REPUBLIC OFKENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCALLANEOUS APPLICATION NO. 259 OF 2018

ALLAN MUSEVE.....DEFENDANT/APPLICANT

VERSUS

ALFRED MUEMA MWANZIA.....PLAINTIFF/RESPONDENT

RULING

The applicant was the defendant in a suit filed by the respondent who was the plaintiff in the lower court. The suit in the lower court was based on a road traffic accident that took place on 29th November, 2010. The respondent is said to have sustained some injuries and blamed the applicant herein.

After the accident the applicant states that he reported the matter to Invesco Assurance Company Limited through their agent, Gosure Insurance Agency, which had covered his car registration No. KAR 152T which is said to have collided with motor cycle registration No. KMCA 785A which at the time of the accident was being operated by the respondent.

After the applicant forwarded the documents to his insurance company, he must have assumed that the insurance company will instruct counsel to take up the matter. This was not to be, until he was served with a notice to show cause why he should not be committed to civil jail, for failing to pay the decretal sum against him.

It is at this point that he noticed proceedings had been conducted against him in his absence. He then made an application to the lower court for leave to file a defence to the respondent's claim, which leave was granted on condition that he deposited Kshs. 1,627,392.33/= in court within 30 days from the date of the order, that is 21st February, 2018.

Aggrieved by the said order, he filed a Memorandum of Appeal dated 11th April, 2018 and at the same time, filed this application dated the same day, for orders that he be granted leave to file appeal out of time and that there be a stay of execution of the order of the lower court dated 21st February, 2018 pending the hearing of the appeal.

The application is by way of Notice of Motion under Order 50 Rule 6 and Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, Sections 1A, 1B, 3A, 79 G and 95 of the Civil Procedure Act. The grounds for seeking the foregoing orders are set out on the face of the application alongside an affidavit sworn by the applicant. The application is opposed and there is a replying affidavit sworn by the respondent herein. Both parties have filed submissions and cited some authorities which I have considered.

The orders sought are discretionary, which discretion has to be exercised judicially. It is clear from the material presented and which has not been seriously disputed that the applicant was not to blame for not filing a defence to the claim in the lower court. I entertain no doubt that, that is the reason why indulgence was extended to him to file the defence in the lower court upon his application dated 5th October, 2017.

The provisions of law cited are instructive and especially Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. I have computed the dates from the delivery of the ruling of the lower court on 21st February 2018 to 11th April, 2018 when this application was filed, and find that the slight delay in lodging the application is not inordinate and has been sufficiently explained in the affidavit and submissions on behalf of the applicant.

As to whether there may be any substantial loss, the threat to commit the applicant to civil jail is substantial loss if effected in view of his position as a police officer who may end up losing his job if stay is not granted. I also bear in mind that the decree herein was not rendered out of a contest but by way of a formal proof in which case the applicant's side of the story has not been heard by the court.

Additionally, I have considered what the applicant is likely to present in the form of defence to the claim as contained in the various annexures herein. Without saying much, there are serious triable issues which stand out and which may only be interrogated through a trial. That is to say, there is an arguable appeal and the applicant should be given an opportunity to be heard, otherwise the intended appeal mayl be rendered nugatory.

I have restrained myself from delving any deeper into the issues raised by both parties, except those that impact on the orders sought. I have balanced the interests of the parties herein, considered the fact that no prejudice has been demonstrated shall be visited upon the respondent, and that both shall have an opportunity of presenting their cases in the event the appeal is successful.

For now, I find it just and fair to stay the execution of the lower court decree and order of 21st February, 2018, which I hereby do, on condition that the applicant deposits a sum of Kshs. 50,000/= as security for costs only. This shall be done within 30 days from the date of this ruling. I further make an order that having filed a Memorandum of Appeal which is on record, the same is now deemed as filed provided that he pays the filing fees within the next 7 days. The costs of this application shall be in the cause.

Dated, signed and delivered at Nairobi this 6th day of November, 2018.

A. MBOGHOLI MSAGHA

JUDGE