



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

(Coram: Odunga, J)

MISCELLANEOUS APPLICATION NO. E10 OF 2020

TWIGA PANNEL BEATERS LIMITED.....DEFENTANT/APPLICANT

VERSUS

FLORENCE LENA MUSEE.....RESPONDENT

RULING

1. By a Motion on Notice dated 17th November, 2020, the applicants herein seek the following orders:

1) **SPENT.**

2) **THAT this honourable court be pleased to extend time and grant leave to the appellants/applicants to lodge a Memorandum of Appeal out of time against the judgement and dc entered against the Applicant by Hon. Mbungi Chief Magistrate sitting in Kitui in Civil Suit No. 226 of 2018 delivered on 16th October, 2020.**

3) **SPENT.**

4) **THAT this honourable court be pleased to stay execution of the judgement and/or decree in Kitui in Chief Magistrate Court Civil Suit No. 226 of 2018 pending the hearing and determination of the intended appeal.**

5) **SPENT.**

6) **This Honourable Court be pleased to issue any other orders that it may deem fit, just and expedient in the interest of justice.**

7) **THAT the costs of this Application be in the cause.**

2. According to the applicant, on 16th October, 2020 judgement was delivered against the Applicants herein where in the Plaintiff was awarded General Damages of Kshs 200,000/-, special damages Kshs 7,750/- plus costs and interests. Though the Applicant was duly informed by its advocate of the said decision, by the time the Applicant consulted and instructed his said advocate to appeal, the time limited for the same had already lapsed.

3. According to the applicant's advocate who swore the supporting affidavit, the delay was occasioned by the fact that the applicant was not aware of the delivery of the judgement.

4. The applicant was apprehensive that due to the threat of imminent execution, this application would be rendered nugatory yet the intended appeal is merited, raises arguable and pertinent points of law and fact. The applicant disclosed that it was ready, able and willing to furnish such reasonable security as this court may deem fit and undertook to provide a bank guarantee for the entire decretal amount pending the outcome of the intended appeal, which according to the applicant was based on quantum.

5. In opposing the application, the Respondent averred that the judgement was delivered in her favour on the 16th October 2020, in a procedural and substantive manner hence ought not to be disturbed by the Court as it will aid the Defendants ill intent of delaying the recovery of the Decretal Sum.

6. Based on legal advice, she deposed that the applicant has not demonstrated the loss they can or likely to suffer hence she should be paid the decretal sum. It was her position that the appellant will delay and deny her from enjoying fruits of her judgment by making baseless applications as this is a constructed way of delaying this matter. To her, the Applicant has approached this Court with dirty hands while seeking for equitable reliefs of stay since they have not made the good use the stay of execution granted by the lower court.

7. It was contended that the Applicant had not discharged its duty in meeting the legal requirements for staying the execution and proposed that the defendant/applicant should be ordered to pay half of the decretal sum to the plaintiff/respondent advocates and deposit the other half in a fixed deposit joint account of both advocates forthwith failure to which execution to proceed. It was asserted that the applicant had not explained to this court the reasons for their delay in filing appeal hence the application ought to be dismissed with costs.

8. In its submissions, the Applicant contended that judgment at the lower court was delivered on 16th October, 2020 where the same was to be emailed to parties since it was not delivered in open court on the said date. However, the advocate handling this matter only became aware that the judgement had been delivered when the clerk perused the file and found that judgement had been delivered. Though the said judgement had indicated that judgement be emailed to the parties, this was not done.

9. Upon being advised of the said judgement, the Applicant gave instructions for the filing of the appeal but by the time of doing so, the time within which to file appeal as required by law had already lapsed. According to the Applicant, the failure to file Memorandum of Appeal within the stipulated time was not deliberate but inadvertent as the applicant was all time not aware that judgement had been delivered neither did they receive a notice from court hence they should not be penalised for the mistakes which they had no control over.

