



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**MISC. CIVIL APPLICATION NO. E120 OF 2021**

**HERBERT MASENGELI .....1<sup>ST</sup> APPLICANT**

**EDWARD GITHAE WANJAU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**EMILY ANNE WANANGITI.....1<sup>ST</sup> RESPONDENT**

**THE KENYA RAILWAYS CORPORATION.....2<sup>ND</sup> RESPONDENT**

**RIFT VALLEY RAILWAYS CORPORATION.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**THE KENYA NATIONAL**

**HIGHWAYS AUTHORITY.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. The motion dated 12<sup>th</sup> March, 2021 by **Herbert Masengeli** and **Edward Githae Wanjau** (hereafter the Applicants) seeks leave to the Applicants to lodge an appeal out of time against the judgment of the lower court delivered on the 22<sup>nd</sup> of January, 2021 in **CMCC No. 7140 of 2016**, that the annexed draft memorandum of appeal be deemed as duly filed upon payment of the requisite fees, and that the said leave does operate as a stay of all proceedings and or execution of any ruling, judgment, decree order and all consequential orders in **CMCC No. 7140 of 2016** pending the hearing and determination of the intended appeal.

2. The motion is expressed to be brought under Section 1A, 1B, 3A, 63(e), 65(1) B, of the Civil Procedure Act, and Order 42 Rule 6 of the Civil Procedure Rules *inter alia*. It is anchored on the grounds on the face of the motion and amplified in the supporting and supplementary affidavits sworn by **Pauline Waruhiu** who describes herself as the Head of Claims and Legal at Directline Assurance Co. Ltd, the insurers of the Applicants, and thus competent and authorized to swear the affidavits on behalf of the Applicants. To the effect that, being aggrieved with judgment delivered in **CMCC No. 7140 of 2016** in favour of **Emily Anne Wanangiti** (hereafter the 1<sup>st</sup> Respondent) on 22<sup>nd</sup> January, 2021 the Applicants desire to file an appeal.

3. In explaining the delay in filing the appeal, she deposes that despite applying for a copy of a copy of the typed judgment and certified proceedings soon after the judgment was delivered on 22<sup>nd</sup> January 2021, it was not until 2<sup>nd</sup> March, 2021 that these records were supplied and instructions received on 8<sup>th</sup> March, 2021 to prefer an appeal, by which date the time to appeal had lapsed. She asserts that the Applicants have an arguable appeal with high chances of success. She swears further that the Applicants are apprehensive that they will suffer substantial loss if interim stay of execution is not granted, as the 1<sup>st</sup> Respondent is in the process of extracting the decree for purposes of execution and that she may be unable to refund to the Applicants any monies paid in satisfaction of the decree should their appeal succeed. She states that the motion has been filed without unreasonable delay and expresses the Applicants' willingness to furnish security for the due performance of the decree.

4. In opposing the motion, the 1<sup>st</sup> Respondent swore a replying affidavit. In her view, the motion is a delaying tactic, vexatious and an abuse of the court process. She takes issue with the motion on grounds that judgment was delivered in the presence of counsel and asserts that the delay in filing the appeal is inordinate and not satisfactorily explained. She deposes that the Applicants had through letters to her advocate requested details of payable costs and bank details indicating willingness to settle the decretal sums, hence the present motion is an

afterthought and in bad faith. She that the Applicants could have perused the handwritten judgment and proceedings of the lower court in view of the time limits for appealing and that no conclusive material has been presented to demonstrate that delay in filing the appeal was beyond the control of the Applicants. In conclusion, she asserts that in the event the court is inclined to allow the motion the Applicants ought to be ordered to provide security for the performance of the decree being herein.

