



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISC CIVIL APPLICATION NO. 37 OF 2017

WILLIAMSON TEA KENYA LIMITED APPLICANT

VERSUS

MARAGARET ACHIB RESPONDENT

RULING

1. The parties to this application were the defendant and plaintiff respectively in **Kericho CMCC No. 306 of 2016**. The plaintiff alleged in her claim that she was an employee of the defendant and that on 17th August 2015, while in the course of her duties, she sustained injuries as a result of a snake bite on her leg. She alleged negligence on the part of the defendant as well as breach of statutory duty under common law and contract and claimed damages for the injuries sustained as a result of such negligence and breach of duty.

2. From the record of proceedings before the trial court, it would appear that the defendant, the present applicant, was not in court when the suit came up for hearing on 20th June 2017. It also appears from the record that the court, satisfied that there was evidence of service, permitted the plaintiff to proceed ex parte. Counsel for the plaintiff, Mr. Mbeche, prayed that the defendant's case be deemed as closed as the defendant was absent. The court therefore proceeded to close the defendant's case and to give a date to confirm the filing of submissions. Thereafter, by its judgment dated 25th July 2017, the court entered judgment for the plaintiff for Kshs 80,000 in general damages and special damages of Kshs 6,500. She was also awarded the costs of the suit, and interest,

3. It is this judgment that has precipitated the present application, which is brought by way of Notice of Motion dated 12th September 2017 and filed under certificate of urgency. In the said application, the applicant seeks the following orders:

(a) That this application be certified as urgent and service of the same be dispensed with in the first instance.

(b) That this application be heard and stay of execution of the Honourable Court's Judgment/Decree dated 25th July 2017 in Kericho CMCC No. 306 of 2016; Margaret Achib vs Williamson Tea Kenya Limited be granted ex-parte in the first instance pending inter partes hearing and determination of this Application.

(c) That this Honourable Court be pleased to enlarge time and grant the Applicant leave to file an appeal out of time against the Judgment/Decree dated 25th July 2017 in Kericho CMCC No. 306 of 2016; Margaret Achib vs Williamson Tea Kenya Limited.

(d) That there be a stay of execution of the aforesaid Judgment/Decree pending the hearing and determination of such appeal as may be preferred against the said Judgment/Decree upon leave being granted by this Honourable court.

(e) That the costs of this application be provided for.

4. The application is brought under **Order 51 Rule 1, Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules and section 3 and 3A and Section 79 G of the Civil Procedure Act**. It is supported by an affidavit sworn by Ms. Lydia Njuguna, the Legal Officer of ICEA Lion, the insurers of the applicant, on 12th September 2017. Ms. Njuguna deposes that on 2nd March 2017 they received a mention notice from the firm of S.B. Mbeche dated 23rd January 2017 informing them that the matter had been fixed for mention on 28th February 2017. In the circumstances, they were perturbed that judgment had been delivered in the matter without it even going for pre-trial directions.

5. Ms. Njuguna further deposes that judgment was delivered in the matter on 25th July 2017 in the absence of their advocates because they had not been served with any notice pertaining to the suit. They only became aware of the judgment when they received a letter dated 21st August 2017, which was received in their offices on 11th September 2017, more than a month after the judgment had been delivered. She contends that the judgment in the matter is therefore unprocedural and unfair, and the applicant is seeking that it should be set aside and/or quashed and that the court orders that the matter does proceed for full trial as provided under the Civil Procedure Act and Rules.

6. Following the said application, the court (Odero J), after hearing the application ex parte on 13th September 2017, granted a temporary stay of the judgment pending inter partes hearing and determination of the application.

7. In a further affidavit sworn in support of the application on 13th October 2017, Ms. Njuguna avers that the mention notice for the 28th of February 2017 was received after the mention date stated in the notice. The applicant's advocates on record could therefore not possibly have been in attendance in court. It is also her averment that Counsel for the respondent did not invite the applicant's advocates to fix a mutually convenient date for the hearing of the matter, nor did they serve any dates upon the advocates on record. There was no correspondence between the parties after the first mention notice was received by the applicant's advocates on record.

8. It is her further averment that the trial court proceeded to hear the matter without verifying that the defendant had been served or was even aware of the proceedings; that the court closed the defence case without giving the defence a chance to put forward its case; that the plaintiff maliciously failed to serve the hearing notice upon the defendant and purported to file an affidavit of service, and in the circumstances the matter proceeded unprocedurally and illegally and should be set aside and/or quashed.

9. In opposition to the application, the plaintiff/respondent filed an affidavit in reply sworn on 25th September 2017. It is her deposition that the present application is inept, frivolous and an abuse of the court process, and that she followed all due process in prosecuting her suit until it was determined. The respondent observes that as stated at paragraph 7 of the affidavit of Ms. Njuguna, the applicant admits to having received a mention notice for 28th February 2017 from the respondent but did not disclose that it did not attend court on that date. The respondent annexes a copy of the mention notice for that day. I note from the annexure, 'MA1', that the receipt stamp indicates that it was received by the defendant/applicant's Counsel on 2nd March 2017. The notice indicates that the matter was coming up for mention on 28th February 2017.

