



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**MISC. CIVIL CASE NO 68 OF 2020**

**MARK MUCHIRI GACHOKI.....APPLICANT**

**-VERSUS-**

**RUTH WAMBUI GITHAIGA.....RESPONDENT**

**RULING**

1. **MARK MUCHIRI MUCHOKI** by his Notice of Motion application dated 20<sup>th</sup> April, 2020 prays for temporary order of stay of execution of the judgment of **Kikuyu PMCC No. 140 of 2013** which was delivered on 17<sup>th</sup> February, 2020. The applicant also prays for extension of time to file his appeal out of time.

2. The applicant has based the above prayers on the grounds that his advocate wrote to the Kikuyu Magistrate's court a letter that was received in that court on 13<sup>th</sup> March, 2020 requesting for typed proceedings, certified decree and judgment to enable an appeal to be filed. Those proceedings had not been provided by the court by the time the application was filed. Further that on 15<sup>th</sup> March, 2020 the **Chief Justice** issued a statement on behalf of **National Council for the Administration of Justice** on scaling down of court activities due to the presence of COVID-19 virus on the country. The deponent of the affidavit in support of the application deponed further as follows: -

***“THAT the applicant's delay in filing and serving the appeal was occasioned by the inability to obtain a copy of the judgment on time and directive issued by the Chief Justice on 15<sup>th</sup> March, 2020 scaling down court's operations due to COVID-19, which are clear factors beyond the applicant's control. In the circumstances, the applicant stands to suffer immense prejudice and injustice if the appeal is not admitted out of time.”***

3. The application is opposed by **RUTH WAMBUI GITHAIGA**, the respondent. The respondent by her replying affidavit deponed that the applicant was represented when the trial court gave a judgment dated for 17<sup>th</sup> February, 2020. That accordingly, the applicant was aware of the date scheduled for delivery of that judgment. That the date of that judgment was a date prior to the announcement made by the Chief Justice on the scaling down of the court processes due to the virus of COVID-19 in the country. The respondent deponed that the applicant was guilty of laches in failing to file the appeal in time and further at the applicant's failure to show that his intended appeal is arguable.

**ANALYSIS**

4. The applicant's appeal should have been filed within 30 days from the date the trial court's judgment was delivered. That is what **Section 79G** of the Civil Procedure Act, Cap 21 provides. 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. (underling mine)***

5. The applicant has not provided certification by the trial court certifying that he failed to file his appeal because he was delayed by the non-provision of the decree or order by the trial court. Accordingly, it is presumed that the applicant relies on the **proviso of Section 79G of Cap 21**. That proviso requires an applicant to satisfy the court that he had a good and sufficient cause for not filing the appeal in time.

6. The applicant by his affidavit in support of the application deponed that his advocate learnt of delivery of the judgment of 17<sup>th</sup> February, 2020 by the trial court, on 26<sup>th</sup> February, 2020. It would seem that although the applicant's advocate had that knowledge by at least 26<sup>th</sup>

February 2020 they waited until the respondent's advocate wrote a letter received by them on 3<sup>rd</sup> March, 2020 to be motivated to take positive action towards filing the appeal. That action however was not until 6<sup>th</sup> March, 2020 when the applicant's advocate wrote requesting a copy of the judgment.

7. The applicant knew he had a limited time, 30 days from the date of the judgment, within which to file an appeal. His lawyers inquired from the court Kikuyu Magistrate's court registry on 26<sup>th</sup> February, 2020 and they got information the judgment was delivered on 17<sup>th</sup> February, 2020. This Court is not informed what action the applicant took between 26<sup>th</sup> February, 2020 and when they wrote a letter dated 6<sup>th</sup> March, 2020 (although the date of that letter is erroneously stated to be 6<sup>th</sup> March, 2019). That letter does not give indication the applicant intended to appeal the trial court judgment. This is because the applicant requested for a copy of the judgment for record. In this regard, I shall cite the case **DILPACK KENYA LIMITED VS. WILIAM MUTHAMA KITONYI (2018) eKLR** as follows: -

***“32. The Applicant however contended that it has a constitutional right to appeal. However in VELJI SHAHMAD VS. SHAMJI BROS. AND POPATLAL KARMAN & CO. [1957] EA 438, it was held that:***

***“In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgement has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgement which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgements should be brought within the prescribed time and no extension of time should be granted except under very special circumstances.”***

8. The applicant failed to give specific reasons for delay in filing the appeal which is what the Supreme Court stated ought to be proved, in the case **NICHOLAS KIPTOO ARAP KORIR SALAT V. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISISON & 7 OTHERS (2014) eKLR**.

9. Granted that on 15<sup>th</sup> March, 2020 the **Chief Justice** on behalf of the **National Council on the Administration of Justice** announced that with the reporting of first case in the country of COVID-19 infection the court processes were to be scaled down for two weeks. In summary the following is what the Chief Justice announced: -

***“All appeals, hearings and mentions in criminal and civil cases in all courts are suspended with immediate effect.***

***All execution proceedings are also suspended during the two weeks.***

***Courts will continue to handle certificates of urgency and taking plea for serious cases.***

***During this time, all judicial officers and staff will continue being on duty. However, there will be no open court appearances.”***

10. In a subsequent announcement dated 15<sup>th</sup> April, 2020 the Chief Justice stated that the operations and services of registries would be scaled up with effect to 21<sup>st</sup> April, 2020.

11. Those announcements affected operations of the court as at 16<sup>th</sup> March, 2020. The applicant should have filed his appeal by 18<sup>th</sup> March, 2020, when the 30 days expired. There is no evidence produced showing the applicant was ready to file his appeal by 18<sup>th</sup> March, 2020 but was prevented from doing so by scaling down of court processes. The court's registry continued operating during the scaling down period. It is because of the above finding that I hold that the applicant has failed to show good and sufficient cause for not filing the appeal in time. There is no merit in the application.

12. Having found that the application to file an appeal out of time is unmeritorious there is no basis for considering the applicant's prayer for stay of execution. This is because stay of execution under **Order 42 Rule 6** of the Civil Procedure Rules is granted pending hearing and determination of an appeal. In this case, there is no appeal pending determination. Stay of execution under that Rule is not granted in anticipation of filing an appeal. Additionally, that prayer for stay of execution also fails.

## **DISPOSITION**

13. In respect to the notice of motion dated 20<sup>th</sup> April, 2020, I grant the following orders: -

(a) The application is unmeritorious and is dismissed with costs.

(b) 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 : - Mark Muchiri Muchoki : - N/A

For Respondent : - Ruth Wambui Githaiga : - N/A

***RULING delivered virtually.***

**MARY KASANGO**

**JUDGE**