



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 217 OF 2018

BESTFOAM COMPANY LIMITED.....APPLICANT

VERSUS

DAVID OPIYO OWUOR.....RESPONDENT

RULING

The Applicant has moved this court by way of a Notice of Motion dated 4th April, 2018 under Orders 22 Rule 22, 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders that; the court be pleased to extend time and grant the Applicant leave to lodge an Appeal out of time against the judgment and decree in CMCC No. 7126 of 2016 and that the court be pleased to order a stay of execution of the aforesaid judgment/decree pending the hearing and determination of the intended Appeal.

The application is based on the grounds set out in the body of the same and is supported by the annexed affidavit of Vitalis Juma Masinde Advocate, sworn on the 4th April, 2018 in which he depones that, judgment was given against the Respondent on 7th February, 2018 for Kshs. 800,000 and 2,000 in general and special damages respectively, together with the costs of the suit. That a request was made for the proceedings on the 12th February, 2018 to enable the Applicant prepare an Appeal but the same were not obtained until later in the month.

The deponent avers that by the time of filing the Application the Applicant's Advocate had not been supplied with a certified copy of the Decree/Order to facilitate the filing of the Memorandum of Appeal as required under Order 42, Rule 2 of the Civil Procedure Rules, 2010 and that though the Memorandum of Appeal is ready, time within which to file the same has lapsed.

He further depones that, there is no stay of execution and the Respondent can execute the decree any time. That the delay in filing the Appeal was due to the delay in obtaining the proceedings and the judgment and is not deliberate. He argues that the Applicant has a good Appeal with high chances of success but he is apprehensive that if a stay is not granted, the Applicant may not recover the decretal sum should the Appeal succeed.

He avers that the Applicant is ready and willing to comply with such reasonable conditions that this Honourable court may grant, to enable it pursue its Appeal. That, no prejudice will be suffered by the Respondent that cannot be compensated by way of costs if the application is granted.

The application is opposed by way of a replying affidavit sworn by David Opiyo Owuor. He has deponed that the Application should be dismissed as the applicant has not satisfied the requirements for either a stay of execution or leave to Appeal out of time and that no sufficient reason has been given to explain why the applicant failed to file their Memorandum of Appeal within the stipulated time.

He avers that the applicant did not require copies of the Decree and order appealed against in order to file a Memorandum of Appeal and that the delay in filing the Memorandum of Appeal is inexcusable under the circumstances. That the Applicant does not deserve the orders sought for the following reasons;

I. That the grounds of Appeal do not elicit any triable issues in that the Applicant has offered to settle the matter at Kshs.500,000 and taking into account the contribution of 20% the only disputed amount is Kshs.141,600 plus costs.

II. That the contention that the Applicant's submissions were not considered is untrue because in the judgment, the learned magistrate noted that the applicant did not attach or provide a medical report by Dr. Waithaka.

III. That on allegation that the Applicant's authorities were not considered, it's not true as the same were considered and the learned magistrate applied his discretion in arriving at his judgment.

The Respondent contends that he shall suffer injury if leave to Appeal is granted due to the reasons that; the original suit was filed in 2015 and he has waited for over three years for the court process to be finalized while he is suffering and hence any further delay will cause irreparable injury to him. He further avers that the delay in bringing the application is unreasonable, the same having been brought two months after the judgment was delivered.

He depones that, as advised by his Advocate on record, extension of time for a party to file Appeal out of time is not a right but an equitable remedy which is only available to a deserving party at the discretion of the court and that the applicant has not discharged the burden for the basis of extension of time and the same should be declined.

That, if the court is inclined to issue a stay of execution and leave to file Appeal out of time, a sum of Kshs.500,000 be paid to him and the balance be deposited in an interest earning account in the joint names of both advocates pending the hearing and determination of the Appeal.

The Application was disposed of by way of written submissions which the court has duly considered.

It is trite that the discretion of the court to extend time is indeed unfettered but it is incumbent upon the applicant to explain the reasons for the delay in making the application for extension and whether there are extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.

The Supreme Court in the case of Nicholas Kiptoo Arap Korir Vs. I.E.B.C. & 7 others (2014) eKLR considered the principles for extension of time and it derived the following as the principles:

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.*

The delay in this case was by two months and the reason given was the delay in obtaining typed copies of proceedings and the judgment. As rightly submitted by the Respondent, the Applicant did not require certified copies of the proceedings and the decree for it to file the Appeal. I find that the delay is inordinate and no good reason has been given for the delay.

On stay of execution, Order 42 Rule 6 of the Civil Procedure Rules sets out the following conditions;

- (a) The Applicant has to show that substantial loss will result unless stay of execution is granted.**
- (b) The application has to be made without undue delay.**
- (c) The Applicant has to offer security for performance of the decree.**

As already pointed out, the delay was inordinate and not sufficiently explained. Though the Applicant has offered to comply with any conditions that the court may impose, the court notes that no substantial loss has been alleged and in any event, the intended Appeal is only on quantum as parties recorded judgment on liability at 80%:20% in favour of the Respondent.

The Respondent has also annexed a letter dated 11th April, 2018, wherein the Applicant has offered to settle the matter at Kshs.500,000. The letter is not on a without prejudice basis. That being the case and taking into account the contributory negligence of 20% on the part of the plaintiff, the disputed amount is minimal.

In the premises, I find that the application dated 4th April, 2018 has no merits and the same is hereby dismissed with costs to the Respondent.

Dated, Signed and Delivered at Nairobi this 8th day of November, 2018

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L. NJUGUNA

JUDGE

In the presence of:-

.....**For the Applicant**

.....**For the Respondent**