



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS CIVIL APPLICATION NO. 4 OF 2017

PAUL KITHINJI.....APPLICANT

VERSUS

OLYVINE KARWITHARESPONDENT

RULING

1. Before me is a Motion on Notice dated 2nd February, 2017 brought under Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Section 3, 3A, 63 (e) and 79 G of the Civil Procedure Act. The Motion seeks two prayers to wit, that pending the hearing and determination of the application, there be a stay of execution of the judgment and decree in Githongo SRMCC No. 4 of 2016 and that leave to appeal out of time be granted to the Applicant against the said decision.

2. The grounds upon which the motion was based were set out in the body of the Motion and the Supporting Affidavit of Paul Kirimi Kithinji sworn on 2nd February, 2017, and the Affidavits of Paul Kariba sworn on 2nd February, 2017 and 7th March 2017, respectively. These were that; judgment was delivered on 16th September, 2016 in favour of the Respondent for KShs.1,009,053/= plus costs; that the outcome was communicated to APA Insurance Company, the Insurer of Motor Vehicle Registration No. KBX 058 J, on the same day; that the advice was not received in the Insurers headquarters in Nairobi until 9th January, 2017 because it had been misplaced at the Insurers Meru Branch Offices. That on receipt of the advice the Insurer advised the Applicant's lawyers to engage those of the Respondent with a view to settle and that the intended appeal is arguable.

3. The Motion was opposed on the basis of the Replying Affidavit of the Respondent sworn on 13th February, 2017. The Respondent narrated how she had sustained permanent disabilities as a result of the accident the subject of the suit before the trial Court; that the Insurer had opted to negotiate on costs rather than file the appeal within time; that the present application was triggered by the threat of being reported to the Insurance Regulatory Authority was made by the Respondent's Advocates. It was further contended that the appeal was not arguable. That in any event, the Respondent's Insurer is in breach of the Insurance Act Cap 487, Laws of Kenya for failing to settle the judgment within 90 days.

4. I have carefully considered the Affidavits on record, the submissions of Learned Counsel and the authorities relied on. This is an applicant for leave to appeal out of time and for stay of execution. I will first deal with the prayer for leave to appeal out of time. The jurisdiction to appeal out of time is donated by Section 79G of the Civil Procedure Act. That power is discretionary. It cannot be exercised blindly or capriciously but within known rules. The principles under which that power is to be exercised were considered in the case of **Morrison M'tetu v James Irerinjagi and Grace Wanjiku Kanyiba (2016) e KLR** wherein Gikonyo J held:-

“The mandatoriness of an explanation of the delay is invariable in applications for extension of time despite the prospects of the intended appeal. On this point I am content to cite Omolo JA in the case of RELIANCE BANK LTD (In liquidation) and SOUTHERN CREDIT LIMITED that:-

“...even good appeals must be filed within the prescribed periods and when that is not done, some explanations must be given ... for the delay.”

This statement, although it was made within the framework of the Court of Appeal Rules, is true in the exercise of discretion under the Civil Procedure Act and Civil Procedure Rules in enlargement of time. However, in order to determine whether the explanation given is good and sufficient cause for not filing appeal in time, I think that the court should consider at least five things:

1. the amount of delay,

2. the reasons for delay,

3. the bona fides of the reasons given,

4. the prospects of the appeal and

5. the degree of prejudice to the Respondent if the application is granted.

I have set out the bona fides of the reasons given as a distinct ground because any explanation that is tainted with mala fides, ill motive, falsehoods, mis-representation or concealment of material and relevant facts is not “good and sufficient cause” for purposes of enlargement of time. I will apply this test to the facts of this case.”

5. While considering an application for extension of time under its Rules, in the case of **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others (2015) eKLR**, the Supreme Court of Kenya delivered itself as follows:-

“As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:

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

“We derive the following as the underlying principles that a Court should consider in exercising such discretion:

- 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;***
- 5. whether there will be any prejudice suffered by the respondents, if 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.”***
[emphasis supplied]

These principles may as well apply to application for extension of time under Section 79G in the High Court.

6. From the foregoing, it is clear that in considering an application for extension of time, the Court should be guided by certain principles. That the power is discretionary which has to be exercised only in favour of a deserving party; the length of the delay; the reasons for the delay; the prospects of the intended appeal and the prejudice, if any, to be suffered by the opposite party.

