



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 225 OF 2018

AIG INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

MICHAEL OKOTH.....RESPONDENT

RULING

1. Most of the prayers sought in the Notice of Motion filed by *AIG Insurance Company Limited*, the appellant/applicant herein are now spent as they sought interim orders pending the hearing and determination of the motion. The prayers which are pending this court's determination are prayers number 2, 6, 7, 8, 9 and 10. The said prayers are reproduced verbatim as follows:

2. *That the applicant be granted leave to file its intended appeal against the ruling and orders of the Hon. P.N Gesora (Mr.) given on 13th March 2018 in Milimani Chief Magistrate's Civil Case Number 7000 of 2017 out of time.*

6. *That pending the hearing and determination of the intended appeal interpartes, there be a temporary stay of the proceedings in Milimani CMCC No. 7000 of 2017.*

7. *That there be a temporary stay of the ruling by Hon. P.N Gesora Milimani CMCC No. 7000 of 2017 issued on 13th march 2018 pending the hearing and determination of the intended appeal.*

8. *That pending the hearing and determination of the appeal interpartes, there be temporary stay of execution of the interlocutory judgment entered on 15th November 2017 and of all subsequent orders entered against the appellant/applicant.*

9. *That pending the hearing and determination of the intended appeal interpartes, there be temporary stay of the proceedings in Milimani CMCC No. 7000 of 2017.*

10. *That pending the hearing and determination of the intended appeal and under the doctrine of restitution, the respondent do deposit into court, or otherwise into an interest earning account in the joint names of the respondent and the applicant herein, the sum of KShs.5,800,000 being a sum of money for the second time paid out to respondent by the appellant and/or to his credit on account of an insurance claim no. 0124265 lodged on comprehensive police number 012449674 in the name of Michael Okoth (the respondent) in respect to an accident alleged to have occurred to motor vehicle registration no. KCK 511H, the 2nd payment made following the execution of a partial decree obtained by the respondent following the entry of an ex parte default judgment dated 15th November 2017.*

2. The application is premised on twenty eight elaborate grounds stated on its face and the lengthy supporting affidavit sworn by *Mr. Crispus Mbaka*, learned counsel for the applicant and the annexures thereto.

3. The application is opposed through grounds of opposition dated 15th May 2018 filed on even date. The grounds taken in opposition to the motion with particular reference to the prayers which are still pending determination by this court are that; the

motion is predicated on an incompetent appeal and is for that reason incompetent; that the court lacks jurisdiction to grant prayer 2; that prayer 8 has been overtaken by events; that the prayer for stay of proceedings is not merited as no cogent or sufficient reasons have been advanced to support the same; that prayers 6 and 7 are misconceived as the ruling dated 13th the March 2018 dismissed the appellant's application seeking to set aside a default judgment entered in favour of the respondent and is not capable of being stayed; and, lastly, that prayer 10 is not available to the applicant as no order of restitution can be granted before the appeal succeeds.

4. On their own volition without any direction by the court, the parties filed written submissions which their learned counsel highlighted orally before me on 8th November 2018. Learned counsel *Mr. Mbaka* represented the applicant while learned counsel *Mr. Amuga* appeared for the respondent.

5. I have carefully considered the application, the depositions in the affidavit supporting the motion, the grounds of opposition filed by the respondent, the submissions both written and oral made by learned counsel for the parties and all the authorities cited.

6. I wish to start by addressing prayer 2 since the outcome of my decision thereon will determine whether or not it will be necessary for me to deal with all the other prayers.

I note at the outset that though in prayer 2 the applicant seeks leave to file its appeal out of time, the court record shows that the applicant filed its appeal on 9th May 2018 vide a memorandum of appeal dated 7th May 2018. As will be demonstrated shortly, the appeal was filed out of time without leave of the court. Prayer 2 of the application is thus in my view misconceived because it seeks court's leave to allow the applicant to do what it had already done. Procedurally, having filed its appeal out of time, the applicant should have sought orders to either have the time within which it would have filed the appeal extended or to have the appeal admitted out of time.

However, in the interest of dispensing substantive justice, I will disregard this procedural technicality and accept *Mr. Amuga's* invitation to treat the prayer as one seeking enlargement of the time the applicant should have filed its appeal upto 9th May 2018 when the appeal herein was filed.

7. The law governing the filing of appeals to the High court is set out in *Section 79 G* of the *Civil Procedure Act* which states as follows:

“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 satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

8. From the above provision, it is clear that the period limited by the law for filing of appeals is 30 days excluding any time that the lower court certifies was necessary for the preparation and supply of a copy of the decree or order sought to be challenged on appeal but the court still has discretion to admit an appeal filed out of time if it is satisfied that the applicant has demonstrated that he had good and sufficient cause for not filing the appeal on time. Needless to state, the court's discretion must be exercised judiciously in accordance with the law and the material placed before it.

9. In this case, it is not disputed that the appeal herein was filed after the time prescribed for filing of appeals to the High Court had expired. Going by the proviso to *Section 79 G* of the *Act*, in order to succeed in its application for admission of its appeal out of time, the applicant had a legal obligation to demonstrate to the satisfaction of the court that it had good and sufficient cause for not filing the appeal on time.

