



**REPUBLIC OF KENYA**

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

**(Coram: Odunga, J)**

**MISC. CIVIL APPLICATION NO. 131 OF 2020**

**THE PRINCIPAL KATHIANI HIGH SCHOOL.....1<sup>ST</sup> APPLICANT**

**THE CHAIRMAN,**

**B.O.G KATHIANI HIGH SCHOOL.....2<sup>ND</sup> APPLICANT**

**=VERSUS=**

**JOSEPH MBUGUA GITHEHU**

**T/A MWAKI JUMLA SUPPLIES.....RESPONDENT**

**RULING**

1. By a Motion on Notice dated 15<sup>th</sup> October, 2020, the applicants herein seek the following orders:

1) SPENT.

2) **THAT** this honourable court be pleased to grant leave to the applicants extension of time to file and serve Memorandum of Appeal and Record of Appeal against the whole judgement of the Chief Magistrate Hon. A. G Kibiru dated 13<sup>th</sup> May, 2020.

3) SPENT.

4) **THAT** there be a stay of execution of the judgement of Hon. A G Kibiru Chief Magistrate dated 13<sup>th</sup> May, 2020 and consequential decree pending the hearing and determination of the intended appeal against the said judgement and decree.

5) **THAT** the costs of this Application be provided for.

2. The application was supported by an affidavit sworn by **Martin Munene**, a State Counsel in the State Law Office and Department of Justice, seized of the conduct of the mater. According to him, the suit which gave rise to this application was instituted seeking special damages. The matter proceeded to hearing on 18<sup>th</sup> February, 2020 and judgement was slated for delivery on 25<sup>th</sup> March, 2020 but due to COVID pandemic, the same was not delivered on the said date and there was no further communication from the Court on the deferred date.

3. According to learned counsel, he only became aware that judgement was delivered on 11<sup>th</sup> June, 2020 when counsel for the Plaintiff wrote to the State Law Office requesting for the settlement of the same which letter was brought to his attention on 15<sup>th</sup> June, 2020. According to him judgement was delivered on 13<sup>th</sup> May, 2020 in which the Respondent was awarded Kshs 1,116,439.00 in the absence of the Applicants' counsel.

4. Upon being made aware of the delivery of the judgement he notified the Applicants of the outcome but by the time he obtained instructions to appeal, the time limited for appealing had already lapsed. It was deposed that the delay in making the application is not inordinate and is excusable, the same having been filed electronically on 9<sup>th</sup> July, 2020. However, the said application was never heard necessitating the filing of the current application on 19<sup>th</sup> October, 2020. In his view the intended appeal is meritorious and raises serious issues of law which require adjudication and determination by this Court.

5. It was deposed that the Applicants stand to suffer substantial and irreparable loss if the orders sought are not granted.

6. The Application was opposed by the Respondent. According to him, the cause of action in this matter arose way back in the year 2000 to 2007 and that the suit was filed over 13 years ago in CMCC No. 145 / 2007 on the 20/02/2007. It was deposed that after the matter was filed, the Defendants delayed the finalization of this matter by continuously adjourning the matter. However, the matter was finally heard and Judgment delivered on 13/05/2020 after the court had issued a Judgment Notice to parties after the initial date of delivery of Judgment was during the COVID 19 Pandemic. On 13/03/2020 the Defendant through its Advocate attended Court for Judgment and judgment was entered for Kshs 1,116,439/= plus interest for the last 13 years which translates to interest of Kshs 1,141,664/= plus costs of Kshs 302,620/= giving a grant total of Kshs 3,159,703/=.

7. It was deposed that the last time the Defence Counsel appeared in Court was on 18/02/2020 when the matter came up for defence hearing and matter was fixed for Mention for Submissions on 3/03/2020 which they failed to attend and matter was fixed for Judgment on 25/03/2020. When Judgment was not delivered on 25/03/2020 the court gave a Notice for 13/05/2020 which again the Defence Counsel nor the Defendant attended Court.

8. According to the Respondent, the Defendant was fully aware of the Judgment from June as per the Supporting Affidavit and only applied to a copy of the Judgment on 15/10/2020 and this application was brought on 19/10/2020, 4 months after the defence was notified of the Judgment.

9. The Respondent averred that the Application is a mere after thought meant to deny me the enjoyment of the fruits of my lawfully obtained Judgment and that if this application is allowed it would greatly prejudice him as I am a Businessman who had supplied the Defendant with goods as far back as 2007 which still remains unpaid.

