



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 9 OF 2012

SABINA NYAKENYA MWANGA.....PLAINTIFF/RESPONDENT

VERSUS

PATRICK KIGORO.....1ST DEFENDANT/APPLICANT

TELCOM (K) LTD.....2ND DEFENDANT/APPLICANT

RULING

1. This is a ruling on the defendants applicant's notice of motion dated 21/9/2016. It seeks for enlargement of time to deposit half of the decretal amount in an interest earning account as was ordered by the court by consent of the parties on 5/4/2016.
2. The application is supported by the affidavit of one Lawrence Karanja Legal Officer of the 2nd defendant which explains the reasons for delay in depositing the amount. The plaintiff/respondent opposed the application in her grounds of opposition filed on 26/09/2016.
3. The facts leading to this application are that the plaintiff/respondent was awarded special and general damages by this court on 22/10/2015 amounting to Kshs.4,215,683/= plus interests and costs. In an application dated 15/2/2016 the applicant was granted orders for stay pending appeal and was ordered to deposit half of the decretal amount in an interest earning account in the joint names of the advocates for the parties within 30 days. The applicant failed to comply with the order within the time given thus giving rise to this application.
4. The applicant explains that there arose a disagreement between the 2nd defendant and its insurers APA Insurance Co. Ltd on the amount the insurance company was to pay. The company first paid a cheque of on Shs.800,000/=. After a series of meetings, the parties reached an amicable agreement and a further sum of 2,183,577/= was paid. These sums were paid directly to the respondent.
5. The insurer is said to have paid only the funds not contested in the appeal. However, it was explained that the intended appeal will revolve on the subject of the contested special damages. Having paid about half the decretal amount to the respondent, the applicant pleads that he acted in good faith and deserves the exercise of the discretion of this court in enlarging time.
6. The respondent opposes the application on grounds that the respondent is just buying time since he has already settled more than half of the decretal amount and has not filed the appeal since the orders were issued. It is also argued that the orders were to lapse automatically in the event that the applicant failed to comply. It is clear now that the applicant chose to clear the decretal amount rather than filing an appeal. For these reasons, the respondent argues that the applicant has not shown that he deserves the orders

sought.

7. The relevant law is Section 95 of the Civil Procedure Act and Order 50 Rule 6 which gives the court unfettered discretion to extend time.

8. The applicant argues that an appeal is deemed to have been filed when a notice is filed and served as per the provisions of Order 42 Rule 6(4). This is the correct position in the rules but the applicant knows very well that after the filing and serving of the notice, the party intending to appeal ought to take the next step of filing and serving the memorandum. There can be no appeal without filing the memorandum of appeal followed by service on the respondent. This has not been done since the 15/4/2016 when the orders were issued. Yet, no explanation for the delay has been given by the applicant.

9. The applicant chose to pursue payment of the decretal amount and took no action in regard to the appeal. One of the orders given by the court on 25/4/2016 read as follows:-

That the applicant fast-tracks the appeal and should serve the respondent with the memorandum of appeal and any other documents within 30 days in default of which the orders herein stand vacated.

10. This order was independent of the other orders relating to the deposit of the decretal amount. The applicant has explained the delay in depositing the amount within 30 days. However, he has completely ignored the order of the court in regard to fast-tracking the appeal. This order was made for a purpose namely the poor health condition of the applicant who surely needed to utilize the fruits of her judgment.

11. The delay in filing the appeal adversely affects the respondents health condition which the court observed during the hearing of the case.

12. Consequently, the orders for stay of execution were pegged on the fast-tracking of the appeal. Considering that the applicant has to file the appeal and has not even applied for extension of time in this regard, I am of the considered opinion that the applicant has lost interest in filing the appeal just as the respondent puts it in her submissions. This conduct portrays lack of seriousness on the part of the applicant in the appeal and in satisfaction of the decree.

13. As for the deposit of the decretal amount which is the subject of this application, the applicant relies on two cases whose facts are distinguishable from those of this application. In the case of **LONRHO MOTORS EA LIMITED (in receivership) VS INSURANCE COMPANY OF EAST AFRICA LTD Nairobi HCCC No. 184 of 2003**. The applicant in this decision successfully sought for orders for enlargement of time on ground that it had not been notified of the ruling of the court directing him to deposit funds.

14. In this application, the applicant had been granted stay and time lines to deposit part of the decretal amount which he was aware of and which has expired several months before filing this application. The orders resulted from the applicant's application for stay and the ruling was delivered in presence of a counsel holding brief for the applicant. There was another order for filing and serving the memorandum of appeal in this application which has also expired and has not been addressed in this application.

15. The 2nd case relied on by the applicant is that of **ELDORET GRAINS LIMITED VS NATIONAL CEREALS BOARD Eldoret HCCC No. 103 of 2009**, the case dealt with only one issue of enlargement of time. The difficulty of transferring the money was well explained to the court in this **Eldoret** case. The applicant had gone a step further to obtain banking details of the respondent's advocate. The application before the court had no other complication as compared to the issues in the application before me.

16. The applicant has explained the delay herein. However, even if this court was to give the orders sought, it would do so in vain for the order of filing the appeal and serving the memorandum was not complied with leading to automatic vacation of the stay orders granted on 5/04/2016. The stay orders have ceased to exist since 4/5/2016 when the 30 days expired and there are no orders for extension in

existence. The applicant herein has not sought extension non-existent.

17. The applicant has settled about three quarters ($\frac{3}{4}$) of the decretal amount and common sense prevails that it chose to settle the decree other than filing the appeal. I take judicial notice that since the application was filed up to the delivery of this ruling, more than three months have expired. Granting of ten (10) days to deposit the money would not therefore serve any useful purpose.

18. I find no merit in this application and I hereby dismiss it with costs to the respondent.

DATED, DELIVERED AND SIGNED THIS 25TH DAY OF JANUARY, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Ndorongo for Kariuki for defendant

Mr. Okwaro for Kathungu for respondent