



**REPUBLIC OF KENYA**

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

**MISC CIVIL APPLICATION NO. E007 OF 2020**

**DALMAS RANDA AKACH.....APPLICANT**

**VERSUS**

**WILFRED OCHIENG WAMBARE.....1<sup>ST</sup> RESPONDENT**

**VITALIS ODONGO MBEKA.....2<sup>ND</sup> RESPONDENT**

*(Application for leave to file an appeal out of time from the judgment in Bondo PMCC No. 123 of 2017 delivered on 12/11/2020 by Hon. JP Nandi, Principal Magistrate)*

**RULING**

1. This Ruling determines the applicant's application by way of Notice of Motion dated 18<sup>th</sup> December, 2020 seeking the following prayers:

**1. Spent**

**2. That this Honorable court be pleased to grant me leave to appeal out of time;**

**3. That this Honorable Court be pleased to order a stay of execution of the decree issued by magistrate court pending the filing and hearing of the intended appeal in this honourable court;**

**4. That costs of this application be in the cause.**

2. The application is premised on the grounds on the face thereof listed from (a-n) and supported by the 'affidavit' of the applicant **DALMAS RANDA AKACH**.

3. According to the applicant's grounds and 'affidavit', his advocate failed to keep him abreast of his case and he only learnt at a later date that judgment had been delivered on 11/11/2020 upon which he studied the judgment and was aggrieved by the decision of the magistrate's court so he seeks leave to appeal out of time. He claims that unless leave is granted, he will suffer great damage and loss.

4. The applicant asserts and deposes that the delay in lodging the intended appeal within the statutory period was inadvertently occasioned by his advocates' failure to notify the applicant on the progress of the case and only realized it later court registry and also that copies of proceedings and judgment was not granted to the applicant instantly.

5. The applicant further deposes that the intended appeal is highly meritorious and stands good chances of success. Further, that it is in the interest of justice that the application herein is granted.

6. The application was opposed by both Respondents. The first Respondent Wilfred Ochieng Wambare filed a replying affidavit sworn by himself on 20<sup>th</sup> January 2021 deposing that he was the 1<sup>st</sup> Defendant in the principal Magistrate's Court Civil Suit No 123 of 2017 and that the judgment was delivered on 12<sup>th</sup> November, 2020 by Honourable J.P.Nandi.

7. The 1<sup>st</sup> Respondent deposes that the applicant has not demonstrated that he applied for any proceedings and judgment and was denied the same. Further, that there was no decree as the case was dismissed and parties ordered to bear their own costs of the suit and that no draft memorandum of appeal has been annexed to demonstrate that the intended appeal is arguable hence the application is devoid of merit and amounts to abuse of court process.

8. The 2<sup>nd</sup> Respondent did not file any replying affidavit but was granted leave to argue in submission legally aided by Mr. Green Advocate

on pro bono basis.

9. The parties argued the application orally on 25<sup>th</sup> January 2021. The applicant reiterated his grounds in support of the application and the contents of the '**supporting affidavit**' and urged this court to grant him leave to file an appeal out of time, emphasizing that the delay in filing the appeal in time was occasioned by the advocate Mr. Felix Okello's failure to notify him of progress in the matter and that when he learnt of the judgment delivery, he went to the advocate's office and the advocate referred him to this court. That when he came to the High Court, time for filing of the appeal lapsed as he was told that he could only file an online application which further delayed the matter as he had to retreat but on filing by email, the court's network was not working hence he had to wait until 18<sup>th</sup> December 2020 when he filed the application.

10. In his oral submissions opposing the application, Mr. Wambare the 1<sup>st</sup> Respondent submitted that the application by the applicant is fatally defective and an abuse of court process. He submitted adopting his replying affidavit and emphasized that there was no evidence that the applicant ever applied for court proceedings for purposes of appeal hence the delay was not justified. He maintained that the applicant had not demonstrated what prejudice he would suffer if the orders sought are not granted and that there was no decree issued in the lower court yet the applicant wants an order staying execution of decree. He cited **CA/2018 Kazi Zaharia & Others v Shalom Levi [2018] e KLR** on considerations to be borne in mind when dealing with an application for leave to appeal out of time. He urged the court to dismiss the application with costs.

