



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 24 OF 2018

XPLICICO INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

MARY NTHAMBI MUTUA.....RESPONDENT

R U L I N G

1. By a Notice of Motion filed on 22nd February 22nd February, 2018, the Respondent/Applicant sought the following orders:

1. That the Memorandum of Appeal herein dated 14th February, 2018 and filed in court on the same day be struck out for being incompetent having been filed outside the period specified by an order of this Honourable Court issued on 6th February, 2018 in Miscellaneous Civil Case No. 18 of 2018 Mary Nthambi Mutua vs Explico Insurance Company Limited.

2. That the orders issued in the said Miscellaneous Civil Suit No. 18 of 2018 staying the execution of the Decree issued in Thika Senior Magistrate's Court no. 773 of 2017 Mary Nthambi Mutua vs Explico Insurance Company Limited be lifted.

2. The Application is premised on grounds that this court issued an order on 6/2/2018 granting time to the Appellant to file an appeal within 7 days of the said order and the Appellant defied the said order.

3. Mary Nthambi Mutua swore a supporting affidavit as the applicant herein. She deponed that the Appellant was granted leave to file its Memorandum of Appeal out of time and within 7 days of the said order. That the appellant did not file the said appeal and in the circumstances the appeal on record having been filed after the expiry of the 7 days, is incompetent and ought to be struck out.

4. **Bessy D. Owiti** swore a replying affidavit on behalf of the appellant. She deponed that the court gave the time extension orders on 6/2/2018 and 7 days were to lapse on 13/2/2018. That during this period he was on leave only to return on 14/2/2018 and discover that his clerk had not filed the memorandum of appeal. That he immediately gave instructions for the filing and the delay is only one day and the applicant will not suffer any prejudice or loss. He stated that the appeal has high chances of success and it is fair and just that the court dismisses the Respondent's application.

5. Subsequently, the Appellant/Applicant filed a Notice of Motion on 3/4/2018 seeking the following orders:-

a)

b) That the garnishee order nisi dated 15/3/2018 be stayed pending hearing and determination of this Application.

c) That time for complying with the orders issued by the Court on 6/2/2018, be enlarged to enable the Applicant to comply with the same.

6. The application is premised on ground *inter alia* that the Respondent has obtained a garnishee order nisi for the sum of Ksh. 3,462,776/=. **Nelson Chege** swore a supporting affidavit on behalf of the Appellant/Applicant. To the effect that the Respondent had obtained an illegal garnishee order nisi of Ksh. 3,462,776 against the appellant. He explained that the Appellant had failed to pay the full decretal amount as she is going through financial difficulties and thus the request to the court to enlarge time for the appellant to comply with the court orders. That no prejudice will be caused to the Respondent if the orders sought are granted.

7. **Charles Ngugi** swore a replying affidavit on behalf of the Respondent. He deponed that the Appellant/Applicant had disobeyed the court orders and therefore execution ensued. He disputed the allegation that the Appellant has been going through financial crisis and asserted that in any event the court is not dealing with garnishee proceedings.

8. The parties agreed by consent that the two applications be disposed off by way of written submissions. The Appellant submitted that it had complied with the order of the court requiring them to deposit Ksh. 1,462,776/= albeit one day late. In regard to the appeal being filed one day late counsel for the Appellant submitted that it was due to a technicality on their part. He referred the court to Article 159(2)(d) of the constitution. Counsel submitted that their appeal is merited and has high chances of success as it is set to argue the question of the quantum limit that is to be paid by an insurance company found liable. Reliance was placed on the case of *Law Society of Kenya vs Attorney General Nbi Petition No. 148 of 2014(2016) eKLR, Africa Merchant Assurance Company Limited vs William Muriithi Kimaru suing as administrator of estate of Patrick Kuira Muriithi (Deceased) 2016 and Justus Mutiga & 3 others vs Law Society of Kenya & Another*. In conclusion, counsel contended that they have fully complied with the orders of the court and urged the court to dismiss the respondent's application and set down the appeal for hearing.

9. Counsel for the Respondent submitted that their application should be allowed as the appellant disobeyed the orders of the court by failing to file the same within 7 days as ordered by the court. Counsel contended that the appeal does not stand a chance of success because Section 5(b)(iv) cap 405 Laws of Kenya was declared unconstitutional. Reliance was placed on the *Civil Appeal No. 141 of 2016*. In the end counsel urged the court to dismiss the Appellant's application and order that the remaining part of the decretal sum be released to the Respondent.

10. The court has considered the material canvassed in respect of the two Motions. Regarding the Motion filed on 22nd February, 2018, it seems that the Applicants did not peruse the court file prior to filing it. The memorandum of appeal was filed on 14/2/18 pursuant to orders of **Ngugi J** on 6th February, in **Misc. Civil Case No. 18 of 2018**.

