



Invesco Assurance Company Limited v Mulwa & 59 others & another (Civil Application E215 of 2020) [2022] KECA 1290 (KLR) (18 November 2022) (Ruling)

Neutral citation: [2022] KECA 1290 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E215 OF 2020
HM OKWENGU, JA
NOVEMBER 18, 2022**

BETWEEN

INVESCO ASSURANCE COMPANY LIMITED APPLICANT

AND

BENSON MULEVU MULWA & 59 OTHERS 1ST RESPONDENT

INSURANCE REGULATORY AUTHORITY 2ND RESPONDENT

(Being an application under Rule 4 of the Court of Appeal Rules 2010 for extension of time within which to serve a notice of appeal against the Ruling of the High Court at Nairobi (M. Odero, J) delivered 29th May 2020 in High Court Insolvency Petition No. E008 of 2019)

RULING

1. By a notice of motion dated 17th July 2020, Invesco Assurance Company Limited (applicant), has moved this Court under rule 4 of the [Court of Appeal Rules](#), 2010 for orders that the period for service of the notice of appeal dated 9th June, 2020 be extended and the notice of appeal be deemed as duly served.
2. The application is anchored on the grounds that the ruling, subject of the intended appeal was delivered on 29th May, 2020. On 10th June, 2020 the advocate for the applicant sent an email to the court requesting for assessment of the notice of appeal dated 9th June, 2020. The assessment was done and payment made on 11th June, 2020 through M-pesa. The applicant's advocate received communication that there was a temporary problem in the delivery of email messages. On 20th June, 2020 the court registry responded to the applicant's advocate confirming receipt of payment and the filing of the notice of appeal. The applicant's advocate then forwarded the notice of appeal to the 1st respondent's advocate through email, but unfortunately the email bounced back. Thereafter, the respondent's advocate was served physically with the notice of appeal on 9th July, 2020 by which date, time or service



of the notice had lapsed by 20 days. The applicant urges the court to extend time so that the belated service can be regularized to enable it to pursue its appeal.

3. The applicant has filed written submissions urging the court to exercise its discretion in its favour as the delay in filing the notice of appeal is not inordinate, and has been adequately explained. In support of its submissions the applicant has cited several authorities.
4. In response to the applicant's motion, the 1st respondent's advocate Nelson Kaburu Felix, has sworn a replying affidavit in which he explains that the petition in the High Court against the applicant arises from the applicant's failure and/or inability to pay damages awarded to the 1st respondents, 60 persons who are road traffic accident victims that have obtained decrees against the applicant amounting to KShs 53,284,914.25, which decrees have not been honoured by the applicant.
5. Counsel for the 1st respondents contend that under rule 77 of the Court of Appeal Rules, a notice of appeal can be served before it is lodged, and that the applicant has not given any reason why it did not serve the respondents despite the difficulties experienced in filing the notice of appeal. Secondly, counsel questions why physical service of the notice was not done on 20th June 2020 after the email to the respondents' advocate had bounced, but was done long after on 9th July, 2020.
6. Counsel submits that an insurance company which cannot pay decrees obtained against it or against its insured under Chapter 405 of the Laws of Kenya, should not be allowed to continue issuing third party liability insurance covers or any insurance contracts, and should not be allowed to dilly dally with suits filed against it without demonstrating a genuine grievance by way of a draft memorandum of appeal.
7. The 1st respondents have also filed written submissions in which they urge the court to dismiss the applicant's motion urging that the applicant cannot plead ignorance of rule 77 of Court of Appeal Rules. In this regard, counsel cited Baber Alibhai Mawji vs Sultan Hasham Lalji & 2 Others, Civil Application No NAI 236 of 1992, wherein it was held that the court cannot condone any error on the part of an applicant, where simply looking at the Rules would have guided the applicant's counsel.
8. Despite having been served with a hearing notice, the 2nd respondent did not file any written submissions, nor did they file any replying affidavit.
9. Under rule 4 of the Court of Appeal Rules this court has discretion to extend time for any action required to be done under the Rules. However, such discretion must be exercised judicially and not whimsically. (See Leo Sila Mutiso vs Hellen Wangari Mwangi [1999] 2 EA 231). In Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, the Supreme Court laid out the following principles for consideration in exercising the court's discretion to extend time:
 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 for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 5. Whether there would be any prejudice suffered by the respondents if the extension was granted;



6. Whether the application had been brought without undue delay; and;
7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time”.
10. In the circumstances herein, the pertinent delay concerns the service of the notice of appeal. Whereas the applicant has explained the efforts made to file and pay for the notice of appeal, the applicant has not given a good reason for the late service of the notice of appeal upon the 1st respondents.
11. As pointed out by Mr Kaburu, rule 77 of the *Court of Appeal Rules*, 2010 provides for service of notice of appeal on persons affected as follows:
 - “(1) An intended appellant shall, before or within 7 days after lodging notice of appeal serve copies thereof on all persons directly affected by the appeal:
Provided that the court may on application which may be made ex parte within 7 days after lodging the notice of appeal direct that service need not be effected on any person who took no part in the proceedings in the superior court.”
12. The rule provides that an intended appellant shall before or within 7 days after lodging the notice of appeal serve copies thereof, on all persons directly affected by the appeal. Contrary to Mr Kaburu’s submissions that the notice of appeal does not need to be filed in Court before being served on the intended respondents, it is clear from the wording of the rule that the appellant is required to serve copies of the notice. Such copies can only be copies of the original notice which has been filed, hence the reference to the time frame as, “before or within 7 days after lodging notice of appeal”.
13. While I accept that the applicant made efforts to lodge the notice of appeal which were hampered by technological challenges, the applicant has not given any reason as to why it did not immediately serve the notice of appeal at the physical address of the 1st respondents’ advocate after the email bounced on 20th June, 2020. There is no explanation as to why it took 19 days to effect physical service on the 1st respondents’ advocate.
14. I take cognizance of the fact that the legality of the notice of appeal, should be the jurisdiction of the bench hearing the appeal, should the appeal proceed to hearing. However, I cannot ignore the fact that although the applicant implores the court to extend time to enable it pursue its appeal, the applicant has not demonstrated that it has any grounds of appeal upon which the chances of the appeal succeeding, can be anchored. It has not stated in his affidavit any ground that it intends to pursue, nor has it provided any draft memorandum of appeal.
15. Given the nature of the petition that was before the High Court as revealed from a copy of the Ruling, subject of the intended appeal that was annexed to the applicant’s supporting affidavit, the applicant has not demonstrated that it has any appeal that can possibly succeed. This was important to demonstrate its good faith in bringing the application.
16. The question of the liquidity of the applicant is a matter of general public importance as the applicant continues to provide service to the public, in the insurance industry and it is important that the issue be resolved. I also take note that the respondents who are said to be accident victims will be prejudiced by any delay in resolving this matter. On the other hand, the applicant will not suffer prejudice or undue hardship if the extension of time is not granted, as the dismissal of its notice of motion only paves way for the substantive hearing of the petition that is still pending in the High Court and the applicant has an opportunity of filing any appeal against any judgment that may ensue therefrom, if the judgment is not favourable to it.



17. As stated by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 Others* [2014] eKLR, 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. The applicant has not convinced me that it is worthy of the exercise of this court's discretion.

18. For these reasons, I dismiss the applicant's motion with costs.

DATED AND DELIVERED AT NAIROBI THIS 18TH OF NOVEMBER, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

