



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISCELLANEOUS CIVIL APPLICATION NO. E057 OF 2021

BETWEEN

UNICOOL INTERNATIONAL LIMITED..... APPLICANT

VSERSUS

ARNOLD KABOGO NDEGWA.....RESPONDENT

RULING

1. What is for consideration is the Notice of Motion dated 25th February, 2021. It is filed by the applicant. The applicant seeks two prayers. The first is for stay of execution of Kiambu Chief Magistrate's Court Civil Case No. 368 of 2017; and second prayer is for leave to file an appeal out of time in respect to that judgment.

2. As correctly stated in the respondent's submission stay of execution pending hearing and determination of an appeal is brought under **Order 42 Rule 6** of the Civil Procedure Rules. The provisions of that Rule does not envisage stay of execution being granted pending a yet to be filed appeal. Stay of execution is granted pending the hearing and determination of an existing appeal. In this case, there is no appeal in existence and therefore, the prayer for stay of execution must and does fail.

3. The judgment which the applicant seeks leave to file an appeal out of time was delivered by Kiambu Chief Magistrate's Court on 5th March, 2020.

4. Section 79G of the Civil Procedure Act provides an appeal from a subordinate court's decision shall be filed within 30 days. That provision is as follows:-

“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. (underlining mine)

5. The applicant stated that the delivery of the judgment on 5th March, 2020 was made in both parties' absence. That the failure to file an appeal in time was due to the advocate who was handling the matter having left the law firm of the applicant's advocate and failed to indicate the judgment date in the firm's diary.

6. There was no affidavit by any of the advocates who are in that law firm confirming that deposition.

7. I have considered the affidavit evidence and submissions filed and I am unable to find that the applicant has satisfied this Court that it has a good and sufficient cause for not filing an appeal for almost one year after the judgment was delivered. See the case **DILPACK KENYA LIMITED VS. WILLIAM MUTHAMA KITONYI (2018) eKLR**, thus: -

“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.”

8. The notice of motion dated 25th February, 2021 is without merit and is dismissed with costs.

RULING DATED and DELIVERED at KIAMBU this 24th day of MARCH, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice

For Applicant: Mr. Okeyo

For Respondent : Mr. Gichuki

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE