



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. E028 OF 2021

FINEJET LIMITED.....APPLICANT

-VERSUS-

MBITHI MUSYIMI.....RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 20th January, 2021 taken out by the applicant and supported by the grounds set out on its body and the facts deponed in the affidavits of advocate Kibet Kemboi, John Kimani and Rosemary Kangwana. The applicant sought an order for leave to appeal out of time against the judgment and decree in Milimani CMCC NO. 4275 OF 2019 delivered on 4th December, 2020 and a further order for a stay of execution of the aforesaid judgment pending the hearing and determination of the appeal.

2. In reply to the said Motion, the respondent filed the replying affidavit of advocate Wislay O. Kiyondi sworn on 10th February, 2021.

3. At the *inter partes* hearing of the Motion, the parties put in their respective submissions. It is clear from both the replying affidavit and submissions by the respondent that he is not opposing a granting of the orders sought in the Motion.

4. In that case, I have considered the grounds set out on the body of the Motion; the facts deponed in the supporting and replying affidavits; and the respective submissions.

5. It is evident from a reading of the Motion that the orders sought therein are two-fold: the first is the order seeking for leave to appeal out of time against the impugned judgment and decree, which I will begin with.

6. Section 79G of the Civil Procedure Act provides for the timelines for lodging an appeal against the decision of a subordinate court as 30 days from the date of the decree or the order being appealed against. Furthermore, under Section 95 of the Civil Procedure Act and Order 50, Rule 5 of the Civil Procedure Rules, the courts have discretionary power to enlarge the time required for the performance of any act under the Rules even where such time has expired.

7. In the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** cited in the applicant's submissions, the Court of Appeal developed various conditions to offer guidance in deciding whether to extend the period for filing an appeal out of time and which I will address hereunder.

8. On the first condition which is the length of delay, Rosemary Kangwana who is the 3rd deponent and the Deputy Legal Manager

of Monarch Insurance Company, the insurer of the applicant, states in her affidavit that the delay in bringing the Motion is not inordinate.

9. While it is apparent from the record that no copy of the impugned judgment was availed to this court, it is not disputed that the aforementioned judgment was delivered on 4th December, 2020 while the Motion was brought sometime in late January, 2021. I therefore do not find the delay to be unreasonable.

10. Concerning the reason(s) for the delay, advocate Kibet Kemboi stated in his affidavit that following delivery of the impugned judgment, his office forwarded a copy of the judgment to the applicant's insurer and sought instructions on the way forward. That upon receiving instructions vide the letter dated 12th January, 2021 he became unwell and was therefore unable to act on them immediately. That in addition, the delay in lodging the appeal was occasioned by the absence of the Legal Manager of the applicant, who had proceeded on leave at the time. These averments were restated by his counterpart, Rosemary Kangwana and echoed in the submissions.

11. Upon considering the above sentiments by the applicant, I find the explanation offered by the applicant to be reasonable in the circumstances.

12. On the principle touching on whether an arguable appeal exists, the applicant asserts and submits that it has an arguable appeal. It is clear from the record that the intended appeal is primarily challenging the award of damages, which the applicant opines to be manifestly excessive and based on wrong principles. I am therefore satisfied that the applicant has raised arguable grounds in its appeal.

13. In addressing the final condition on prejudice, it is not in dispute that the judgment was in favour of the respondent, who would therefore ordinarily be entitled to enjoy the fruits of his judgment.

14. Nonetheless, I am convinced that it would not be in the interest of justice to lock out the applicant who are clearly aggrieved by the award made by the trial court and in any case, the respondent is not challenging the applicant's intention to appeal the award. I therefore find it reasonable to grant the applicant a chance to lodge the appeal.

15. The second order sought is that of a stay of execution of the decree pending appeal.

16. The guiding provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the following conditions in determining an application for stay.

17. The first condition being that the application must have been made without unreasonable delay has already been addressed above and there is no need for me to belabor my finding.

18. The second condition touches on substantial loss to be suffered by an applicant. In their respective affidavits, Kibet Kemboi and Rosemary Kangwana stated that the applicant is apprehensive that the respondent will proceed to execute the decree, thereby rendering the intended appeal nugatory.

19. However, I note that the applicant through its submissions adds that the respondent is a person of unknown means, thereby offering no guarantee that he will be in a position to refund the decretal sum if the same is paid out to him and the appeal succeeds.

20. The law is well settled that submissions do not constitute evidence and hence a party cannot purport to raise new issues or evidence in its submissions. This was the position taken by the Court of Appeal in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR**. Consequently, since the applicant did not raise its apprehensions regarding the respondent's financial capabilities in the affidavit evidence, it cannot be heard to do so in its submissions.

21. The law is also well settled that execution being a lawful process, it is the responsibility of an applicant to bring credible evidence to show the substantial loss he or she stands to suffer in the process. I am not convinced that the applicant in this instance has brought any such evidence. However, I will consider the interest of justice given that the respondent is not opposed to a granting

of the orders sought in the Motion.

22. On the final condition which is the provision of security for the due performance of such decree or order, the applicant has indicated its readiness and willingness to comply with the conditions to be set by this court on the provision of security and further proposes the issuance of an insurance bond or a bank guarantee. The respondent on his part states and submits that he requires urgent medical attention to the tune of Kshs.420,000/= and has outstanding medical bills estimated at Kshs.1,500,000/= and therefore suggests that the sum of Kshs.4,000,000/= be paid to him and the remaining decretal balance be deposited in a joint interest earning account. In that case, I must balance the interest on the parties.

23. In the end, the instant Motion dated 20th January, 2021 is allowed in terms of prayers 2 and 5, giving rise to the following orders:

a) The applicant shall file and serve its memorandum of appeal within 14 days from today.

b) There shall be a stay of execution of the judgment delivered on 4th December, 2020 on the condition that the applicant releases a sum of Kshs.3,000,000/= to the respondent and further provides a bank guarantee for the remaining balance of the decretal sum from any reputable bank to be agreed upon between the parties, within 45 days from today, failing which the order for stay shall automatically lapse.

c) Costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2021.

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Ms. Chepngetich for the Applicant

Mr. Momanyi for the respondent for the Respondent



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