Morande v Machuki (Miscellaneous Application 150 of 2023)
[2024] KEHC 8466 (KLR) (24 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8466 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

MISCELLANEOUS APPLICATION 150 OF 2023

TA ODERA, J

JUNE 24, 2024

BETWEEN

FREDRICK OKARI MORANDE ..... APPELLANT

AND

HENRY MOGAKA MACHUKI ..... RESPONDENT

RULING

1. By a notice of Motion Application dated 13th December 2023 and filed through the firm of Kimondo Gachoka & Company Advocates, filed under Section 3A, 79 G and 95 of the *Civil Procedure Act* Order 22 Rule 22, order 42c Rule 6, order 50 Rules 6 and order 51 Rules 1 and 3 of the civil procedure rules and all the enabling provisions of law. The Appellant/Applicant herein seeks the following orders: -

    1. Spent
    2. spent
    3. That the Honourable Court be pleased to grant leave to the applicant to appeal out of time against the judgment of Hon. P.K Mutai (PM) in Kisii Kisii CMCC No. E156 of 2022 delivered on 1.11.23.
    4. spent
    5. That this Honourable court be pleased to stay execution of the judgment and decree in Kisii CMCC No. E156 of 2022 delivered on 1.11.23 pending hearing and determination of the appeal herein.
    6. That this Honourable court be pleased to order that the applicant furnishes security in the form of bank guarantee for the decretal amount pending hearing and determination of this appeal.

The application is based on the grounds that:

i. Judgment was delivered on 11.11.23

ii. Instructions to appeal were received 30 days after the date of the judgment.

iii. The delay in filling the appeal was not intentional.

iv. The delay has been explained.

v. The applicant is aggrieved by the judgment intended to be appealed from.

vi. The application has been made timely without undue delay.

vii. The applicant is likely to suffer substantial, irreparable loss and damages as there is likelihood that the applicant will be unable to recover the decretal sum if paid.

viii. Unless the application is allowed the intended appeal will be rendered nugatory.

ix. The applicant has an arguable appeal with high chances of success.

2. The Application was supported by an Affidavit sworn by the Appellant/Applicant dated 13.12.23 in which he reiterated the grounds on the face of the application. He said he is the insured owner of motor vehicle registration no KCS 940 A and that deponed on 1.11.23 judgment was delivered against him at Kshs 730.000/= for general damages at 100% liability. He said that instructions to Appeal came one month after the judgement. He annexed the said instructions "FOM1" and draft memorandum of appeal "FOM2". He said no prejudice would be occasioned to the respondent as he is ready and willing to provide a bank guarantee "FOM3". Also that time within which to file the appeal expired 30 days upon delivery of the judgement and that the intended appeal is arguable. Also that the delay as due to inadvertence and that he will suffer irreparable loss and prejudice unless the application is allowed.

3. The respondent filed replying affidavit dated 18.1.24 and said no plausible reason has been given for the delay. Also that the application says instructions to Appeal were received on 11.12.23 yet the appeal was filed on 21.12.24.

4. He denied that the intended appeal has high chances of success and termed it a deliberate delaying tactic meant to deny him of the fruits of his judgment.

5. The Respondent filed a replying affidavit dated 29.9.23 in which he opposed the application and suggested that the applicant releases half of the decretal sum to him and the other half be deposited in a joint interest earning account in the names of both Counsel herein.

6. It was directed that the Application be disposed off by way of written submissions.

Submissions

7. The Appellant/Applicant filed his written submissions dated 22.1.24 on 26.1.2024. The Appellant submitted that the application in question is with respect to the question of stay of execution pending the hearing and determination of the appeal. further that in the case of Edith Gichungu v Stephen Thiothi (2014) eKLR the principles under pinning an application for leave to file an appeal out of time were set out as follows:

a. Period of delay:

b. Reasons for the delay

c. Degree of prejudice

8. It was submitted that the delay was not inordinate as it was for about 2 months and it was due to the reasons that the instructions to appeal were received after the days provided for had lapsed and that no prejudice would be occasioned to the respondent as the applicant is ready to deposit security.

