



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPL. NO. 294 OF 2014

PZ CUSSONS (EA) LIMITED APPLICANT

V E R S U S

FELTON KIMORI 1ST RESPONDENT

FELISTINA KIMORI 2ND RESPONDENT

RULING

1. **FELTON KIMORI** and **FELISTINA KIMONI** the personal representatives of the Estate of **DONALD MWAENDO KIMORI** (Deceased) sued before the Chief Magistrate's Court at Mombasa in **CMCC Case No. 1331 of 2007 PZ CUSSONS (E.A) LTD** (Cussons) for special and general damages suffered by the Estate of Kimori (Deceased) following a motor vehicle accident with a vehicle owned and registered in the name of Cussons.

2. That case was heard by the Learned Senior Principal Magistrate J. Gandani, and according to submissions on behalf of Cussons, judgment was reserved for 15th April 2014. Both parties are in agreement that the judgment was not delivered on that day but there is no agreement on the subsequent date fixed for delivery of judgment.

3. Cussons have brought before this Court a Notice of Motion dated 1st September 2014 brought under Sections 1A, 1B, 3A, 65(1) (b) and 79 of the Civil Procedure Act Cap 21 and Order 50 Rule 6 and 7, Order 51 rule 1, 3, 4 and 10 of the Civil Procedure Rules. Cussons seeks two prayers, one for extension of time to file the appeal and secondly for stay pending the hearing and determination of the appeal.

4. Section 79G of Cap 21 provides-

“79 G. Every appeal from a Subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

PROVIDED that an appeal may be admitted out of time if the appellant satisfied the Court that he had good and sufficient cause for not filing the appeal in time.”

The essence of that provision is that an Applicant should file an appeal, notwithstanding that it would be out of the 30 days provided under Section 79G and on filing seek the Court's leave to admit that appeal

out of time as was held in the case GERALD M'LIMBINE JOSEPH KANGANGI [2009]eKLR as follows-

“My understanding of the proviso to Section 79G is that an Applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek the Court’s leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending Appellant first seeks the Court’s permission to admit a non-existent appeal out of the statutory period.”

What the Cussons have done in this matter is that they filed a draft Memorandum of Appeal, in this Miscellaneous Cause, seeking leave to file the appeal out of time. The fact they filed the Miscellaneous Cause rather than the appeal is in my view not fatal, particularly when one considers the overriding objective of the Civil Procedure Act.

5. The grounds upon which Cussons seeks to file an appeal out of time are that the lower Court delivered its judgment on 26th May 2014 without Notice to it; that on being informed by the Respondent Cusson’s Advocates were unable to obtain the lower Court file for the perusal to enable obtain details of the judgment for their client’s further; and that Cussons is aggrieved by the judgment of the lower Court.

6. The Respondent opposed the application on several grounds. That is that their advocate received notice from the Court that judgment would be delivered on 20th May 2014. That as it may be seen from the handwritten record of the Learned Trial Magistrate the judgment was delivered on 26th not 20th of May 2014 in absence of parties. It therefore follows that there is credence in the contention by Cussons that their Advocates were unaware of the date of lower Court’s judgment.

7. The Respondents opposed the application on the ground that even after Cusson’s Advocates were informed of the judgment they delayed for eleven (11) days before moving the Court. In my view (eleven) 11 days is not inordinate. That delay is also explained by Cussons that their Advocate was unable to obtain the lower Court’s file at the Court registry and that on the day the Court file was made available by the incharge, Civil registry of the lower Court, the Respondent proclaimed Cusson’s goods with a view to carrying out attachment of moveable goods.

8. Respondents also sought the striking out of the affidavit sworn by Mark Onyango Aruwa, Cussons Store Keeper. Mr. Aruwa deponed in that affidavit that he was “**competent and duly authorized**” by Cussons to swear the affidavit.

9. Order 9 Rule 1 of the Civil Procedure Rules provides-

“Any application to or appearance or act in any Court required or authorized by the law to be made or done by a party in such Court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an Advocate duly appointed to act on his behalf.”

The proviso of that rule is that one may have an authorized agent do the acts in Rule 1. In Rule 2(c) of that order it is provided that in respect of a Corporation a recognized agent is “**an officer of the Corporation duly authorized under the Corporate seal.**” Since Mr. Aruwa did not have such authorization the Respondent sought the striking out of his affidavit in support of Notice of Motion dated 1st September 2014.

10. In my view the requirement for one to have authorization under seal do not cover one giving evidence by affidavit. Evidence by affidavit is similar to *viva voce* evidence given under oath before Court. When a witness attends Court to testify for a Corporation by giving *viva voce* evidence such witness is not required to provide an authorization under seal. Similarly a party not necessarily a Corporation, can call witness to either swear affidavit in their support or to adduce *viva voce* evidence. The only requirement in that case, just as much as a Corporation would be required, is that such witness would only testify

when authorized by the party calling him as a witness. Mr. Aruwa deponed he was authorized to swear the affidavit and that suffices.

11. Cussons prayer for stay of execution pending hearing and determination of the appeal is on the ground that if stay is not granted their goods, and more particularly their cosmetics would be attached and as a result they would not be able to meet their contractual obligation to supply the same to their customers.

12. Bearing in mind that submission by Cussons the Respondent failed to respond by showing that even if the decretal sum of the lower Court is paid to them they had the means to refund if the appeal was successful. Having failed to do so there is likelihood that Cussons would suffer substantial loss.

13. Order 42 Rule 6(2) of the Civil Procedure Rules provides that a Court may, in granting stay pending appeal, order provisions of security. In my view Cusson should provide such security.

CONCLUSION

14. In the end I make the following orders-

- a. **The Applicant is granted leave to file an appeal out of time and within fourteen (14) days from this date hereof.**
- b. **On condition that the said appeal is filed as ordered in (a) above there shall be stay of execution of Mbsa CMCC NO. 1331 of 2007 until the hearing and determination of the appeal.**
- c. **The Applicant shall within thirty (30) days file in the Appeal file a bank guarantee for the payment of the decretal sum.**
- d. **Failure to file the appeal as ordered in (a) above and failure to provide the security as ordered in (c) above the stay of execution of Mbsa CMCC No. 1331 of 2007 shall be vacated.**
- e. **The costs of the Notice of Motion dated 1st September 2014 shall abide with the outcome of the appeal to be filed.**

DATED and DELIVERED at MOMBASA this 3RD day of MARCH, 2015.

MARY KASANGO

JUDGE