5. The Kenya Railways Corporation (hereafter the 2<sup>nd</sup> Respondent) opposed the motion by way of a replying affidavit deposited by **Stanley Gitari** who describes himself as the Senior Legal Officer of the 2<sup>nd</sup> Respondent. He asserts that the motion is bad in law, fatal, inept, incompetent and ambiguous as it does not sufficiently disclose any justifiable cause for not filing the appeal within set timelines. He views the motion as intended to deny the 2<sup>nd</sup> Respondent its right to enjoy the fruits of judgment and asserts that the Applicants have failed to tender proof of attempts to extract the judgment within the period alleged. He further points out that counsel on record for the 2<sup>nd</sup> Respondent was able to extract the said judgment upon delivery and thus the Applicants' assertions on inability to do the same are false. He concluded by stating that the reasons proffered to justify delay are meant to hoodwink the court into condoning the negligence of the Applicants' counsel.

6. In a rejoinder to the 1<sup>st</sup> Respondent's affidavit, **Pauline Waruhiu** swore a supplementary affidavit. She deposed therein that correspondence between the respective counsels preceded the acquisition by the Applicants' of the copy of the judgment and that the said correspondence does not curtail the Applicants' rights of appeal and that it is a matter of judicial notice that since the onset of the Covid-19 Pandemic there has been restriction of physical access to court premises, making perusal of the physical file difficult. Concerning 2<sup>nd</sup> Respondent's replying affidavit, it was reiterated that the motion was not brought in bad faith solely to deny the 1<sup>st</sup> Respondent the fruits of her judgment and there has been no complacency on the part of counsel for the Applicants, and if their counsel is guilty of any mistake, it should not be visited on the innocent Applicants.

7. The **Rift Valley Railways Corporation** and the **Kenya National Highways Authority** (3<sup>rd</sup> and 5<sup>th</sup> Respondents, respectively) despite being served with motion filed neither a response to the motion nor submissions. The **Attorney General** (4<sup>th</sup> Respondent) through his counsel did not oppose the motion.

8. The motion was canvassed through written submissions. Counsel for the Applicants relied on **ABN Amro Bank, N.V v Le Monde Foods Limited –Civil Application No. Nai 15 of 2002** as cited in **Allan Ngala Mwendwa v Margaret Wilson Wambura & Another [2017] eKLR** and **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR** on the issue of substantial loss. He argued that if execution were to proceed it would render their appeal, if successful, nugatory, and reiterating the Applicants' affidavit material emphasized their apprehension, asserting that it may be difficult for them to recover any sums paid to the 1<sup>st</sup> Respondent as she has not demonstrated her financial capacity.

9. Concerning the prayer for leave to file an appeal out of time, counsel anchored his submissions on the principles enunciated in **Mwangi v Kenya Airways Limited [2003] eKLR** as cited in **APA Insurance Limited v Michael Kinyanjui Muturi [2016] eKLR**. Counsel asserted that the delay in filing the appeal was satisfactorily explained; that the appeal has high chances of success as it raises weighty issues that ought to be considered by the court and citing **Waljees Ltd v Ranji Punjabhai Bugerere Tea Estate Ltd (1971) EA 188** it was submitted that the Respondents do not stand to suffer any prejudice that could not be adequately compensated by way of costs if leave is granted. Finally, citing the provisions of Section 3A of the Civil Procedure Act and **Attorney General v Lucy Nduta Nganga** as cited in **Abdirahman Abdi v Safi Petroleum Products Ltd & 6 Others [2011] eKLR**, he urged the court to allow the motion to enable the Applicants pursue their appeal.

10. On her part, the 1<sup>st</sup> Respondent reiterated the contents of the affidavit in opposition to the motion that no plausible explanation had been offered by the Applicants for delay in filing the motion or appeal within the stipulated timelines, beyond the casual reasons cited in the supporting affidavit. Relying on the decision in **Andrew Kiplangat Chemarigo v Paul Kipkorir [2018] eKLR** it was asserted that the appeal was an afterthought, meant to delay the 1<sup>st</sup> Respondent's enjoyment of the fruits of her judgment. Moreover that, the Applicants have no arguable appeal. Concerning the prayer for stay, it was contended that the onus lay with the Applicants to prove that the 1<sup>st</sup> Respondent was incapable of refunding the decretal sums if the appeal were to succeed. Counsel relied on **Caveland Ltd v Delphis Bank Ltd (2000) eKLR** in that regard, and calling to aid the decision in **M/s Portreitz Maternity v James Karanja (CA No. 63/1997)** as cited in **Mohamed Salim t/a Choice Butchery v Nasserpuri M. Jamat [2013] eKLR**, he urged the court to balance the competing rights of the 1<sup>st</sup> Respondent and of the Applicants. The 1<sup>st</sup> Respondent repeated her plea that if the court were to be inclined to allow the motion, it ought to require the Applicants to provide security.