9. Also that the court has unfettered jurisdiction to grant the orders sought,

10. The respondent filed submissions dated 23.1.24 on 24.1.24 and raised the following issues for determination;

    i. Whether the applicants have satisfied the conditions for granting stay.

    ii. Whether the applicant is required to file a substantive appeal and seek orders to have it admitted out of time or whether she should seek leave in a miscellaneous application.

    iii. Whether there are good and sufficient grounds for not filling the appeal out of time.

    On whether the applicant has satisfied conditions for grant of stay, it was submitted that the same has not satisfied conditions for grant of stay pending appeal under Order 42 Rule 6 CPR. Also that in the case of Butt vs Rent restriction Tribunal (1982) eKLR 417, the issue of grant of stay pending appeal was held to be discretionary.

11. It was also submitted that there must be a filed appeal before an application for leave to file out of time can be considered and that no appeal has been filed herein and so the application is in competent as was held in the case of Evans Kiptoo vs Reinhard Omwonyo Omwoyo (2021) where the Hon Judge cited EmukhuleJ in Gerald M'Limbine vs Joseph Kangangi (2008) eKLR it was held:

> ''My understanding of the proviso to section 79G is that an applicant seeking "an appeal to be admitted out of time" must in effect file such an appeal, and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court's process under section 79B which says:
>
> "79B Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily"

It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the *Civil Procedure Act* except upon the existence and perusal of the appeal to be "admitted" not to be "filed out of time." Admission presupposes that the appeal has been filed and will be "admitted" for hearing after a judge has established under Section 79B that there is "sufficient" ground for interfering with the decree part of a decree or order appealed against."

Determination

12. I have carefully considered the application, the reply and the able submissions by both counsel. The issues arising for determination are:

    i. Whether the applicant has met the conditions for leave to extend time.

    ii. Whether the applicant has met the threshold for grant of stay pending appeal.

13. On the conditions for granting leave to extend time to appeal out of time, Section 79G of the *Civil Procedure Act*, which stipulates that:

> " Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for 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."
>
> The applicant moved the court under section 79 G of the *Civil Procedure Act* and the respondent argued that under the said section an appeal must have been filed for leave to file it out of time to be granted. The Respondent cited the case of Evans Kiptoo vs Reinhard Omwonyo Omwoyo (2021) where the Hon Judge cited Emukhule J in Gerald M'Limbine vs Joseph Kangangi (2008) eKLR. The said decision emanates from courts of concurrent jurisdiction and are thus persuasive to this court. My interpretation of the proviso to Section 79 G of the CPA is that Section 79G allows the court the discretion to courts to grant leave to a party who has not filed an appeal at all to file an appeal out of time and also to deem an appeal which has been filed out of time without leave of the court as duly filed appellant who has filed. The only condition attached to the said proviso is that an applicant must show sufficient cause for the delay. On whether there was inordinate delay in filling the application, the applicant said that the delay was occasioned by the instructions to appeal which came in 30 days after delivery of judgment i.e 11.12.23 yet judgment was delivered on 1.11.23 and thus the delay is excusable. The respondent said that the delay was inordinate and that there is no good reason for the said delay and that the application was also filed on 21.12.23. The right to be heard is fundamental and the courts should not deny this right unless it is shown that the applicant was out to deliberately delay the case or obstruct the course of justice. The reason given for the delay is plausible. I find that the delay was of about 1½ days and thus was not inordinate.

14. On the issue of chances of the appeal to succeed. I have seen the draft memorandum of appeal, the same challenges quantum and damages and though the respondent says it has no chances of success, the same raises arguable issues,

I find that sufficient cause has been shown in support of the prayer for leave to file the intended appeal out of time. I allow the prayer for extension of time within which to file the intended appeal.