10. Ms. Achib further deposes that a hearing notice for 20th June 2017 was served upon the applicant through registered post on 29th March 2017 but the applicant did not appear for the hearing. She annexes a certificate of posting dated 29th March 2017 as well as the hearing notice dated 28th March 2017. She avers that the application for stay of execution and for leave to file an appeal out of time is only meant to deny her the fruits of her judgment.

11. In accordance with directions issued on 16th October 2017, the parties have filed written submissions which I have duly considered alongside the respective averments of the parties.

The Applicant's Submissions

12. In submissions dated 23rd October 2017, the applicant contends that the application requires the court to consider two issues for determination. First, the grounds for enlarging time and granting leave to file an appeal out of time and secondly, whether the application has been made without unreasonable delay.

13. With respect to the first issue, the applicant relied on the decision in **Stanley Kahoro Mwangi & 2 others vs Kanyamwi Trading Company Limited [2015] eKLR** with regard to the principles that should guide a court in considering an application for leave to file an appeal out of time. Its case was that it was not aware that judgment had been entered against it in the matter as no notice of judgment was ever served upon it. It was therefore not given an opportunity to participate in the proceedings in the lower court despite the fact that it had Counsel on record.

14. The applicant reiterated the averments of Ms. Njuguna that it had only learnt of the judgment from a letter seeking payment of the decretal amount. It had then moved swiftly and made the present application, but by then the time within which to file an appeal had lapsed. The applicant prayed that the court exercises its discretion and grants it leave to file an appeal out of time as it was not the cause of the delay. It relies on the case of **Edward Njane Nganga & Another vs Damaris Wanjiku Kamau & Another [2016] eKLR** and **Edward Kamau & Another vs Hannah Mukui Gichuki & Another [2015] eKLR**.

15. The applicant also cites section 79 G of the Civil Procedure Act and the Supreme Court case of **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others SC Appl 16/2014** where the court set out the principles that a court should consider in the exercise of discretion to extend time. Its submission was that it had shown good and sufficient cause for not filing an appeal in time and therefore asks the court to grant it leave to file the appeal out of time.

16. With regard to the second issue, whether the application has been made without unreasonable delay, the applicant's submission was that it had made the present application on 12th September 2017 whilst the judgment was delivered on 25th July 2017. This was slightly more than 30 days from the date of the judgment, and the delay was due to the fact that it was only made aware of the judgment on 11th September 2017. Immediately it had become aware of the judgment, it had filed the present application and served the respondent.

17. The applicant submits, in reliance on the case of **Winfred Nyawira Maina vs Peterson Onyiego Gichana [2015] eKLR**, that substantial loss may result if the orders sought are not granted as it faces a real danger of execution, which would highly prejudice its business and result in loss and embarrassment.

18. It is also its submission that should it succeed in its appeal, it stands to suffer substantial loss which it may not be able to recover from the respondent as she is not engaged in any known economic activity and may not be able to pay back any sums paid out to her, which will render the appeal nugatory.

19. The applicant further submits that the appeal that it intends to lodge raises weighty issues of law and fact as enumerated in the draft memorandum of appeal annexed to its application. It is also its case that it is willing to furnish such security as may be directed by the court.

The applicant urges the court to exercise its discretion to order a stay of execution of the judgment delivered on 25th July 2017 and make other consequential orders to avoid a miscarriage of justice.

Submissions by the respondent

20. In her submissions in reply dated 24th November 2017, the respondent argues that she had served the mention notice for the 28th February 2017 on the appellant. Her submission was that if indeed the applicant had received the mention notice late, it should have made a follow up to ascertain what transpired on 28th February 2017.

21. With respect to service of the hearing notice, the respondent's position was that she had served the notice by registered post on 29th March 2017. The hearing was scheduled for 20th June 2017. The notice had been served close to 2½ months before the date which was slated for hearing. Her submission was that Order 12 Rule 12 (a) requires that where the defendant is absent, if the court is satisfied that the hearing notice was duly served, it may proceed to hear a matter ex parte, which the court did on 20th June 2017. She submitted that she stood to suffer great prejudice if the orders sought are granted, and further, that the application is premature as the respondent has not extracted a decree. The applicant had an obligation to demonstrate that it had met the principles for grant of stay of execution, which in her view the applicant had failed to do. The respondent therefore prayed that the application be dismissed with costs.

