



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APPLICATION NO. E401 OF 2021

GEOFFREY MAINA NJUGUNA.....APPLICANT

-VERSUS-

WAWERU NDIRANGU.....RESPONDENT

RULING

1. The motion dated 18th August, 2021 by **Geoffrey Maina Njuguna** (hereafter the Applicant) seeks two key prayers. First that the court be pleased to grant a stay of execution of the judgment and decree in **Milimani CMCC No. 1376 of 2017** issued in favour of **Waweru Ndirangu** (hereafter the Respondent), pending the hearing and determination of the intended appeal and secondly, an order that the Applicant be granted leave to file an appeal out of time. The motion is expressed to be brought under Section 3A and 79G of the Civil Procedure Act, Order 42 Rule 1 & 2 and Order 50 Rule 1 & 5 of the Civil Procedure Rules (CPR). On grounds, among others that, being dissatisfied with the judgment and decree of the lower court, the Applicants desire to prefer an appeal but the period within which to appeal has lapsed.

2. The motion is supported by the affidavit of **Linda Njenga**, who describes herself as a Legal Officer with Britam General Insurance the insurers of the Applicant with respect to the subject matter of the suit before the lower court; and the affidavit of **Dorry Wamugo**, counsel having conduct of the matter on behalf of the Applicant. The gist of former affidavit is that judgment was delivered in the absence of counsel on record and being dissatisfied with the judgment, the Applicant desires to appeal but the time prescribed has lapsed. She explains that delay herein was compounded by delayed provision of copies of the judgment. She avers that the Applicant has a good and arguable appeal which will be defeated if extension of time to file an appeal out of time is not granted.

3. On the part of counsel, she deposes that judgment was delivered in her absence as the initial reserved date of 14th May, 2021 was declared a public holiday therefore the judgment was not delivered as scheduled. She goes on to assert that this fact delayed her getting instructions from her client and that that the appeal is arguable with a high chance of success and the motion had been lodged in good faith and expeditiously.

4. The motion was opposed through the replying affidavit of **Muturi Kamande**, counsel for the Respondent. He deposes that *vide* a notice dated 13th May 2021, the lower court had advised parties that the judgment was deferred judgment to 18th May 2021 when the matter was listed on the day's cause list and judgment eventually delivered. That the Applicant's assertion that he had no notice of the delivery of the judgment is therefore baseless and ought to be dismissed. Counsel further deposes by his letter dated 10th June, 2021 which was within the 30 day appeal period, he notified counsel of the judgment while calling for the settlement cheque, a letter duly acknowledged the Applicant .He avers therefore that the motion ought to be dismissed as the Applicant has failed to demonstrate a good reason to warrant extension of time within which to file the appeal and he gives reasons why he views the intended appeal as bereft of chances of success.

5. The motion was canvassed through written submissions. As regards the applicable principles for extension of time, the Applicant's counsel anchored his submissions on the decision in **Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] eKLR**. Counsel submitted the motion was filed without inordinate delay after the Applicants learned of the judgment. She relied on **Nairobi Civil Application No. Nai 245 of 2014 Karachiwalla Nairobi Limited and Sanjivan Mukherjee**. To submit that the circumstances leading to delay were beyond the control of the Applicant. Further, that the Respondent would not suffer any prejudice if the motion were granted.

6. Concerning the prayer for stay pending the intended appeal counsel based her submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules and cited several authorities, including **Kiambu Transporters v Kenya Breweries [1997] eKLR**, and **Kenya Shell Limited v Benjamin Kibiru [1986] KLR 410**. It was her submission that the Applicant stands to suffer substantial loss unless an order of

stay of execution is granted as the Respondent failed to demonstrate her financial capability of refunding the decretal sum in the event the same is paid out and the Applicant is successful on appeal. Finally, citing the decision in **G.N Muema P/A Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another** counsel reiterated the Applicant's readiness to provide security for the entire decretal sum in the form of an insurance bond and cited that the motion was filed without undue delay. The court was thus urged to allow the motion.

7. Counsel for the Respondent submitted that no good cause has been advanced to justify the extension of time for filing the appeal; that there was clearly inordinate and unexplained delay in filing the instant motion. Concerning the prayer for stay of execution pending the intended appeal counsel anchored his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules and cited **HGE v SM [2020] eKLR, James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** to assert that the Applicant had not discharged the duty to demonstrate substantial loss. In conclusion he relied on the Court of Appeal decision in **Civil Appeal Application No. E131 of 2021 The Public Service Commission & 72 Others v Okiya Omtatah & 4 Others** to state that the intended appeal is frivolous and does not raise any bona fide issues thus urged this court dismiss the motion with costs.

8. The Court has considered the rival affidavit material and submissions made in respect of the motion. Starting with the prayer seeking stay of execution pending the intended appeal, it is evident on a plain reading of Order 42 Rule 6(1) of the CPR that an order to stay execution pending appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the Civil Procedure Rules. Although the provision does not expressly say so, this can be inferred from the rule. Further, an analogy can be drawn from Order 42 Rule 6 (4) of the Civil Procedure Rules which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given. Equally, Order 42 Rule 6 (6) of the Civil Procedure Rules states:

“Notwithstanding anything contained in subrule (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.” (Emphasis added).