7. The delay must not be inordinate and if it is inordinate, there must be good reason for it. There is no specific time frame that can be said to be reasonable. Each case has to be considered on its own special circumstances. In the present case, the time for filing the appeal expired on the 15th October, 2016. This application was filed on 3rd February, 2017. There was a delay of 118 days. The time given under the Civil Procedure Act is thirty (30) days which expired on 16th October, 2016. To my mind, a delay of 118 days in the circumstances of this case was inordinate.

8. What were the reasons for the delay? It was deponed that the Advocates for the Applicant wrote to the Applicant’s Insurers on 17th September, 2016 advising them of the judgment. That letter was delivered to the Insurer’s Meru branch on the same day but the advise got misplaced when there was movement of office. The advise was finally traced on 9th January, 2017. That the Insurer thereupon expressed its dissatisfaction with the judgment. The parties thereupon entered into post judgment negotiations.

9. The assertion that the Insurer’s branch was moving offices was not denied or challenged. Documents being misplaced during such an exercise is not out of the ordinary. In my view, there was a good explanation for the delay between 16th October, 2016 and 9th January, 2017. The period that is unexplained is between 10th January, 2017 and 3rd February, 2017 when the current Motion was filed. That is a period of twenty three (23) days. That the Insurer decided to engage into post judgment negotiation after there had already been a delay of about three (3) months, to my mind, unreasonable. In the circumstances, I am not satisfied that the delay has been satisfactorily explained.

10. As regards the prospects of the appeal, I have looked at the draft Memorandum of Appeal. It sets out five (5) grounds which only attack the judgment on the issue of quantum. I have also looked at the impugned judgment. I do not wish to express my opinion on prospects of the intended appeal at this stage.

11. As regards prejudice, the Respondent did not demonstrate that she would suffer any prejudice were the extension sought granted. The

only prejudice in my view could be the delay in realizing the fruits of her judgment and loss of the right granted to her to be paid by the Insurer within 90 days under Section 203 of the Insurance Act. However, since there is a penalty payable by the Insurer under Sub-Section 3 of that Section, the said penalty of five (5) percent, in my view, would ameliorate the hardship caused by the delay.

12.. As regards the prayer for stay, it is also a discretionary power under Order 42 Rule 6. Although that Section was not cited and the jurisdiction therefore not invoked by the Applicant, I will pardon that as an oversight curable under Order 50 Rule 12, of the Civil Procedure Rules.

13. Under Order 42 Rule 6 of the Civil Procedure Rules, stay is to be granted if the Court is satisfied that substantial loss may result to the Applicant and security for the due performance of the decree is given. This is clearly set out in Order 42 Rule 6 (2) of the Rules which states:-

“(2). No order for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

14. Substantial loss is a matter of fact. It is not only to be alleged by the party seeking an order for stay. It must be proved. I have looked at the Affidavits sworn by the Applicant, Paul Kithinji on 2nd February, 2017 and Paul Kariba sworn on 2nd February, 2017 and 7th March, 2017, respectively. In none of those Affidavits did the Applicant allege or demonstrate the nature of loss he would suffer if the stay was not granted. It was never alleged that any loss suffered would be substantial. This Court cannot presume or speculate that the Applicant will suffer loss and that such loss would be substantial. In any event, this is a money decree and it was not alleged that the Respondent is so impecunious that she will not be able to refund the decretal sum if the Applicant’s intended appeal succeeded.

15. The Applicant’s Counsel cited the cases of ***Said Mohammed t/a Bulbul Traders & Another v Emily Wavinya (2016) eKLR*** and ***Apa Insurance Ltd v Michael Kinyanjui Muturi (2016) eKLR*** in support of the prayer for stay. The said authorities are not applicable in this case because, the Applicants in those cases made statements on oath that if a stay was not granted, their properties would be sold in execution of the decree and the monies would be out of their reach. In the present case, there was no such allegation or averment.

16. In any event, the Applicant prayed for stay in the following terms:-

“2. That pending inter-partes hearing and determination of this application there be stay of execution of the judgment and decree in Githongo SRMCC No. 4 of 2016.”

17. It is clear from the foregoing that the stay sought by the Applicant was meant to run until the hearing and determination of this Application. In this regard, the prayer sought is already spent as the motion has been heard and determined. In the premises, granting the Order will be in vain as the Applicant has been enjoying a stay to date.

18. In the premises, I find the application to be without merit and the same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT MERU THIS 11TH DAY OF MAY, 2017.

A. MABEYA

JUDGE

11/05/2017