



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CIVIL CASE NO 118 OF 2020

MURAGE NYAWIRA GLADYS.....APPLICANT

VESUS

LYDIA MUTINDI MUTUNGA (suing as mother and personal representative of the estate of)

KENNEDY MUTUA (DECEASED)RESPONDENT

RULING

1. A Notice of Motion application dated 9th July, 2020 is filed by **MURAGE NYAWIRA GLADYS**, the applicant. The applicant seeks two main prayers. The first is the prayer for leave to file an appeal out of time. The second prayer is for stay of execution of the judgment delivered in **Thika CMCC No. 969 of 2017**. The application is brought under **Order 42 Rule 4, 6 and 7** of the Civil Procedure Rules and **Section 79G** of the **Civil Procedure Act**, Cap. 21.

2. The applicant's application was supported by her advocate's affidavit. In that affidavit, the advocate stated that the trial court's judgment was delivered on 30th April, 2020. On the day of that judgment, the trial court issued the applicant stay of execution for 30 days. The advocate further deponed as follows:-

“THAT the defendant/Applicant being dissatisfied with the judgment sum intends to file an appeal to challenge the same.

THAT the defendant/applicant has just given us instructions to appeal the said judgment after perusal of the same.

THAT the time within which the judgment dated 30th April, 2020 can be appealed according to statute has since lapsed. . .

THAT the delay in filing the appeal was due to the COVID-19 pandemic as courts did not give directions in good time as to how matters would be conducted.”

3. The respondent does oppose the application by means of grounds of opposition. The respondent termed the application as frivolous incompetent and vexatious.

ANALYSIS

4. The statutory provision which limits the period of filing an appeal from the subordinate court is **Section 79G of Cap 21**. That Section provides: -

“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.”

5. The applicant was required to file her appeal within 30 days from the date the judgment was delivered by the trial court. In calculating

that period, the days within which the applicant was required to obtain a copy of the decree or order appealed from are excluded. That trial court would then be required, in case where there is delay in obtaining the decree or order appealed, to certify the period it took to provide such a decree or order. In this case, there is no such certificate by the trial court.

6. It follows that leave to appeal out of time can only be granted to the applicant if the applicant satisfies this Court that he had a good and sufficient cause for not filing her appeal within the 30 days stated under **Section 79G Cap. 21**. The meaning of that phrase "sufficient cause" was considered in the case ***FWNM VS. SMM (2019) eKLR*** as follows: -

"I again repeat the question what does the phrase "Sufficient cause" mean. The Supreme Court of India in the case of PARIMAL VS VEENA observed that: -

'sufficient cause' is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously'.

7. Is the explanation given by the applicant for delay in filing the appeal adequate? The applicant stated that judgment was delivered on 30th April, 2020. The applicant was obviously represented at the delivery of that judgment because she was granted by the trial court 30 days' stay of execution. The applicant, without elaborating stated, through her advocate thus:-

"... Applicant has just given us instructions to appeal."

8. The affidavit does not shed light when the applicant instructed her advocate to file an appeal. Was it a day before or a month before the swearing of that affidavit? Is the date of obtaining instructed to appeal related to the date the affidavit was sworn? This Court is left guessing. Even though there were some disruptions to the court's processes following the declaration of the presence of the virus of COVID-19 in the country the applicant ought to have specified what challenges she encountered in filing the appeal. It is not enough to state that the delay in filing the appeal was due to the COVID-19 pandemic.

9. I wish to remind the applicant that she had an obligation to file the appeal within the period set in the statute. The applicant also needs to be reminded that the respondent has a vested right to the judgment of the trial court. In this regard, I refer to the case ***DILPACK KENYA LIMITED VS. WILLIAM 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'.

10. Moreover, I am persuaded by the holding of *Emukule J.* (as he then was) in the case ***GERALD M'LIMBINE VS. JOSEPH KANGANGI (2009) eKLR*** where the judge held that an appeal should be filed, notwithstanding it be out of time, then an application be filed for its admission out of time. In that case the judge stated as follows: -

"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 leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out the stipulated period. To do so would actually be an abuse of the court's process under Section 79B".

11. That holding is supported by the proviso of section 79G of Cap. 21. The proviso provides that an appeal ought to be filed and thereafter an applicant can seek to have it admitted out of time. In this case, the applicant has not filed an appeal. She has filed the present application in a miscellaneous file. There is no appeal in existence to be admitted out of time.

12. For the above reasons, the applicant's prayer for leave to file an appeal out of time is incompetent and it fails.

13. Having dismissed the prayer for leave to file an appeal out of time there is no basis for considering the prayer for stay of execution of the judgment pending appeal. Notwithstanding that holding it is important to note that Order 42 rule 6 of the Civil Procedure Rules, stay of execution can only become operational when an appeal exists. No stay of execution can be granted, as sought by the applicant, in the absence of an appeal. Stay of execution is not granted in anticipation of an appeal to be filed in the future.

14. The prayers presented by the applicant are unmerited.

DISPOSITION

15. In respect to the notice of motion dated 9th July, 2020, I grant the following orders: -

(a) The application dated 9th July, 2020 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: - N/A

For Respondent: - N/A

COURT

RULING DELIVERED VIRTUALLY.

MARY KASANGO

JUDGE