



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

MISC. APPLICATION NO. 5 OF 2020

PETER KAMAU NDIRITU.....APPLICANT

VERSUS

BIASHARA SACCO SOCIETY LTD.....RESPONDENT

RULING

1. This application dated 3/03/2020 arises from the ruling of the Co-operative Tribunal sitting at Nyeri delivered on 7/11/2019. The ruling dismissed the applicant's notice of motion seeking to set aside *ex parte* judgement entered in default of appearance. The applicant having been dissatisfied with the said ruling intends to file an appeal in this court but the time of filing such appeal has already expired.

2. The Notice of Motion therefore seeks for extension of time to file an appeal; for grant of stay of execution and for stay of the orders of the tribunal in its ruling delivered on 07/11/2020. The orders in the last two prayers if granted are intended to subsist during the pendency of the appeal.

3. By consent the parties agreed to dispose of the application by way of written submissions which were filed by both parties.

4. The applicant's grounds supporting his application are contained in his supporting affidavit and on the face of the application. Precisely, the applicant argues that the tribunal delivered its ruling a few days before the scheduled date and did not give notice of early delivery to the parties. In addition, the tribunal had earlier issued a public notice to all the advocates and parties dated 15/10/2019 to the effect that due to financial constraints, it would not be sitting from October to December 2019. The ruling in respect of the matter was scheduled for delivery in November 2019. There being no further notice issued by the tribunal to withdraw the first one, the court went ahead and delivered the ruling without any notice whatsoever to the parties. The applicant states that he came to be aware of the ruling on 27/02/2020 when his advocate went to the tribunal registry to peruse the file. It was then that the applicant swung into action and filed this application but the time for filing an appeal had long expired.

5. The respondent conceded to this prayer for extension of time for filing an appeal due to the reasons explained in the foregoing analysis and asked the court to allow it as prayed

6. Section 79G of the Civil Procedure Act provides that an appeal from a subordinate court against a decree or order shall be filed within 30 days. the proviso to the Section provides:-

“Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time”

Order 50 Rule 5 of the Civil Procedure Rules further provides that:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any orders made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

7. The foregoing provisions clothe the court with jurisdiction to extend time, which prayer has been conceded to by the respondent. The orders for costs of the application will be given late in this ruling.

8. Although this court is inclined to grant leave to file the intended appeal out of time, it is noted that this prayer was made together with the

application for stay of execution brought under Order 42 Rule 6 prior to the promulgation of the new Constitution. This court given different circumstances would have directed that leave to appeal out of time be obtained first before filing an application for stay. However this is a technicality that is curable under Article 159 of the Constitution to save the striking out of the application for stay of execution pending appeal.

9. The applicant seeks for orders of stay of execution pending the hearing and determination of the intended appeal. It is explained that the appellant had already been committed to civil jail for a period of one month. He is apprehensive that execution of a similar manner is likely to take place sooner than later should this court fail to grant orders for stay. It is also argued that the tribunal entered judgement on grounds of failing to enter appearance. The applicant has therefore never been heard and is still keen on being his right to hearing.

10. The respondent intimated that the applicant has not satisfied the requirements of showing that he will suffer substantial loss. However, the respondent did not seriously oppose this ground save from drawing the attention of the court that the applicant has brought in extraneous matters through his submissions by stating that the loan he was advanced by the respondent was fully secured. I agree with the respondent that since these matters are not in the applicant's affidavit, they should not have been brought in this application. For that reason, this court has no business in addressing the said issues which are indeed irrelevant. The procedure requires that parties be guided by their pleadings and this ought to be strictly observed.

11. On the issue of security which the applicant has not offered, the respondent urged the court to direct the applicant to deposit half of the decretal amount. From the ruling of the tribunal, the applicant had "self beba" deposits of Kshs.260,039 with the respondent and the loan approved in the letter of offer dated 19/10/2012 was kshs.41,500/= at an interest rate of 1.1%. Due to passage of time, the amount owing to the respondent must have increased at the agreed interest rate. It is noted that the decree was not attached. However, this court will use its discretion based on the material presented before it to decide on the amount of security, in the event that this application is successful.

12. On the final requirement of filing this application without undue delay, the delay has been explained in regard to prayer one. However, it is important to note that this application was filed on 03/03/2020 which was less than 30 days from 27/02/2020 when the applicant came to learn of the ruling of the tribunal. As such there was no undue delay on part of the applicant for he moved into action and filed this application within less than 30 days.

13. At the moment, there is no appeal but the applicant has annexed a draft memorandum of appeal though it is erroneously titled "Memorandum of Appeal" which I have perused. I am aware that under Order 42 Rule 6, there is no requirement for the applicant to prove that he has an arguable appeal as suggested by the respondent.

14. Consequently, I find that the applicant has satisfied the requirements of Order 42 Rule 6.

15. I find the application merited and allow it in the following terms:-

- a) That the applicant is hereby granted seven (7) days within which to file his appeal failure to which these orders will lapse.
- b) That pending hearing and determination of the intended appeal, stay of execution to issue against the orders on 7/11/2019 on condition that within 30 days from this date, the applicant do deposit Kshs.200,000/= as security in an interest earning account in the joint names of the advocates for the parties and in default, these orders be vacated.
- c) That costs be in the cause.

16. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF FEBRUARY, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 25th day of February 2021.