



Great Rift Shuttle Services Ltd v Musambai (Suing as legal representative of the Estate of Silas Kisutia Musambai) (Miscellaneous Civil Application E004 of 2023) [2023] KEHC 3921 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3921 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS CIVIL APPLICATION E004 OF 2023**

**DK KEMEL, J
APRIL 27, 2023**

BETWEEN

GREAT RIFT SHUTTLE SERVICES LTD APPLICANT

AND

JOASH MUKWAMI MUSAMBAI (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF SILAS KISUTIA MUSAMBAI) RESPONDENT

RULING

1. The Applicant filed an application dated 2nd February, 2023 seeking principally for leave to file and appeal out of time from the judgment and decree in Webuye SPMCC. No.105 of 2018 and an order of stay of execution of the said judgment and decree delivered on December 28, 2022 pending the hearing and determination of the intended appeal. It also seeks for costs.
2. The application is supported by the grounds set out in the face thereof as well as the affidavit of Maureen Tesot learned counsel in conduct of the matter on behalf of the Applicant sworn on even date. The applicant's gravamen is inter alia that the Applicant is aggrieved by the judgment of the trial court and is desirous of lodging an appeal against the same as evidenced by the draft memorandum of appeal marked as annexure MF – 3" that the judgment was delivered without notice after the scheduled date fell on a public holiday. That the applicant learnt of the delivery of the judgment on January 30, 2023 and subsequently filed the present application that the interred appeal raises triable issues with high chances of success; that the appeal will be rendered nugatory if the order of stay is not granted that the Applicant is willing to provide a bank guarantee from Family Bank as security pending the hearing and determination of the intended appeal.
3. The Respondent opposed the application vide a replying affidavit sworn on March 9, 2023 wherein he deponed *inter alia*; that there is no evidence of substantial loss on the part of the Applicant if an order of stay is not granted; that the applicant has not explained the reasons for the delay in filing its



memorandum of appeal in time; that the intended appeal has no chances of success as the Applicant did not call witnesses to controvert the Respondent's evidence in the lower court; that the affidavit in support of the application has been sworn by an Advocate instead of the applicant himself; that the purported security relied upon by the applicant has expired ; that the application is meant to prevent the respondent from enjoying the fruits of the judgement.

4. The application was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
5. I have given the consideration to the application rival affidavits and submissions. I find the issues for determination are firstly, whether this court should grant leave to the Applicant to lodge its appeal out of time and secondly, whether the court should grant an order of stay of execution of decree pending determination of the intended appeal.
6. It is noted that the Applicant's application is predicted upon section 79G of the Civil Procedure Act and order 42 rule 6(2) of the Civil Procedure Rules.
7. As regards the first issue section 79G of the Civil Procedure Act provides that;
" 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 a decree or order."
Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.
8. Therefore an applicant seeming enlargement of time to file an appeal or an admission of an already filed appeal must show that he has a good cause for doing so, since as was held in *Feroz Begum Quneshi & another v Maganbhai Patel & others* {1964} EA 633 that there is no difference between the words "Sufficient cause" and good cause". In the case of *Dalphine Parry v Murray Alexanders Carson* {1933 } EA 546 it was held that though the provisions for extension of time is requiring advance substantial justice when no negligence nor inaction, nor want of bonafides is imported to the appellant, its interpresentation must be in accordance with judicial principles. If the appellant had a good case on the merits but it is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time barred even if at the risk of injustice and hardship to Appellant.
9. As to the principles to be considered in exercising the discretion whether or not to enlarge time, the court in the case of *American bank of Kenya Ltd v Gulab P.be 2 others* {2002} IEA 65 set out the factors to be considered in deciding whether or not to grant such an application and these are;
 - i. the explanation, if any, for the delay.
 - ii. the reasons for the delay .
 - iii. The merits of the interrelated action; whether the matter is arguable deserving a day in court or whether it is a frivolous one which would only result in the delay of the cause of justice.
 - iv. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.
10. In the present case the applicants draft Memorandum of Appeal is dated 2.2.203 while the Judgement appealed from was delivered by the Lower court on the December 28, 2022 and hence the appeal ought to have been lodged by close of business on the 28/1/20-23. It seems the applicant was late by some