10. The reason or explanation given by the applicant in this case for the delay in filing its appeal is contained in paragraphs 42 and 45 of the supporting affidavit. The applicant's counsel deposed that he was under the impression that a memorandum of appeal had to be accompanied by a certified copy of the ruling appealed against and the time required for preparation of a certified copy of the ruling would be excluded from the computation of the 30 days period allowed for filing of the appeal provided that he produced a certificate of delay from the trial court; that the time limited for filing of the applicant's appeal expired on 20th April 2018 when the

7 days taken in preparation of a certified copy of the impugned ruling was taken into account.

11. I must say with respect to the applicant's learned counsel that the above explanation is based on a total misconception of the law. Under *Order 42* of the *Civil Procedure Rules*, an appeal to the High Court is instituted by merely filing a memorandum of appeal which need not be accompanied by a certified copy of the decree or order appealed against. The applicant did not need a certified copy of the ruling in order to file its appeal.

12. Given the foregoing and considering that the ruling challenged in the intended appeal was delivered on 13th March 2018, the applicant ought to have filed its appeal on or before 13th April 2018 when the 30 days limited for filing of appeals expired. And even if counsel believed that he needed to have a certified copy of the ruling before filing the appeal, the certificate of delay annexed to his supporting affidavit shows that the applicant obtained the said ruling on 20th March 2018.

13. Learned counsel for the applicant contended that he presented the memorandum of appeal in the registry on 20th April 2018 but the same was not accepted for filing as he was advised to file it together with an application seeking leave to file the appeal out of time and that this is what he did on 9th May 2018. While as I have no reason to doubt counsel on this averment, the explanation given therein does not explain the delay of between 20th March 2018 when he obtained a certified copy of the ruling and 9th May 2018 when the appeal was filed.

14. Be that as it may, it is clear from the material placed before me that the delay in filing the appeal was mainly occasioned by reasons attributable only to the applicant's learned counsel. In my considered view, given the nature of the orders challenged on appeal and the issues raised in the appeal, it would be unfair and against the wider interests of justice to deny the applicant an opportunity to exercise its right of appeal because of mistakes or omissions made by its counsel.

15. Since the applicant ought to have filed its appeal on or about 13th April 2018 and the appeal was filed on 9th May 2018, it is evident that the appeal was filed about 26 days late. Taking everything into account, I find that a delay of less than 30 days is excusable since it is not inordinate. Besides, there is no likelihood that if the application was allowed, the respondent is likely to suffer any prejudice that cannot be ameliorated by an award of costs considering that they have already been paid the decretal amount.

16. For all the foregoing reasons, I am persuaded to exercise my discretion in favour of the applicant. I consequently admit the applicant's appeal filed on 9th May 2018 out of time and deem it to have been properly filed.

17. Having admitted the applicant's appeal out of time, I now proceed to determine the remaining prayers. Regarding the prayer for stay of proceedings in the lower court pending determination of the appeal, the material placed before me shows that what is appealed against is a ruling on an application which sought to have a default judgment entered against the applicant set aside. Considering that the application was dismissed and execution for the decretal amount has already been levied, it is not clear whether there are any proceedings still pending in the trial court which would be capable of being stayed by this court pending determination of the appeal. The applicant did not shed any light on this point. In the absence of proof that there are proceedings pending in the lower court and considering the policy of the law that courts should not issue orders in vain, I find no merit in prayers 6 and 9 of the motion and the same are hereby dismissed.

18. Turning to prayer 8 and 10, I must say that am in total agreement with learned counsel *Mr. Amuga* that prayer 8 has been overtaken by events as it is not disputed that the decretal amount whose execution is sought to be stayed has already been settled.

19. I also find that it is not disputed that the ruling delivered on 13th March 2018 whose stay is sought in prayer 7 only dismissed the applicant's application which sought the setting aside of the default judgment entered against it and leave to defend the respondent's claim.

The ruling did not result in any positive order that required compliance by any of the parties. It did not order any party to do or refrain from doing anything capable of being stopped or stayed. As held by the Court of Appeal in *Kanwal Sarjit Singh Dhiman V Keshavji Jivraj Shah [2008] eKLR*, the law is that negative orders are incapable of execution save in respect of costs and are hence incapable of being stayed. In this case as noted earlier, the entire decretal amount has already been paid to the respondent. Consequently, I find that there is no aspect of the said ruling that is capable of being stayed by orders of this court as prayed.

20. On prayer 10, I find that the orders sought therein cannot be canvassed on the basis of affidavit evidence at this stage but must await determination of the appeal.

21. The upshot of this ruling is that the applicant's Notice of Motion filed on 9th May 2018 has partially succeeded. The appeal filed herein has been admitted out of time but all the other prayers in the motion have been dismissed for lack of merit.

22. The respondent is awarded costs of the application assessed at KShs.20,000 which should be paid in the next 21 days.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 20th day of December, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Mbaka for the appellant

Ms Ambuko holding brief for Mr. Amuga for the respondent

Ms Kavata: Court Assistant



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