



Sanghani v Eastern Chemical Industries & another (Civil Miscellaneous Application E1246 of 2024) [2024] KEHC 6357 (KLR) (31 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL MISCELLANEOUS APPLICATION E1246 OF 2024**

AN ONGERI, J

MAY 31, 2024

BETWEEN

RK SANGHANI APPLICANT

AND

EASTERN CHEMICAL INDUSTRIES 1ST RESPONDENT

JACOBS TECHNICAL SERVICES LIMITED 2ND RESPONDENT

RULING

1. The application coming for consideration is the one dated 20/12/2023 brought under order 42 rule 6 and 51 rule I of the Civil Procedure Rules 2010 section and 63(e) of the Civil Procedure Act, Under Section 79G of the Civil Procedure Act, under section 5 and 25 of the High Court (Organization and Administration) Act 27 of 2015 and under the Inherent Powers of the Court seeking the following prayers;
 - i. That this Application be certified as urgent and be heard exparte in the first instance.
 - ii. That there be a stay of execution of Judgement and Decree herein pending hearing and determination of this Application inter parte.
 - iii. That there be a stay of execution of the Judgement and Decree herein pending the hearing and determination of the intended Appeal.
 - iv. That the Applicant be granted leave to file the Memorandum of Appeal out of time and the Court to extend such time within which to file the Memorandum of Appeal.
 - v. That the Memorandum of Appeal annexed be deemed duly filed upon the payment of requisite fees.



- vi. That the costs of this Application be provided for.
2. It is supported by the affidavit of Ravji Karsan Sanghani sworn on 20/12/2023 in which he deposed That he has been aggrieved by the decision of the trial court and has lodged an appeal. The intended appeal raises arguable grounds That challenge the decision and has good prospects of success.
 3. He intends to raise several grounds of appeal namely;
 - a) That the Learned Trial Magistrate erred in law and fact in entering Judgement in favour of the Respondent against the Appellant.
 - b) That the Learned Trial Magistrate erred in law and fact in finding that the Respondent had proved the claim against the Defendants and that the Defendant's driver was wholly to be blamed.
 - c) That the Learned Trial Magistrate erred in law and fact in ignoring and completely disregarding the Appellant's evidence.
 - d) That the Learned Trial Magistrate erred in law and fact in failing to make a finding that the Respondent's driver contributed to the occurrence of the accident.
 - e) That the Learned Trial Magistrate erred in law and fact by fully relying on the Respondent's Assessor's Report.
 - f) That the Learned Trial Magistrate erred in law and fact by making a finding that the Respondent's evidence on the circumstances of the evidence is not rebutted.
 - g) That the Learned Trial Magistrate erred in law and fact in failing to consider the Appellant's Defence, submissions and authorities annexed thereto.
 - h) That the Learned Trial Magistrate erred in law and fact failed to take into account that interlocutory Judgement had been entered against the 2nd Respondent and to make a finding that the 2nd Respondent's driver was fully liable for causing the accident.
 4. He deposed that that the respondent's advocate has since issued him with a notice of entry of judgement and requires that he settle the decretal amount within 10 days failure to which they would proceed to execute. He indicated that the application herein is merit and meets the requisite threshold to warrant grant of orders sought for. He is willing to deposit 1/3 of the decretal sum herein being Kshs. 547,023 as security and/or abide to such terms as security as the court may impose or as agreed by the parties.
 5. The respondents filed a replying affidavit by Jenipher Catherine Ombonya dated 7/2/2024 to oppose the application. In it she deposed that the applicant is guilty of laches. The relevant cause of action arose on 13/11/2001 which is over 22 years ago when a road accident occurred involving motor vehicle registration number KAD 645W- ZB 6312 owed by the 1st respondent and motor vehicle registration number KAL 248X owed by the applicant which resulted in the 1st respondent incurring material loss of Kshs. 1,825,110 together with costs and interest. The 1st respondent had to wait for close of 20 years to receive justice when judgement was delivered on 30/4/2020.
 6. She indicated that this application has been filed close to 4 years from the date when the judgement was delivered in Nairobi CMCC No. 1234 of 2004 and the applicant wishes to re-open the case by way of appeal. That it is not enough for the applicant to have written only 2 letters dated 25/5/2021 and 18/8/2021 enquiring as to when the judgement would be delivered without making effort to visit



