LTD –VS- KIBIRI & ANOTHER (supra)** at page 410 the court held that:

> ***…. In application for stay the court should balance the parallel prepositions, first that a litigant, if successful, should not be deprived of the fruits of a judgment in his favor without a just cause, and secondly that execution would render the proposed appeal nugatory … (emphasis added)***

61. Indeed, this duty was succinctly highlighted in **TABRO TRANSPORTERS LTD (supra) (at page 10 paragraph 59) where Gikonyo, J.** held as follows:

> ***"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree."***

62. Consequently, the best way to balance these parallel prepositions will be to allow the Applicants to pursue the appeal and the 1st Respondent to enjoy some of the fruits of her judgment.

63. Therefore, the 1st Respondent proposes that the Applicants be ordered to pay half of the decretal amount due from them and deposit the other half in an interest earning account held in joint names of both advocates on record.

64. This is the best way to balance these prepositions; in this respect the 1st Respondent relies on the persuasive decision in **EDWARD KAMAU & ANOTHER -VS- HANNAH MUKUI GICHUKI & ANOTHER (2015) eKLR)**.

65. Nonetheless, even if the Applicants seek a stay of proceedings in Makindu Civil Suit No. 114 of 2015 the 1st Respondent submits that the prayer should not be granted. The Trial Court has delivered the judgment in the matter and thus is *functus officio* in this regard, no further proceedings can be undertaken therein.

66. The criteria for grant of stay of proceedings has been laid out by the court of appeal in **CHRIS MUNGA N. BICHAGE –VS- RICHARD NYAGAKA TONGI & 2 OTHERS (2013) eKLR.** In the ruling of the majority delivered by Onyango Otieno J. A, at page 6, the Applicant must persuade the court on two limbs: the appeal or intended appeal is arguable, and that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. Further, these two limbs must both be demonstrated and it would not be enough that only one is demonstrated.

67. Evidently, the Applicants have not satisfied the criteria for stay of proceedings. It is worth mentioning that those suits have been stayed since 2015. It would be unjust to stay them any longer, after all, justice delayed is justice denied.

ISSUES ANALYSIS AND DETERMINATION

68. After going through the pleadings, affidavits and submissions by parties, I find the issues are;

> ***i. Whether the application is un-procedural and defective?***
>
> ***ii. If above in negative, has the same met the threshold for extension of time to appeal and stay of pending appeal?***
>
> ***iii. What is the order as to costs?***

69. On the first issue, the complaint is that provision of section 79 G CPR does not provide for filing an application to seek leave to appeal out of time. The procedure, as provided in the proviso above, is to file the appeal and then seek to have it admitted out of time. With respect the same provision does not say that appeal should be filed before one seeks extension of time.

70. The proviso to the same section stipulates that;

> ***"….. provided 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."***

71. In the case of **<u>Samuel Mwaura Muthumbi –Vs- Josephine Wanjiru Ngugi & Another [2018] eKLR</u>** the court held;

> ***"I will begin by dealing with this aspect of the Respondent's complaint. I am aware of this line of cases by the High Court on this question. I have, however, taken a different view of the provision. I do not take the phrase "an appeal may be admitted out of time" to mandatorily require that a party who is late to file an appeal must first file it and then approach the Court for the filed appeal to be admitted out of time. At best I find such a constrained reading of the statute to be an impermissible raising of a procedural technicality above substance.***
>
> ***At worst, that reading of the statute is not in accord with our practice and may be out of place with the "mischief rule" of statutory interpretation in this case. It appears obvious that the intention of the statute was to provide a mechanism for a party who did not, for good cause, file an appeal on time, to approach the Court to be allowed to file such an appeal. To deny such a party leave to file the appeal merely because they did not, first, file the appeal which would have been, in the first place, out of time as a way of preserving their right to approach the Court seems a touch too formalistic for our jurisprudence in this day and age."***

72. The provision does not outlaw seeking extension of time before lodging an appeal out of time. It is trite that in an application contemplated herein, one seeks to sway court to exercise its discretion his favour by way of adducing sufficient reasons as to why appeal was not lodged within stipulated time.

73. Under **Order 50, Rule 6 of the Civil Procedure Rules**, the court has power to enlarge time **"upon such terms as the justice of the case may require…"**

74. On the defects of the supporting affidavit, the court notes the complaint is that In respect of the first defect, the deponent states that she swears the supporting affidavit in her capacity as the claims director at Direct-line Assurance Company Limited.

75. It is deposed that the said company is the insurer of motor vehicle registration number KBV 225X, at whose instance the suit is being defended. This is not true as from annexures 'PJK – 2' and 'PJK – 4' it is clear that the motor vehicle insured by Direct line is motor vehicle registration number KBM 688J.

76. Certainly, there is no nexus between the deponent and motor vehicle registration number KBV 225X. Clearly, the deponent lacks capacity to depose to the supporting affidavit.

77. The court agrees with the Respondent as the record shows as much. The Applicant has not rebutted the same nor sought to explain the defects.

78. The Applicant has not sought to cure the same but have kept mum. Parties are bound by their pleadings and it is not courts mandate to modify, amend or correct the same for the parties.

79. In the case of in **<u>Independent Electoral and Boundaries Commission & Anor –Vs- Stephen Mutinda Mule & 3 others (supra)</u> cited with approval the decision of the Supreme Court of Nigeria in <u>Adetoun Oladeji (NIG) Limited –Vs- Nigeria Breweries PLC SC 91/2002</u> where Pius Adereji, JSC** expressed himself thus on the importance and place of pleadings:

> ***"... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."***

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80. Thus the court is left with no option but to hold that; **the same affidavit plus the application it supports cannot stand and are hereby struck out with no orders as to costs.**

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

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C. KARIUKI

JUDGE