11. Vitalis Odongo Mbeka the 2<sup>nd</sup> Respondent opposed the application and it was submitted on his behalf by Mr. Odera Green Advocate that the power to extend time to file an appeal is discretionary, which discretion should not be exercised whimsically or capriciously. Counsel submitted that the applicant had not demonstrated the reasons or justification for the delay in filing the appeal as there was no letter requesting for court proceedings and there was no judgment of the lower court to prove decree or communication with his advocate on the case status to show his proactivity in following up his matter. He concurred with the 1<sup>st</sup> Respondent's submissions and urged the court to dismiss the applicant's application with costs.

12. In a brief rejoinder, the applicant submitted that he could not have filed an appeal before obtaining leave and that the Respondents were lying to the court.

#### **DETERMINATION**

13. The application subject of this ruling was first brought to my attention under certificate of urgency and online on 18<sup>th</sup> December 2020. I however declined to certify the same as the application was devoid of any material upon which the court could certify the urgency or grant any conservatory orders. There was no indication as to what kind or nature of suit was before the trial court to warrant a stay order. I therefore directed that the applicant serves the respondents for interpartes hearing on 25<sup>th</sup> January 2021.

14. I have considered the application and prayers sought substantially, for leave to appeal out of the statutory stipulated period and secondly, stay of execution of decree of the lower court pending the lodging, hearing and determination of the intended appeal. The main issue for determination therefore is whether the application has any merit.

15. **Section 75G 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 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.”***

16. The applicant asserts that the judgment in the magistrate's court, which court he did not even disclose until the 1<sup>st</sup> Respondent cited the case number and Hon Magistrate Hon JP Nandi, was delivered without his knowledge and that his advocate never notified him of the progress of the case until much later and by the time he was attempting to file an appeal, the time was running and he was met with hurdles.

17. On the part of the Respondents, they submitted in contention that the applicant had not demonstrated that he even applied for proceedings and judgment of the lower court for appeal purposes or that indeed his advocate may have in any way contributed to the delay as alleged.

18. In addition, the applicant claims that the impugned judgment was delivered on 11<sup>th</sup> November 2020 but the 1<sup>st</sup> Respondent contended that the judgment was delivered on 12<sup>th</sup> November 2020.

19. This application was filed on 18<sup>th</sup> December 2020 hence the delay though apparent, is not inordinate as it is just about 6 days after delivery of the impugned judgment.

20. The issue for determination is whether the application has merit. The applicant though self represented, did not attempt to bring before this court evidence that he had applied for any copies of pleadings, judgment and or decree for this court to appreciate the nature of the suit or claim before the trial court. It is therefore very difficult for this court to assert jurisdiction in a matter whose cause of action is not disclosed. In addition, the applicant has not filed any draft memorandum of appeal to demonstrate the arguability of the intended appeal and whether this court should decline the application, he stands to suffer any prejudice.

21. In my directions given on 18/12/2020, I stated that the application was bare and therefore I could not certify it as urgent without knowing what the nature of the suit in the trial court was. The applicant has not made any attempt to disclose to this court the nature of the claim before the trial court and what the decision of the trial court was all about such that if leave to appeal is denied then he would suffer prejudice or loss.

22. In addition, despite the respondents contending that there was no decree capable of execution in the lower court as the applicant's suit was dismissed with each party to bear their own costs, the applicant did not respond to that contention which is material as a court of law cannot stay a negative order of dismissal and where there is nothing capable of being enforced, the court cannot stay execution of nothing as the court would be acting in vain.

23. The other observation that I must make in this application is that other than in the certificate of urgency where the case number and court is mentioned, throughout the application, grounds and the '**supporting affidavit**' there is no mention of which case number and before which court of law the applicant was heard and aggrieved, which renders the application barren of any material or substance upon which the court can exercise discretion and issue orders of stay or grant leave to the applicant to appeal out of time.