11. On the record herein are proceedings before **Ngugi J** on 21/2/18, and the Judge's order to the following effect:

“COURT: The court notes that the memorandum of appeal was filed within the time stipulated. Further mention on 23/05/18 to confirm filing of the Record of Appeal.”

12. This court cannot sit on appeal on the above order of **Ngugi J**. Moreover the Motion filed on 22nd February 2018 is not seeking the review or setting aside of the said orders. Evidently, the Applicants were unaware of the order made in respect of the Memorandum of Appeal on 21st February 2018. Nothing more need be said concerning the Motion filed on 22nd February 2018. The Motion is accordingly disallowed.

13. Turning now to the Motion filed on 3rd April 2018, the same also arises from the orders of 6th February 2018 in the miscellaneous proceedings granting conditional stay of execution and leave to appeal out of time, *inter alia*, to the Appellant. The outstanding prayer is for the enlargement of time to comply with the orders made on 6th February, 2018. While the prayer does not state expressly what limb of the orders of 6th February 2018 contemplated, the parties' affidavits and submissions are riveted on limb 2 which required the payment of KShs.2 million within 30 days to the Respondent, and limb 5 regarding the filing of the memorandum of appeal.

14. As at 5th April 2018 when the Respondents affidavit was sworn, it was admitted that a sum of KShs.1,750,000/= had been paid albeit outside the period stipulated in the order. The Appellant explaining that it had been undergoing financial difficulties and that the typed proceedings in the lower court case had been obtained as at 3rd April, 2018. The record of appeal was lodged in court on 4th May, 2018. It would appear therefore that in terms of limb 7 of the order of 6th February, 2018, the Respondents were entitled to press on with execution effective from 6th March 2018. Thus, the garnishee proceedings in the lower court.

15. While the delay in filing the record of appeal may be easily attributed to the fact that the Appellant had to first obtain proceedings of the lower court, it is difficult to accept the assertions by the Appellant that it was experiencing financial difficulties during the material period. Annexure **MNM1** to the Replying affidavit of the Respondent appears to suggest otherwise. The annexure is an affidavit by the manager of the Appellant's bank confirming that as at 15th March, 2018, the Appellants account held the sum of KShs.2,404,783.59 and that the balance as at 9th April 2018 stood at KShs.3,589,959.59.

16. The power of the court to enlarge time for the taking of any step or action is discretionary and a party seeking the exercise of the court's discretion in its favor must demonstrate sound reasons and grounds. Moreover, the successful applicant ought to explain the delay. The court must satisfy itself that the delay is not unreasonable or prejudicial to the Respondent [see **Nicholas Kiptoo arap Korir Salat v IEBC & 7 others [2014] eKLR**]. And this, notwithstanding the fact that the court's discretion under Section 95 of the Civil procedure Act is unfettered.

17. The Appellant's application was brought almost a month since the expiry of the time stated in limb 2 of the order of the court dated 6th February, 2018 and 12 days after the lapsing of the period stipulated in the order for the filing of the record of appeal (limb 5). The delay is not inordinate, in the circumstances. Even so, it was not until 4th May, 2018 that the record of appeal was filed – a delay of about 42 days, which has been attributed to the time taken to obtain the typed proceedings. In absolute terms this delay is not entirely inordinate given constraints in most lower courts in providing typed proceedings to parties.

18. It is admitted that by 8th March, 2018, a sum of KShs.1,462,776 had been deposited into court by the Appellants and the total deposited sum stood at KShs.1,750,000/= by the 3rd April 2018. Yet, there is uncontroverted evidence by the Respondents that the Appellants were possessed of adequate funds in the Garnishee bank during that period. The reason for the failure therefore, in making the payments on time must lie elsewhere and not in alleged financial constraints per se. It must be noted however that the judgment under execution was passed on 5th December, 2017 and a portion of the decretal sum had been already paid out by the Appellant three months later.

19. In my view, the delay by the Appellants in making full payment in accordance with the order of 6th February 2018 ought to be taken within the context of the matter and not merely within the confines of this appeal, but bearing in mind that the Respondent is entitled to the

fruits of her judgment. The Appellant has not acquitted itself admirably in explaining its delay in complying with the court's order of 6th February, 2018. Balancing one thing against another, and in the interest of doing justice between the parties, this court will reluctantly extend the time stipulated for the filing of the Record of appeal and deem as properly filed, the Record of appeal already on the court record.

20. Further, the court will extend time for full compliance by the Appellant with limb 1 and 2 of the order of 6th February, 2018. For the avoidance of doubt, the Appellants must be in full compliance by close of business on 18th October, 2018. In default execution shall proceed. In light of all the foregoing the Appellants will pay all the costs occasioned by the application filed on 3rd April 2018.

DELIVERED, DATED AND SIGNED AT KIAMBU THIS 12TH DAY OF OCTOBER 2018

C. MEOLI

JUDGE

In the Presence of:

For the Appellant –Mr. Kingangi holding brief for Mr. Owiti

For the Respondent – No appearance

Court Clerk – Kevin