- the court registry physically even once to enquire as to why there was no response to their letter yet the said lawyers are based in Nairobi.
7. she averred that in the circumstance that the court is inclined to grant the application then the same be conditional upon;
 - i. half of the decretal sum being released to the 1st Respondent who is entitled to the fruits of the judgement, and
 - ii. the balance of the decretal sum be retained in Court pending the determination of the intended appeal.
 - iii. In the alternative to no. (1) & (ii) foregoing the Applicant deposits the entire decretal sum in Court.
 8. The parties filed written submissions as follows; the applicant submitted that judgement was entered on 30/4/2020 against the applicant in the sum of Kshs. 1,641,160 plus costs and interest without notice and without the applicant's knowledge. The applicant wrote various letters requesting for the said judgement only to be served with a notice of entry of judgement on 13/12/2023 and proceeded to file the instant application on 20/12/2023.
 9. The applicant submitted that he will suffer substantial loss being engaged in business. The intended appeal raises triable issues and has high chances of success. The applicant will therefore be prejudiced if stay is not granted as the respondent is intent on executing the decree of the lower court's decision and if do done; it will render this appeal nugatory.
 10. The applicant submitted on leave to appeal out of time that he was not aware of the said judgment despite making countless efforts to obtain the same as evidenced, by the various letters requesting the judgement.
 11. The respondent alternatively admitted that judgement was read without notice to the parties on 30/4/2020 but the applicant failed to take adequate steps required. The Applicant's lawyers became aware of the judgement having been delivered in Nairobi CMCC No. 12434 of 2014 vide our letter dated 21/4/2022.
 12. That this material fact was pleaded at paragraph 10 of Jenipher Catherine Ombonya's Replying Affidavit, and expounded further in paragraphs 11, and 12 of the said affidavit. There was and there is no rebuttal to these material facts by the Applicant. Consequently, the period of delay in filing the instant application is approximately 1 year 7 months.
 13. The respondents submitted that the Applicants' exhibit marked RKS-2 being a letter to the Executive Officer, Milimani Commercial Court dated 25/4/2022 which confirms the fact that as at 25/4/2022 the Applicant was aware that judgement had been delivered on 30/4/2020. ? There is no explanation as to why the said Advocates did not proceed physically to Court to peruse the Court file to understand the reasoning of the Court and expeditiously decide on their client's next course of action.
 14. It was the respondent argument that that the only reason why this application was filed was because execution became imminent when the Judgement/Creditor served a Notice of Entry of Judgement together with a copy of the decree upon the Applicant's lawyers in December, 2023. That equity does not aid the indolent.
 15. On stay of execution the respondent submitted that the Applicant has not demonstrated substantial loss that will result to it if an order of stay of execution is not granted. The Applicant has not expressed any fear that the 1st Respondent is financially incapable of reimbursing the Judgement sum



if indeed its appeal succeeds. The Judgement is monetary and can be refunded by the Judgement creditor who suffered this financial loss over 20 years ago and is still in existence to date. That by the Applicant submitting that it will suffer substantial loss being engaged in business is an admission that their business is precarious. The respondent urged the court therefore Court to move with speed to secure the entire judgement sum which stood at Kshs.2,959,093.40 as at 12/1/2023 and currently the judgement sum is in excess of Kshs. 3,500,000.

16. The issues for determination in this ruling are
 - i. Whether the applicant be granted stay of execution pending appeal.
 - ii. Whether the applicant should be granted leave to file the appeal out of time.
 - iii. Who pays the costs of this application?
17. The governing provision for stay pending appeal is order 42 rule 6 which states as follows;
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (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 Applicants 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 Applicants”.
18. On the issue as to whether the applicant should be granted leave to appeal out of time, applicant submitted that he was not aware of the said judgment despite making countless efforts to obtain the same as evidenced, by the various letters requesting the judgement.
19. The said submissions were not rebutted by the respondent and I find that the court has good reason to grant the applicant leave to appeal out of time.
20. I grant stay pending appeal on the following conditions;
 - i. That the appeal is filed within 30 days of this date.
 - ii. That the entire decretal sum is deposited in court pending appeal. The same to be deposited within 30 days of this date.
 - iii. That the appeal is fully prosecuted within 90 days of this date.
 - iv. The applicant to pay the costs of the application dated 20/12/2023.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 31st day of May, 2024.



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A. N. ONGERI

JUDGE

In the presence of:

..... for the Applicant

..... for the 1st Respondent

..... For the 2nd Respondent

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