



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISCELLANEEOUS APPLICATION NO.272 OF 2016

KENINDIA ASSURANCE COMPANY LIMITEDAPPLICANT

VERSUS

FRANCIS NGARUIYA KARIUKIRESPONDENT

RULING:

1. Kenindia Assurance company limited (hereinafter referred to as the Applicant) has filed a Notice of Motion dated 19th October, 2016 expressed to be brought under the provisions of Order 51 rule 1, Section 79G, 95 of the Civil procedure Act (cap 21 law of Kenya), Section 59 of the Interpretation and General Provisions Act (Cap 2 Laws of Kenya) and all other enabling provisions of the law. The suit is directed at the Respondent Francis Ngaruiya Kariuki and seeks the following prayers namely:-

(1) THAT there be stay of execution of the Ruling and Order of 19th August, 2016 and proceedings in Mavoko PMCC No. 177 of 2016, Francis Ngaruiya Kariuki Vs Kenindia Assurance Company Limited, pending the hearing and determination of the Application herein.

(2) THAT this Honourable court be pleased to grant the Applicant leave to lodge its Appeal against the Ruling of 19th August, 2016

(3) by Hon J. A. Agonda (Senior Resident Magistrate) in Mavoko PMCC. No. 177 of 2016, Francis Ngaruiya Kariuki Vs Kenindia Assurance Company Limited out of time.

(4) THAT there be stay of proceedings in Mavoko PMCC. No. 177 of 2016, Francis Ngaruiya Kariuki Vs Kenindia Assurance Company Limited pending the determination of the intended Appeal.

(5) THAT costs be provided for.

2. The Application is supported by an Affidavit of the Applicants Learned Counsel one Hellen Wairimu Njoroge sworn on 19th October, 2016 and further upon the following grounds namely:

(a) THAT the Advocate who had been handling the matter previously on behalf of the Applicant has since resigned from employment without notice.

(b) THAT the said Advocate had been handling all the Applicants legal briefs close to around 400 files.

(c) THAT following the departure of the said Advocate it was realized that the matter herein had been slated for pre-trial conference and it was further realized that there was a court order which had been issued on 19/08/2016 against the Applicant herein.

(d) THAT the fault of an Advocate should not be visited upon his client.

(e) THAT the applicant has a high chance of success should the Appeal be allowed to be lodged.

(f) THAT it is just that the Applicant's Application be granted.

3. The Applicant's Application was strenuously opposed by the Respondent on the following grounds:

(1) That granting leave to the Applicant to file Appeal out of time will prejudice the Respondent as the matter shall be delayed while the Respondents motor vehicle continues to waste at the hands of the Applicant.

(2) That the Ruling of 19/08/2016 did not determine the entire suit as contended by the Applicant.

(3) That the operational mistakes or errors experienced by the Applicant with their Advocates should not be visited upon the Respondents.

4. At the initial stages, the Applicant was granted stay of execution of the order dated 19/08/2016 pending interpartes hearing. Subsequently, both Learned Counsels appeared before Hon. Justice Ogola on 07/11/2016 wherein they agreed to have the interim orders extended and further that the Respondents motor vehicle registration Number KBC 304 G the subject matter of this suit, be released to the Respondent and the matter rescheduled to 15/11/2016. Come the 15/11/2016, the parties through their learned counsels entered into a consent whereby the interim orders staying proceedings at the Mavoko law Courts in PMCC. 177 of 2016, be discharged and any issues arising out of the said orders were to be addressed before Mavoko Law courts. It was further agreed that the issue of leave to appeal out of time by the Applicant be canvassed in this court by way of written submissions.

5. The Submissions:

Counsel for the Applicant has attacked the Ruling of the Senior Resident Magistrate dated 19/08/2016 at Mavoko law courts arguing that a final order had been made at interlocutory stage yet the main suit was yet to be heard. Counsel further submitted that due to some mistakes on the Advocate who was seized of the matter on behalf of the Applicant, they were unable to lodge the appeal within the stipulated 30 days hence the necessity of filing this Application. Counsel sought to rely on the provisions of section 95 of the Civil Procedure Act relating to courts discretion to enlarge time. He also relied on Order 50 Rule 6 of the Civil Procedure Rules. It was also submitted that the court should allow the Application pursuant to the provisions of Section 79 G of the Civil Procedure Act. Further the Application has been filed timeously and without undue delay. The Applicant now craves to be given an opportunity to ventilate its case on Appeal on merits. The case of **JAMES NDENGA NYAKWEBE & OTHERS VS JAIRO ATENYA ASIBA [2012] e KLR** was relied upon. Again the case of **PHILIP CHEMWOLO & ANOTHER VS AUGUSTINE KUBENDE [1986] KLR 492** was relied upon. Counsel finally submitted that the Applicants intended Appeal has high chances of success in that the lower court at Mavoko determined the whole suit in an Application yet the issues in the main suit had not been canvassed at all by the parties. In the same vein counsel sought for stay of proceedings in the lower court namely Mavoko PMCC 177 of 2016 so as not to render the intended appeal nugatory.