24. Furthermore, the so called 'supporting affidavit as filed in court is not signed by the applicant and although it is allegedly sworn on 18<sup>th</sup> December 2020 before a Commissioner of Oaths at Siaya, the Advocate and stamp Commissioning the affidavit is Francis Otieno Rakewa of P.O. Box 9384 Kisumu. That affidavit is fatally defective and incapable of being relied on by this court to state the facts and circumstances under which the applicant was delayed in filing of his intended appeal.

25. Case law has established guidelines which aid Courts in exercising the discretion whether to extend time to file an appeal out of time or not. The Court of Appeal set out some of these considerations in the case of **Mwangi v Kenya Airways Ltd [2003] KLR**. These include the following:

a. *The period of delay;*

b. *The reason for the delay;*

c. *The arguability of the appeal;*

d. *The degree of prejudice which could be suffered by the Respondent if the extension is granted;*

e. *The importance of compliance with time limits to the particular litigation or issue; and*

f. *The effect if any on the administration of justice or public interest if any is involved.*

26. The Supreme Court of Kenya (M.K. Ibrahim & S.C. Wanjala SCJJ) in **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others** (supra) as follows:-

*“(1) Extension of time is not a right of a 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 on a case to case basis.*

*(4) Whether there is 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; and*

*(7) Whether in certain cases, like election petitions, public interests should be a consideration for extending time.”*

27. As earlier stated, albeit the delay is not inordinate, the applicant has not demonstrated that he has any arguable appeal as the substance of the suit before the trial court is not disclosed to this court. In addition, he has not demonstrated what prejudice he will suffer if the leave sought is not granted as prayed as the subject matter of the suit in the lower court is not even disclosed.

28. In this application, the court has not been shown that the applicant deserves the discretion of the court to be exercised in his favour to extend time for filing of an appeal out of time. Instead, I find that the respondents are likely to be prejudiced by an apparent frivolous and vexatious intended appeal as the subject matter of the suit and intended appeal are not disclosed to this court.

29. For the above reasons, I find and hold that the prayer for leave to appeal out of time is not merited. The same is disallowed and dismissed.

30. On the prayer for stay of execution of judgment or decree of the trial court pending the hearing and determination of the intended appeal, Order 42 Rule 6(2) of the Civil Procedure Rules which provides that:

***“No order for stay of execution shall be made under subrule (1) unless-***

***a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***

***b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.***

This court enjoys discretion to grant stay of execution of decree pending appeal. In **JMM v PM [2018] e KLR** it was stated:

***“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”***

31. Order 42 rule 6 of the Civil Procedure Rules grants this court as an appellate court, as well as the trial court wide discretion to stay execution of decrees pending appeal. In the present case, leave to appeal out of time has been declined and therefore a stay of execution of an alleged decree whose subject matter or nature of the orders sought to be appealed from not having been disclosed to the court is an exercise in futility.

32. Assuming the contention by the respondents is true, that the applicant’s suit against the respondents was dismissed, with each party to bear their own costs of the suit which from the citation in the certificate of urgency appears to be a fairly old case, then this court cannot stay a negative order.

33. Accordingly, the application for stay of execution of decree is found to be baseless and an abuse of court process. The same is hereby dismissed.

***34. On the whole, I find the applicant’s application by way of Notice of Motion dated 18/12/2020 devoid of merit and I dismiss the same with costs to the respondents assessed at Kshs 5,000 payable to each respondent Kshs 2500 each by the applicant within 14 days of this ruling failure to which the respondents are at liberty to execute for recovery.***

35. Orders accordingly.

36. This file is closed.

**Dated, Signed and Delivered at Siaya this 26<sup>th</sup> Day of January, 2021 in the physical presence of both the applicant and the respondents.**

**R.E. ABURILI**

**JUDGE**