few days. Section 79 G of the Civil Procedure Act required that before the court emerges the time for appealing, the applicant must satisfy the court that he had a good and sufficient cause for not filing the appeal in time. The applicant's counsel in the supporting affidavit has averred that they became aware of the judgement on January 30, 2023 when the 30 days appeal period had elapsed and that they conducted the client who instructed them to proceed and lodge an appeal against the judgement. It was the contention of the Applicant's counsel that the delay was due to the fact that the judgement was delivered on December 28, 2022 without notice to the parties and that there has not been any inordinate delay. The Respondent has countered this by questioning how the Applicant came to know about the delivered of the judgement. It is noted that the Judgement was initially scheduled for delivery on the December 27, 2022 which fell on a public holiday and that the trial magistrate delivered it the following day. Indeed there was no notice for delivery on the 28.12.22 to the parties as after the scheduled date (27.12.22) was declared a public holiday. Ordinarily parties are expected to follow up on their matters once the scheduled dates have lapsed without delivery by the court. The applicant's claim that there was no notice appears to me to be plausible. It is my considered view that the period of delay is not that inordinate as to warrant a denial. Article 48 of the Constitution guarantees every person access to justice. The applicant is late by about five days after the period of appeal had lapsed which I find not to be inordinate or unreasonable delay. It is nor in dispute that the discretion of this court to enlarge time for filing of a late appeal is unfettered. It is noted that as soon as the applicant became aware of the matter, it filed the present application. This is clear evidence that the applicant is desirous of pursuing an appeal. The Respondent will not suffer any prejudice if the affidavit is allowed to lodge its appeal out of time since costs can adequately compensate him in any event. I find it fair and just to allow the applicant an opportunity to ventilate its appeal.

11. For all the above reasons I find the applicant's request for enlargement of time to file memorandum of appeal out of time is merited it will be given timelines within which to comply.
12. As regards the second issue order 42 rule 6 (1) and (2) of the Civil Procedure Rules provide as follows:-
 1. No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed 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 decree or order, and whether 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 sub-rule (1) unless:-
 - 1 (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 my ultimately be binding on him has been given by the applicant.
13. On the issue of whether the application has been made without unreasonable delay, it is noted that the applicant has swumounted the same as it lodged the present application about five day after the lapse of the statutory period for lodging appeals. It has already been established from the pleading paragraphs that there was no inordinate delay in filing the present application.
14. On the issue of substantial loss, it is noted that the decretal sum is in the region of about Kshs.2million. It was contented by the Applicant that if an order of stay is not granted and the said sums paid



to the Respondent then the same might not be recovered from the Respondent whose financial means is unknown. Indeed the Applicants affidavit in support vide paragraph 14 thereof the issue of the Respondent's means was raised. However, the Respondent failed to address himself to the said allegations by filing an affidavit of means so as to assuage any fears of loss to be suffered by the Applicant in the event of success of the appeal. The Respondent did not make any averment to the effect that he is in a position to refund the monies to the Applicant in the event of success of the appeal. The said sums are a tidy sum by any standards and if the same will not be refunded then the applicant stands to suffer substantial loss. In the case of *Kenya Shell Ltd v Kibira* [1986] KLR 410 it was held that substantial loss in its various forms the cornerstone of both jurisdictions for granting a stay – that is what has to be prevented. In the circumstances, I am satisfied that if stay is not granted then the applicant will suffer substantial loss as not only will the appeal be rendered nugatory but that the Applicant might not recover the monies from the Respondent.

15. On the issue of security it is noted that the Applicant has offered to furnish a bank guarantee from Family Bank pending the hearing and determination of the intended appeal. However, the Respondent's counsel submitted that three quarters (3/4) of the decretal sums be paid to the Respondent and the remaining be deposited into a joint interest account in the names of both Advocates for the parties. It is noted that the Applicant herein is challenging both liability and quantum. It is also noted that the Applicant is accusing the trial court for not apportioning liability to rope in other motorists over the accident. It is also noted that the Applicant did not under evidence before the trial court. This being the position I find that at the conclusion of the intended appeal it is highly unlikely that the Respondent will come not empty handed. I find in the circumstances that a quarter of the decretal sums should be paid to the Respondent while the balance shall be secured by a bank guarantee from a reputable bank to be furnished by the Applicant pending determination of the intended appeal. This in my view would best cater for the interests of the parties herein.
16. In view of the foregoing observations it is my finding that the Applicants application dated 2.2.2023 has merit.

The same is allowed in the following terms:-

- i. The applicant is hereby granted leave to lodge appeal out of time and to file and serve its memorandum of appeal within seven (7) days form the date hereof.
- ii. An order of stay of execution of the judgement and degree and all consequential orders in Webuye SPMCC No. 105 of 2018 is hereby granted upon the Applicant paying a quarter of the decretal sums (Kshs.447,200/-) to the respondent's advocate while the balance thereof shall be secured by a bank guarantee from a reputable bank which shall be furnished by the applicant within thirty (30) days form the date hereof failing which the stay shall lapse.
- iii. The costs hereof shall abide in the intended appeal.

DATED AND DELIVERED AT BUNGOMA THIS 27th DAY OF APRIL 2023.

D. Kemei

Judge.

In the Presence of:-

Miss Tesot for Applicant

No appearance for Keter for Respondent

Kizito Court Assistant