11. The 2<sup>nd</sup> Respondent confined its submissions on the prayer for leave to appeal out of time. Counsel based his submissions on the provisions of Section 79G of the Civil Procedure Act and the decision in **First American Bank of Kenya Ltd v Gulab P. Shah & 2 Others [2002] 1 EA 65** regarding the principles to be considered by the court in the exercise of its discretion under the said provision. Counsel dismissed as unacceptable the reasons given for the delay herein and cited the case of **Church of God East Africa & Another v Dinah Buluma [2019] eKLR**. In his view, the intended appeal is a sham and undeserving of the Court's consideration as it raises no serious issues against the 2<sup>nd</sup> Respondent which stands to suffer prejudice. The 2<sup>nd</sup> Respondent urged the Court to dismiss the motion.

12. 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.

13. 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).

14. 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.

15. 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.”**

16. 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.

17. In the circumstances, the prayer seeking stay of execution of the judgment and decree in in **CMCC No. 7140 of 2016** pending the hearing and determination of the intended appeal has no legal anchor and is consequently disallowed.

18. 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 deponent of the affidavits in support of the motion asserts that delay in filing the appeal and motion was occasioned by the delayed provision of the copy of the lower court judgment which and that it took time for counsel to advise his client and to instructions to appeal. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents accuse the Applicants of tardiness and assert that the Applicants could have obtained the copy of judgment earlier or perused the physical file.

19. 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 appellants 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.”**

20. The principles governing applications for 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.”**

21. 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.**

22. 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.**

23. The judgment of the lower court was delivered on 22<sup>nd</sup> January 2021. The correspondence annexed as **"PW4-PW8"** to the affidavit supporting the motion reveals that the Applicants and their advocates were actively pursuing the matter after the judgment, and not merely tarrying. The request for a copy of judgment was made within relatively good time and though it took about a month and a half, which is not an inordinate period of delay, before the instant motion could be filed, the Court is satisfied with the explanation given by the Applicants. It could perhaps be said that the Applicants' counsel delayed and had to be reminded to provide the Applicants with an opinion of the judgment. That however is not the Applicants' fault. As Apaloo, J.A. (as he then was) famously stated in **Phillip Kiptoo Chemwolo and & Anor. v Augustine Kubede (1986) eKLR,;**

**"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit."**

24. In the circumstances of this case, it would be onerous to shut out the Applicants from pursuing their right of appeal on account of the failures and mistakes of his counsel, that do not appear deliberate or aggravated. The Respondents will not thereby suffer prejudice that cannot be compensated through costs.

25. Concerning the arguability 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 Applicants' affidavit appears to raise issues serious enough to warrant 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."**

26. 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;...”**

27. In the circumstances of this case, the court is persuaded that in order to facilitate the Applicants’ undoubted right of appeal, the prayer for leave to appeal out of time ought to be granted. Pursuant to leave hereby 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 1<sup>st</sup> and 2<sup>nd</sup> Respondents in any event.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF MARCH 2022**

**C.MEOLI**

**JUDGE**

**IN THE PRESENCE OF:**

**FOR THE APPLICANTS: MS. KAHITI**

**FOR THE 1ST RESPONDENT: MRS CHIRCHIR**

**FOR THE 4TH & 5TH RESPONDENTS : MR ONGORO H/B FOR MR AMOLO**

**C/A: CAROL**