9. It would seem therefore that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the Civil Procedure Rules). Until the memorandum of appeal is filed, the court may be acting *in vacuo* by considering the Applicants' prayer for stay of execution pending a non-existent appeal. The Court of Appeal in **Abubaker Mohamed Al-Amin v Firdaus Siwa Somo [2018] eKLR** while citing with approval the decision of the High Court in **Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased)) [2017] eKLR** concurred and adopted the foregoing reasoning.

10. Earlier, the Court of Appeal in the case of **Equity Bank -Vs- Westlink MBO Limited [2013] eKLR** while commenting on Rule 5 (2) (b) of the Court of Appeal Rules, whose wording is substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules, and on Order 42 Rule 6 (6) of Civil Procedure Rules, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also **Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR**). Order 42 Rule 1;

“(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

11. There is no provision for the filing of a notice of intended appeal in the High Court from a decision of the subordinate court. Order 42 Rule 1 of the CPR provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, an appeal is yet to be filed and there is therefore no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter. If the Applicant desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application. In my considered view, the words that *“an appeal may be admitted out of time”* in Section 79G, appears to admit both retrospective and prospective applications. So that leave under the section may be sought before or after a memorandum of appeal is filed. However, it may be more prudent for a party who also seeks stay of execution in the same motion for leave to appeal out of time to have filed the memorandum of appeal in advance.

12. In the circumstances, the prayer seeking stay of execution of the said judgment and decree in **Milimani CMCC No. 1376 of 2017** issued in favour of **Respondent** pending the hearing and determination of the intended appeal has no legal anchor and is consequently disallowed.

13. Turning now to the prayer seeking leave to appeal out of time, the power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the Civil Procedure Act. The deponents of the affidavits in support of the motion assert that delay in filing the appeal and motion was occasioned by the fact that the lower court judgment which was scheduled to be delivered on 14th May, 2021 was delivered on 18th May, 2021 in the absence of counsel on account of the fact that the initial reserved judgment date was declared a public holiday. It was further asserted by the deponents that delay was compounded by the fact that it took time to acquire details of the judgment to enable counsel to advise her client and subsequent issuance of instructions to appeal from the instructing client.

14. The Respondent vehemently rebutted the above assertions stating that parties were duly notified of the rescheduled delivery date of the judgment by dint of the court notice, and that the Respondent notified the Applicant's counsel of the delivery subsequently and before 30 days lapsed. In his view, the Applicant had not given a reasonable explanation for the delay in filing the motion.

15. 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 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.”

16. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate *“good and sufficient cause”* for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

17. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of **Telkom Kenya Limited V. John Ochanda And 996 Others [2015] eKLR** that:

“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court’s discretion in curing the pleadings before it. This Court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place....

It is this Court’s position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not irrelevant but are the handmaidens of justice that facilitate the right of access to justice in the terms of Article 48 of the Constitution....”

See also **Patrick Wanyonyi Khaemba V Teachers Service Commission & 2 Others [2019] eKLR**.

18. The Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

- 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
- 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**
- 7.”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR**.

19. The judgment of the lower court was delivered virtually in the absence of the Applicant on 18th May, 2021, the earlier reserved date of 14th May 2021 having been declared a public holiday. With a little more diligence counsel for the Applicant could have seen the Court’s notice communicating the change of date and the cause list, and therefore attended delivery. The explanation given appears limp, therefore. Nevertheless, the delay herein is approximately two (2) months which is not inordinate, albeit the fact that Applicant’s counsel had by 10th June 2021 been notified of the judgment by the Respondent’s counsel. An eminent Judge has said that blunders will continue to be made in

proceedings and in the circumstances of this case, it may be onerous to shut out a party from his right of appeal on account of the failures and mistakes of his counsel, that do not appear deliberate. The Respondent will not suffer prejudice that cannot be compensated through costs.

20. Concerning the agreeability of the intended appeal, parties have taken rival positions. Based on the language employed in **Mutiso v Mwangi** (supra) the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this nature. The draft memorandum of appeal attached to the Applicant's affidavit appears to raise issues serious enough to be worthy of the court's consideration on appeal or that are *prima facie* arguable. The Court of Appeal in **Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited (2020) eKLR** stated that such appeal:

“... may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court.”

21. In **Vishva's** case, the Court emphasized the right of appeal in the following terms:

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized in the case of Richard Ncharpi Leiyagu vs. IEBC & 2 Others (supra); Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003; for the holding *inter alia* that:

(i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;

(ii) the right to be heard is a valued right; and

(iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;...”

22. In the circumstances of this case, the court is persuaded that in order to facilitate the Applicant's undisputed right of appeal, the prayer for leave to appeal out of time is granted. The appeal is to be filed within 14 days. In the meantime, there will be an order lasting 14 days to maintain the *status quo* existing as of today in the lower court suit. The costs of the motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF FEBRUARY, 2022

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr Gaya

For the Respondent: Mr Muturi

C/A: Carol