



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, JA (IN CHAMBERS))**

**CIVIL APPEAL (APPLICATION) NO. 237 OF 2015**

**IN THE MATTER OF THE INTENDED APPEAL**

**BETWEEN**

**JUBILEE INSURANCE COMPANY (K) LIMITED.....APPLICANT**

**AND**

**DANIEL MAINGI MUCHIRI.....RESPONDENT**

*(An application for extension of time to file and serve the Notice of Appeal out of time in an intended appeal from a Judgment of the High Court of Kenya at Nairobi (Sergon, J.) dated 17<sup>th</sup> July, 2015*

*in*

**H.C.C.A. NO. 328 OF 2009)**

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**RULING**

The applicant, by this application made under Rule 4 of the Court of Appeal Rules seeks extension of time to file a notice of appeal out of time and to deem the notice of appeal dated 10<sup>th</sup> August 2015 and filed on 12<sup>th</sup> August 2015 as having been filed and served on time.

The application is supported by the affidavit of **Steve Luseno**, the advocate appearing for the applicant.

The application is opposed by the respondent through his counsel.

The respondent, **Daniel Maingi Munene** filed **Civil Suit No. 6553 of 2013** in the Chief Magistrate's court in Nairobi against the applicant for a declaration that the applicant was liable to satisfy a decree in favour of the applicant in **Milimani CMCC No. 369 of 2003** under section 10 of the **Insurance (Motor Vehicle Third Party Risks) Act, (Act)**. In the plaint the respondent averred that the applicant had insured and issued a motor vehicle insurance policy under the Act to cover motor vehicle registration No. KAC 987. The applicant filed a statement of defence. In its defence the applicant stated, amongst other things, that it did not issue any cover to the owner of motor vehicle (Reg. No. KAC 987) and that the

respondent did not comply with statutory regulations attendant to issuance of reliefs sought in the plaint.

Subsequently, the respondent filed an application for striking out the defence on grounds, *inter alia*, that it was frivolous and abuse of the process of the court. The application was supported by the affidavit of the respondent.

The respondent deposed in the replying affidavit that the liability was covered by the insurance policy issued by the applicant. The applicant quoted the policy number and the period of the cover. The respondent also annexed a copy of an “Abstract From Police On A Road Accident” indicating that the applicant had covered the liability. The applicant did not file a replying affidavit. Instead, it filed grounds of opposition stating, among other things, that the Police Abstract is not proof of cover under the Insurance Act.

The trial magistrate, (**T. S. Nchoe – Ag. SRM**) allowed the application on 7<sup>th</sup> May, 2014. The trial court made a finding that the applicant did not file a replying affidavit and that the defence consists of mere denials.

The applicant appealed to the High Court (**Civil Appeal No. 195 of 2015**) against the ruling. On 17<sup>th</sup> July 2015 the High Court (**Sergon, J.**) dismissed the appeal. The High Court made a finding that failure by the applicant to file a replying affidavit to the affidavit in support of the application to strike out the defence was an admission of facts in the application. The High Court also made a finding that the applicant did not controvert the allegation that it was served with a statutory notice. Further, the High Court made a finding that the averment in the applicant’s defence that respondent did not comply with the statutory requirements attendant to issuance of relief was a general traverse and that the applicant did not demonstrate that it was within any exception to the contract of insurance.

The applicant states that the intended appeal is arguable, *inter alia*, that the fact of insurance has not been resolved; that the intended appeal is intended to curb fraud and that the judge erred in holding that failure to file replying affidavit is an admission of its claim.

The Court has unfettered discretion to extend time. However to get a favourable exercise of discretion in his favour, an applicant should satisfy the Court that the intended appeal is not frivolous, that the extension of time will not cause undue prejudice to the respondent, and that the delay has not been inordinate (**Swala v Wasike [1984] KLR 591**).

Starting with the question of delay, the judgment of the High Court was delivered on 17<sup>th</sup> July 2015. The applicant was required to file the notice of appeal within 14 days. The 14 days expired on 31<sup>st</sup> July 2015. The notice of appeal was filed on 12<sup>th</sup> August 2015. The delay is about 11 days.

However, the explanation for the delay is not satisfactory. The applicant’s advocate explains that he was waiting for the typed copy of the ruling before he could file a notice of appeal. Yet, the applicant’s advocates admit that the last part of the ruling dismissing the appeal was read. That pronouncement was sufficient to set in motion the process of filing a notice of appeal. It is apparent from the Ruling of the High Court dated 6<sup>th</sup> November, 2015 staying execution of the decree pending appeal to this Court that the respondent caused warrants of attachment to be issued on 6<sup>th</sup> August, 2015 and that on 12<sup>th</sup> August, 2015 the applicant herein filed an application for stay of execution of the decree in the High Court.

It is apparent that it is the issuance of the warrants of attachment that precipitated the filing of the notice of appeal upon which the application for stay of execution could be pegged. Moreover, there is no explanation for the delay in filing the present application on 8<sup>th</sup> September 2015, over three weeks after the notice of appeal was filed. Apparently, the filing of the notice of appeal was precipitated by the execution proceedings and not by the genuine desire to appeal.

As regards the merits of the intended appeal, it is clear that he intended appeal is a second appeal. **Section 72(1)** Civil Procedure Act specifies the grounds on which a second appeal can lie to this Court. The

applicant has not attempted to show that any of the stipulated grounds exists in relation to the intended appeal.

Secondly, the applicant had an opportunity in the subordinate court to file a replying affidavit to refute the existence of the insurance policy indicated in the Police Abstract and produce relevant documents from its records to controvert the contents of the Police Abstract. Alternatively, the applicant did not show that circumstances stipulated in S.10(2) of the Act existed, which exempted the applicant from satisfying the judgment. Thus, I am not satisfied that *prima facie* the intended appeal either lies or has merit.

For those reasons, the applicant is not entitled to the Court's discretion.

Accordingly, the application is dismissed with costs to the respondent.

***Dated and delivered at Nairobi this 12<sup>th</sup> day of February, 2016.***

***E. M. GITHINJI***

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***JUDGE OF APPEAL***

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**