6. Counsel for the Respondent confirmed that indeed the provisions of Section 95, 79 G of the civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules vests the court with powers to exercise discretion to enlarge time.

Counsel further submitted that he agrees that the Honourable Magistrate may have erred in giving damages in an Application but that the Respondent has cured the mischief by procedurally proceeding with the matter and that the Respondent construes the error as expunged from the said Ruling and invites the court to find that the offending paragraph be expunged and therefore there is no need for an order of stay of proceedings. Finally counsel sought for the dismissal of the Application dated 19/10/2016 with costs.

7. I have considered both submissions of the learned counsels for the parties herein. Certain issues are not in dispute. Firstly that the Respondent's motor vehicle registration Number KBC 304 G has already been released to him. Secondly, that the main suit is now scheduled for hearing on the 17/04/2017. Thirdly, that the stay orders earlier issued have been discharged. The issues for determination are as follows:

(1) Whether or not the Plaintiff/Applicant has demonstrated that it merits to be allowed to lodge appeal out of time.

(2) Whether there will be any prejudice suffered by the Respondent.

8. In determining the above issues, it must be borne in mind that a court's discretion to extend time is unfettered and that it is incumbent upon the applicant to explain or give reasons for the delay in lodging appeal on time and further whether there are any extenuating circumstances that can enable the court to exercise discretion in favour of the Applicants. Thus extension of time is not a right of a party but an equitable remedy which is only available to a deserving party at the discretion of the court. A party seeking such a remedy has the obligation of laying a basis to the satisfaction of the court. An applicant should also demonstrate that he has moved the court without undue delay. In the case of **GYKA FUEL MART LTD VS BWANA MSHIR (SUNGURA MSA MISC. APP. NO. 40 OF 2013 e KLR** Justice Muya granted the Applicant leave to file appeal out of time after he had demonstrated that the intended appeal was arguable and not frivolous. The Applicant herein has in my considered view given a reasonable explanation as to why it was unable to lodge appeal within the stipulated period. It has explained that it is their then Counsel who let them down and who later resigned from employment and they were not able to know the position of the court case at Mavoko Law Courts. Moreover a perusal of the Ruling of the court showed that none of the parties were present in court when the same was delivered. Again the Applicant's application has been made without undue delay in that it was filed as soon as the Applicant came to learn about the same. Further the Applicant in its Affidavit and submissions by its learned Counsel that the intended Appeal is arguable and not frivolous is hinged on their claim that an award of damages had been made by the court when it ruled on the interlocutory Application yet the same ought to wait for the trial in the main suit. Indeed the counsel for the Respondent admits in his submissions that the court at Mavoko erred in awarding damages at interlocutory stage instead of reserving it for the trial of the main suit. The Respondent's counsel submissions that the said order be deemed expunged from the Ruling aforesaid is not tenable in law since Ruling is now a permanent court record and is the basis upon which the applicant seeks to lodge an appeal against. It is now not available for the Respondent to circumvent it but to leave it as it is for the scrutiny of the Appellate court.

As regards the second issue, I note that the Respondent has already taken possession of the suit motor vehicle registration Number KBC 304 G and therefore I do not see how the respondent stands to be prejudiced if the Applicant is given leave to file Appeal out of time. The Applicant is entitled to be given an opportunity to ventilate its case and it would be unfair and unjust to shut it out.

9. The upshot of the foregoing observations is that I come to the finding:

(a) That the Applicant's application dated 19th October, 2016 has merit.

(b) Leave to appeal out of time is granted to the Applicant.

(c) The appeal to be filed and served within fourteen (14) days from the date of this Ruling.

(d) Cost shall be in the cause.

It is so ordered.

Dated and delivered at Machakos this **9th** day of **February** 2017.

D. K. KEMEI

JUDGE

In the presence of:

Applicant: KASSAM ADV.....

Respondent ...MATHI ADV.....

C/A:.....MUNYAO.....