Analysis and Determination

22. I believe that two issues arise for consideration in this matter. First, whether the applicant is entitled to stay of execution pending appeal and secondly, whether the court should grant the applicant extension of time to file the appeal. I note that a mention notice for 28th February 2017 had been served on the applicant, but it was received on 2nd March 2017. There was therefore no proper notice to the applicant of the mention of the matter scheduled for 28th February 2017.

23. I note, secondly, that a hearing notice was served by way of registered post. While the rules do provide for such a mode of service, it is not clear why the respondent elected to pursue this mode of service, given that there was an address for service of process on record. With this in mind, I turn to consider the issues that arise in this application.

Stay Pending Appeal

24. With respect to the grant of orders of stay pending appeal, Order 42 Rule 6 of the Civil Procedure Rules as follows:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.

25. Whether or not to grant an order of stay of execution is discretionary. However, such discretion must be exercised in accordance with the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules. These are that the application must be made without undue delay, and the applicant must demonstrate that substantial loss will result unless the order sought is granted. The applicant must also provide such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant.

26. In its decision in **Housing Finance Company of Kenya vs Shark Kher Mohamed Ali Hirji & another [2015] eKLR**, the Court of Appeal stated as follows:

“16. In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded. In our view, the balance tilts in favour of the applicant in this application.”

27. Where, as in this case, the decree sought to be stayed is a money decree, in considering whether a money decree or a liquidated claim would render the success of an appeal nugatory, the Court of Appeal observed in **Kenya Hotel Properties Ltd vs. Willesden Properties Ltd** that:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on

the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all.”

28. I am satisfied that in this case, the applicant filed the application for stay within reasonable time. The judgment in the matter was delivered on 25th July 2017, while the present application was filed on 12th September 2017. According to the applicant, it was only made aware of the judgment on 11th September 2017.

29. The law requires that a balance be struck between the interests of the decree holder and the judgment debtor. The applicant argues that the respondent may not be able to repay the decretal sum once it is paid to her. Its contention is that it therefore stands to suffer substantial loss which it may not be able to recover as the respondent is not engaged in any business activity.

30. From the facts of this case, I am satisfied that the interests of justice require that the applicant be granted an opportunity to present its appeal. That requires, in my view, also safeguarding the interests of the decree holder. The decree holder was an employee of the applicant, and it is not certain that she would be in a position to repay the decretal sum should the appeal be successful. I am therefore satisfied that the interests of justice lie in an order for stay of execution pending appeal.

Extension of time

31. The applicant has offered to deposit such security as the court may direct. The orders that commend themselves to me in this regard is that the applicant does deposit the decretal sum in a joint interest earning account in the names of the Advocates for the applicant and the respondent.

32. The applicant seeks extension of time to file its appeal out of time. It is submitted on its behalf that it was not aware that there was a judgment against it, and had not been given an opportunity to participate in the proceedings.

33. Section 79 G of the Civil Procedure Act provides as follows with respect to the filing of appeals from subordinate courts:

“79G. 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. “

34. The court has discretion to extend time for filing an appeal, but an applicant for extension of time must satisfy the court that such orders are merited. In **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others, SC Appl 16/2014**, the Supreme Court set out the principles that a court should consider in deciding whether or not to grant extension of time. The court noted that extension of time is not a right but an equitable remedy that is only available to a deserving party at the discretion of the court.

35. A party seeking extension of time has the burden of laying a basis to the satisfaction of the court. The court will consider whether or not to grant extension of time on a case to case basis, and in doing so, will consider whether the applicant has good reason for the delay in taking the action for which extension of time is sought. The court will also consider whether any prejudice will be caused to the opposing party if the extension is granted and finally, the application should have been brought without undue delay.

36. The applicant in this case has explained the reason for the delay in filing its appeal. It has brought the present application as soon as reasonably possible after the judgment delivered against it was brought to its attention. I believe that the applicant has satisfied the conditions for extension of time to file its appeal.

37. Accordingly, the applicant’s application dated 12th September 2017 succeeds and is allowed on the following terms:

i. That the applicant be and is hereby granted leave to file an appeal out of time against the judgment/decreed dated 25th July 2017 in Kericho CMCC No. 306 of 2016-Margaret Achib vs Williamson Tea Kenya Limited;

ii. That the said appeal to be filed and served within sixty (60) days hereof;

iii. That there be a stay of execution of the aforesaid judgment/decreed pending the hearing and determination of such appeal as may be preferred against the said judgment/decreed;

iv. That as a condition precedent to prayer (i) and (ii) above, the entire decretal sum in Kericho CMCC No. 306 of 2016-Margaret Achib vs Williamson Tea Kenya Limited to be deposited within fourteen (14) days hereof in an interest earning account in the joint names of the advocates for the parties hereto;

v. That in default of prayers ii and iv hereof, the respondent to be at liberty to execute;

vi. That the applicant to meet the costs of this application.

Dated, Delivered and Signed at Kericho this 3rd day of October 2018

MUMBI NGUGI

JUDGE