



IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO. 204 OF 2013

PAUL TIMUTI.....1ST APPLICANT

DANIEL WILFRED.....2ND APPLICANT

VERSUS

EMMAH N. MUIGAI.....RESPONDENT

RULING

By the Notice of Motion dated 31/5/2013, the applicants Paul Timuti and Daniel Wilfred seek the following orders:-

- 2. That this Honourable court be pleased to enlarge the time within which to file the memorandum of appeal against the ruling of Honourable Mr. Muholi, Senior resident Magistrate delivered on 25th February, 2013 in Nyahururu SPMCC No. 85 of 2012;**
- 3. That there be a stay of execution of the decree and all consequential orders in Nyahururu SPMCC No.85 of 2012 pending the hearing and determination of this application.**

The application is premised in two affidavits sworn by Kinyanjui Theuri, counsel for the applicant's insurers who had conduct of the case in the trial court. They are dated 30/5/2013 and 24/7/2013.

The application was opposed and Joseph Mwangi advocate for the respondent swore an affidavit dated 1/7/2013 in reply.

A background of the case before the trial court is that the trial court entered an ex-parte judgment against the applicants in favour of the respondents in Nyahururu SPMCC 85/2012. The applicants filed an application to set aside the ex-parte judgment and stay of execution. It was heard on 11/2/2013 and the ruling delivered on 25/2/2013 dismissing the applicant's application. The counsel got instructions to attempt negotiations but by letter dated 19/4/2013, the respondent's counsel declined the offer. Meanwhile, the insurer's legal counsel was on leave and upon resumption of duty on 10/5/2013, instructed the counsel to file an appeal but by that time, the period within which the law allows for lodging an appeal had expired and that prompted this application. The counsel exhibited a copy of the draft memorandum of appeal (JKT5). It is counsel's view that the delay in filing the appeal is excusable, is not inordinate and that they are willing to furnish any security that this court will order. In the further affidavit, counsel urged that the court do grant a temporary stay of execution as the respondent had extracted a notice to show cause and hence there was imminent threat of execution against the applicants.

In opposing the application, Mr. Mwangi deponed that the case before the trial court came up for hearing

on 8/10/2012, and though duly served, neither the applicants nor their counsel attended. The trial court delivered judgment on 12/11/2012 and the applicants were notified of it vide the letter dated 16/11/2012 (JM4). The applicants lodged an application seeking to set aside judgment on 7/12/2012 but on 25/2/2013, the trial court dismissed the said application; that after a month the applicants' counsel invited the respondents to negotiate but the offer was unacceptable. It is counsel's view that the applicants received instructions to negotiate and the excuse that the legal counsel for insurers (Invesco) was on leave is not believable because there are more than 8 counsel working with Invesco Insurance Company, that there has been inordinate delay in bringing this application, the respondent is prejudiced in that he cannot enjoy the fruits of his judgment; that the trial court exercised its discretion in declining to grant the prayer; that the application is an afterthought and there is no good reason to warrant interference by this court.

In an application to extend time for filing an appeal, the law is well settled. In **Ann Mukami Muchir v David Kariuki Mundia (2006) KLR J Okwengu** cited with approval the decision of **Leo Silla Mutiso v Rose Hellen Wangari Mwangi HCC 255/1997** where the court said that:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled in general the matters which this court takes into account in deciding whether to grant an extension of time are: first the length of delay, secondly the reason for the delay, thirdly (possibly) the chances for the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

In the instant case, the court read its ruling on 25/2/2013, this notice of motion was filed on 31/5/2013, a delay of about 3 months. The first excuse given by the applicants is that there was an attempt at negotiations but the respondent contends that the attempt was made a whole month after the ruling had been delivered. I have seen the letter written by Kinyanjui Njuguna Advocate to the respondent. It is dated 27/3/2013 (JM5). It was inviting the parties to negotiating and an offer was made. The respondent's counsel took over three weeks to reply on 19/4/2013. I do agree that the attempt at negotiate did contribute to the delay.

The 2nd explanation for the delay is that the legal counsel for the insurer was away on leave but I find that to be a lame excuse taking into account the fact that the applicants made an offer to negotiate, meaning that somebody gave them instructions. It must have been with advise of counsel. The first explanation given for the delay is persuasive in the circumstances. A draft memorandum of appeal has been exhibited showing that the applicants are keen on appealing. In the lower court, the applicants had filed a defecne and having shown keenness in defending the suit, it is always in the interest of justice that a party be given their day in court unless for very good reasons. It is unfortunate that the applicants never annexed the ruling of the court so that the court can consider whether or not they have an arguable appeal. But I take into account the fact that during the negotiations, the applicants had made an offer on the quantum. It means that they will be disputing the quantum. Having looked at the pleadings, I am satisfied that the applicants have an arguable appeal and should be accorded a chance to file and argue it.

The suit in the trial court was filed and determined in 2012. I do take into account the fact that the respondent has a judgment and should not be denied enjoyment of the fruits of that judgment. In doing so, and in exercise of this court's discretion justice will be better served to both parties if both were heard. The applicants were willing to furnish the court with security for due performance of any decree that may be passed against them and the court will thus not deny them a chance to be heard.

For all the above reasons, I grant leave to the applicants to file their appeal. The appeal should be filed and served within 14 days hereof. The court takes into account the fact that the applicants had offered to settle the decretal sum at Kshs.150,000/-. For that reason I direct that there be stay of execution on condition that the applicants pay Kshs.150,000/- to the respondents within 30 days hereof, in default the stay order will automatically lapse. Costs be borne by the applicants.

DATED and DELIVERED this 4th day of October, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Wahome for the applicants

N/A for the respondent

Kennedy – Court Clerk