10. It was reiterated that the intended appeal is merited, arguable and raises pertinent points of law and fact thus it has an overwhelming chance of success and further, the Respondent as opposed to the applicant, will not suffer any prejudice that cannot be cured by way of costs.

11. It as submitted that the applicant was ready and willing to give a bank guarantees for the entire decretal sum as security pending hearing and determination of this application and the intended appeal. In support of its submissions the applicant relied on **Gatirau Peter Munya vs. Dickson Mwenda Githinji and 2 Others, Civil Appeal No. (Application) No. 38 of 2013 [2014] eKLR.**

12. As regards he extension of time the Applicant elide on the case of **Samuel Mwaura Muthumbi vs. Josephine Wanjiru Ngugi & another [2018] eKLR,** and **Amal Hauliers Limited vs. Abdulnasir Abukar Hassan [2017] eKLR** and submitted that the delay as not inordinate.

13. On behalf of the Respondent reliance was placed on the case of **Mwangi vs. Kenya Airways Ltd [2003] KLR** and it was submitted that **it is upon the applicants to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal and as such the Court has to balance the competing interests of the applicant with those of the respondent. However, in this case** the applicants have failed to demonstrate and/or give any substantive reason to show why there was a delay in filing an appeal. Nothing whatsoever has been offered by the applicants in explaining the delay in filing their alleged appeal. According to the Respondent, she respondent has been in the corridors of justice since 2018, and has never received her compensation and her lawfully judgment has never been settled. She is suffering from the injuries sustained and will be highly prejudiced if the delaying tactics employed by the applicant are allowed to prevail.

14. **It was submitted that** here was a delay on the side of the applicant in that the application was brought to court after the lapse of the 30 days stay of execution which had been granted by the court from the date of delivery of judgment as such the application is an afterthought. It was submitted that the trial court had ordered the defendant/applicant to pay the plaintiff the judgment sum, which they failed to do or even appeal against the same within the period of 30 days ordinarily given as stay period. In the present application, the applicant has not demonstrated that he would suffer substantial loss. The applicants have not discharged this obligation thus they have not established that substantial loss will occur unless stay of execution is made.

15. As regards security, it was submitted that the respondent is also entitled to equal treatment before the law and the fact that the Applicant is a man of means should not be used to trample on the respondent's rights. It is in the interest of justice that the respondent interests should be taken care of and expeditiously. The Court was urged to dismiss the application with costs.

16. It as however submitted that in the alternative, court should apply the balancing act and have the applicant pay half of the decretal sum to the Respondent and deposit the other half in a fixed joint interest account.

Determination

17. I have considered the application, the respective affidavits and the submissions filed as well as the authorities relied upon.

18. 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 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.

19. Under the proviso to section 79G of the ***Civil Procedure Act***, 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. This must be so since it was held in **Feroz Begum Qureshi and**

Another vs. Maganbhai Patel and Others [1964] EA 633 that 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.

20. 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.

21. As regards the reason for the delay, there is no attempt to explain the reason why the appeal was not filed within time It is deposed that the fact of the delivery of the judgment was brought to the attention of the applicant who after further consultation gave instruction to appeal. However, by then the time limited of appealing had lapsed. That is all that is stated in the affidavit. However, in the submissions, the Applicant has introduced the fact that it was not notified of the judgment. That was an issue that ought to have been deposed to in the supporting affidavit so as to enable the Respondent respond thereto. Submissions is not the mode of adducing evidence but is meant to draw the attention of the Court to the evidence already adduced.

22. In the premises, I agree that there no reason has been given for the delay. As the applicant has failed in satisfying the conditions extension or enlargement of time to file an appeal out of time or admission of this appeal out of time, the said limb of the application must fail and without an order extending time the stay cannot be granted in vacuum and must similarly collapse.

23. Consequently, the Motion on Notice dated 17th November, 2020 is dismissed with costs.

24. It is so ordered.

Read, signed and delivered in open Court at Machakos this day of 25th day of February, 2021.

G V ODUNGA

JUDGE

Delivered in the absence of the parties

CA Geoffrey