On the issue of the threshold for stay pending appeal, Order 42 Rule 6 of the Civil Procedure Rules, 2010 provides as follows: -

Stay in case of appeal

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 to have such order set aside.

(2) No order for stay of execution shall be made under sub rule [1] unless-

(a) the court is satisfied that substantial loss may result to the applicant 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 applicant.

(3) Notwithstanding anything contained in sub rule [2], the court shall have power without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub rule [1] of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

The issue of delay has already been dealt with herein above.

15. On substantial loss, the applicant said he will suffer substantial loss if the orders are not granted but this was refuted by the respondent who said that the applicant is out to deny him enjoyment of the fruits of his judgment. He however he did not give any evidence of his ability to refund the decretal sum incase the appeal succeeds. In the case. RWW v EKW [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

> " The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
>
> 9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."

16. I have weighed the rights of the applicant and those of respondent on this issue and I find that the applicant will suffer substantial loss unless the stay orders are granted.

17. On the issue of security, the applicant has offered a bank guarantee as security in the application however in its submissions it submitted that no prejudice would be occasioned to the respondent if the orders are granted as it has already deposited ½ of the decretal sum as ordered by the court as a condition for stay pending interpartes hearing of the instant application, I have looked at this file and there is no evidence of such deposit. I have perused the said Bank guarantee dated 14.6.23 offered by the Applicant as security herein. The same is issued by Family Bank in favour of the Direct line the insurer of the applicant and it is for Kshs 200,000, 000/=. I note that the same was issued one year down the line and is too general as it is not specific to any mattes and thus one cannot tell whether the same is still in place or has been exhausted. In the case of *Nzyuko v Matheka (Civil Appeal E061 of 2023*) [2023] KEHC 23844 (KLR) (12 October 2023) (Ruling) it Was held that This Court notes that there is an agreement

exhibited between Family Bank and the directors of Direct Line Assurance Company Limited who is the insurer of the Applicant. The same is for a sum of Kshs 50,000,000 million. It is for a period of 12 months with an option to renew the guarantee was received by the said bank on 23rd February, 2022 which as the time of this ruling had not been renewed. 34. This Court further takes note of the fact that Applicant is not a party to the said agreement as the said agreement is between the Applicant's insurer and Family Bank. There is no evidence that the bank guarantee herein is for the intent and purpose of this matter. 35. This Court finds and agree with the Counsel for the Respondent that the said bank guarantee is not suitable in this present case. It is in a nutshell general bank guarantee it has not stated how each party will benefit from it hence it will pose hindrance at the time of enforcement an agreement exhibited between Family Bank and the directors of Direct Line Assurance Company Limited who is the insurer of the Applicant. The same is for a sum of Kshs 50,000,000 million. It is fora period of 12 months with an option to renew the guarantee was received by the said bank on 23rd February, 2022 which as the time of this ruling had not been renewed.

34. This Court further takes note of the fact that Applicant is not a party to the said agreement as the said agreement is between the Applicant's insurer and Family Bank. There is no evidence that the bank guarantee herein is for the intent and purpose of this matter. 35. This Court finds and agree with the Counsel for the Respondent that the said bank guarantee is not suitable in this present case. It is in a nutshell general bank guarantee it has not stated how each party will benefit from it hence it will pose hindrance at the time of enforcement "Similarly in this case"

    I find that the "bank guarantee" is not really a guarantee for the decretal sum herein Security by way of deposit of the decretal sum in court would be appropriate in the circumstances.

    In the upshot I find merit in the application for stay the judgment and the decree of the lower court. I allow the application on condition that the applicant deposits the entire decretal sum in court within 30 days from the date of this ruling. The intended appeal be filed and served within 14 days from today.

File is closed.

DATED, DELIVERED AND SIGNED AT KISII THIS 24TH DAY OF JUNE 2024.

T.A ODERA

JUDGE

In the presence of:

Mr. Omandi I hold brief for Miss Sagwa for the respondent

No appearance for the applicant

Oigo Court Assistant