



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**MISC. CIVIL CASE NO. E127 OF 2021**

**BETWEEN**

**MARY MUTHONI NYAMU.....APPLICANT**

**VS**

**ADEPHINE NYABIKARI.....RESPONDENT**

**RULING**

1. Before court is what I can loosely call an application. It is dated 4<sup>th</sup> June, 2021. I refer to it as such because although it has the prayers, as applications often have, it has no title at all. One is therefore left to wonder whether what is before me is a chamber summons, Notice of Motion or even originating summons. That is but one of the many transgressions of the applicant hereof.

2. For the purpose of description, I shall refer to what is before me as an application. The applicant, **MARY MUTHONI NYAMU** seeks two substantive prayers in that application. Those prayers are: -

*“That stay of execution of the judgment entered on 17<sup>th</sup> November, 2020 be granted pending the hearing and final determination of intended appeal.*

*That this honourable court be pleased to grant the appellant/applicant leave to lodge an appeal out of time against the judgment entered on 17<sup>th</sup> November, 2020 in Ruiru CMCC 301 of 2019.*

*That the memorandum of appeal herein be deemed as properly filed.”*

3. I have reproduced the above prayers as reflected in the application before me. It will be noted that the applicant sought stay of execution of judgment delivered on 17<sup>th</sup> November, 2020, but that prayer does not state the case number of that judgment, nor is there stated the court which delivered that judgment. One only gets a clue of the meaning of that prayer from the following prayer where the applicant sought leave to appeal. The leave to appeal is sought in respect to the judgment of 17<sup>th</sup> November, 2020 at Ruiru CMCC No. 301 f 2019. A party is bound by its pleading and that being so, the applicant’s prayer for stay cannot be granted because of the vagueness of the prayer. There is no specific judgment the applicant seeks to stay with that prayer. That prayer therefore fails.

4. The prayer that remains for consideration is the one where the applicant seeks leave to file an appeal out of time and the prayer for the Memorandum of Appeal, attached to the affidavit in support of the application, to be deemed as properly filed.

5. The affidavit in support of the application is sworn by *Linda M. Nzioka* who is the applicant’s advocate. The deposition in that affidavit can be summarised as follows:-

*a. That Ruiru Court entered judgment against the applicant in CMCC No. 301 of 2019 on 17<sup>th</sup> November, 2020 for Kshs.583,440 plus costs and interests.*

*b. That the applicant was aggrieved by the whole of that judgment and intends to file an appeal against it.*

*c. That the applicant instructed her **then** advocate to file an appeal but the advocate failed to lodge an appeal within the required to file an appeal on time was occasioned by the then applicant’s advocate.*

6. As stated before, that affidavit was sworn by the applicant's advocate. The advocate did not state that she had first-hand knowledge of the applicant instructing her **then** advocate to file an appeal. This is what is required under order 19 Rule 3 (1) of the Civil Procedure Rules. That Rule provides:-

***“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:-***

***Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information”***

7. The deponent should have confined herself to facts known to her otherwise she was required by the above Rule to make statements of information and belief showing the source and grounds. In this case, the deponent did neither of that. She did not state the source of her information nor did she state her belief in that information. For that reason, those depositions are hereby expunged for that contravention.

8. More seriously is that those depositions alleged that an unnamed advocate was instructed. There is no information when he/she was instructed to file an appeal for the applicant.

9. The applicant should have filed her appeal within 30 days of the date of judgment that is 17<sup>th</sup> November, 2020. The applicant did not file that application within the 30 days provided under section 79G of the Civil Procedure Act. That Section is in the following terms:-

***“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.”***

10. Attention is drawn to the proviso of that Section which provides that an appeal may be filed out of time if an applicant satisfies the court that he has a good and sufficient cause.

11. The applicant did not meet the threshold of “sufficient cause”. The only reason given why the appeal was not filed within time was because the applicant gave instructions on unknown date to an unnamed advocate to file the appeal but the said unnamed advocate did not file the same. The applicant in seeking the exercise of this Court's discretion in her favour had a burden to provide material upon which the court could exercise its discretion. In the case **DILPACK KENYA LIMITED VS. WILLIAM MUTHAMA KITONYI (2018 eKLR)** the court was faced with similar application as I am considering the court's discussion in that case is very pertinent to this matter. The court had this to say in **DILPACK KENYA LIMITED VS. WILLIAM MUTHAMA** (supra):

***“27. Therefore an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in FEROZ BEGUM QURESHI AND ANOTHER VS. MAGANBHAI PATEL AND OTHERS [1964] EA 633, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in DAPHNE PARRY VS. MURRAY ALEXANDER CARSON [1963] EA 546 that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but 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 at the risk of injustice and hardship to the appellant.***

***28. As to the principles to be considered in exercising the discretion whether or not to enlarge time in FIRST AMERICAN BANK OF KENYA LTD VS. GULAB P SHAH & 2 OTHERS NAIROBI (MILIMANI) HCCC NO. 2255 OF 2000 [2002] 1 EA 65 the Court 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 merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). 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.”***

12. In this case, the applicant did not give explanation for the delay, the applicant did not provide a copy of the judgment she intends to appeal to enable this Court determine if the proposed appeal is deserving a day in court and the applicant did not state if the respondent can be compensated with costs.

13. Although the application was unopposed by the respondent, even though her advocate was served, the same is unmerited.

#### **DISPOSITION**

14. For the reasons set out in this Ruling, the application dated 4<sup>th</sup> June, 2021 is dismissed with no orders as to costs. The interim order of stay of execution issued on 7<sup>th</sup> June, 2021 is hereby vacated.

15. This file shall henceforth be closed.

**RULING DATED AND DELIVERED AT KIAMBU THIS 21ST DAY OF FEBRUARY, 2022.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant: Maurice

For Applicant: - (Mary Muthoni Nyamu): - N/A

For Respondent: (Adephine Nyabikari): - N/A

**COURT**

Ruling *delivered virtually*.

**MARY KASANGO**

**JUDGE**