10. The Respondent averred that the Applicant's application is unmerited and should be dismissed with costs and he be allowed to proceed with execution.

### **Determination**

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

12. 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.***

13. 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.

14. 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.

15. As regards the reason for the delay, the Applicants contend that the judgement was not delivered on due date and that they were not notified of the date of the delivery of the same. Though the Respondents is adamant that the Applicants were notified of the date of the delivery of the judgement, no such evidence has been placed on record. In **Ngoso General Contractors Ltd. vs. Jacob Gichunge Civil Appeal No. 248 of 2001 [2005] 1 KLR 737**, the Court of Appeal held that:

***"The failure by the Superior Court Judge in an application for extension of time to file an appeal, to consider, as a matter of law, whether the Appellant, who was admittedly absent when the Judgement was delivered, was served with notice of delivery of the Judgement was a misdirection...The law under Order 20 r 1 is explicit in terms and mandatory in tone that a Judgement which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates and where only the successful party in the Judgement had prior knowledge of the delivery of the Judgement and no apparent reason was advanced for the failure to serve or to attempt to serve the Appellant or his advocate, the Appellant's right of appeal was grossly compromised."***

16. Similarly, in **Leonola Nerima Karani vs. William Wanyama Ndege Civil Application No. Nai. 21 of 2007**, it was held that:

***"Since there is no indication that the judgement of the Superior Court was delivered with notice to the parties or their***

advocates which would be a serious breach of the rules, it would follow that the breach threw the litigation timetable off balance and the advocates on record for the applicant at the time cannot be blamed for filing the notice of appeal and the letter bespeaking copies of the proceedings and judgement when they did.”

17. In Kisumu Paper Mills Ltd vs. National Bank of Kenya Ltd & 2 Others Kisumu HCCC No. 413 of 2001, it was held that:

“A party not invited to a date when an important and essential determination is made against him is usually not afforded an opportunity on its case...The court as a matter of obligation was required to issue and serve a notice on all the parties to the suit and the advocate for the applicants ought to have been given an opportunity to be present so that he could represent his client’s interest including applying for leave to appeal as it is not the business of an advocate to keep checking with a Judge or a magistrate about the delivery of a particular judgement as rulings and judgements of the Court must ordinarily and as a matter of good practice be delivered on the due date and if not delivered parties must be sufficiently and adequately notified of the date of delivery by issuing a notice...The practice, procedure and regulation of the Court where a Judgement/ruling is not delivered on its due date is to notify all parties involved and their respective advocates and the notice is issued in accordance with the rules of proper service which must be in tandem with the requirement in the Civil Procedure otherwise there would be a serious breach of procedure amounting to a denial of the right to be heard...As a matter of protocol and good advocacy, an advocate is obligated to inform an absent advocate immediately of the delivery of the Judgement/ruling.”

18. It is clear that based on the foregoing decisions that the Applicant has surmounted the first hurdle.

19. Waki, JA in Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005 held that:

“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant’s counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay...Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”

20. As regards the reason for delay, judgement was entered on 13<sup>th</sup> May, 2020 and the Applicants’ counsel became aware of the same on 15<sup>th</sup> June, 2020 when the Respondent’s counsel notified him of the same. The Counsel for the Applicant has exhibited an email dated 9<sup>th</sup> July, 2020 enclosing the application for extension of time which was electronically transmitted to the Court. That was 24 days after receipt of the letter from the Respondent’s counsel. The 2<sup>nd</sup> Applicant herein is the Chairman of the Board of Governors of a school while the 1<sup>st</sup> Applicant is the Principal of the School. Judicial notice ought to be taken of the fact that a decision to appeal ought to be made by its Board.

21. In Sebei District Administration vs. Gasyali and Others [1968] EA 300, it was held that a distinction is to be drawn between an individual defendant and a secretary of an incorporated body which is a defendant, with his multifarious duties to perform. In my view a delay of 24 days cannot, in the circumstances of this case, be inordinate.

22. As prejudice, I did not hear the Respondent contend that if the application is allowed it will suffer such prejudice that cannot be compensated by an award of costs. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See Waljee’s (Uganda) Ltd Vs. Ramji Punjabhai Bugerere Tea Estates Ltd Kampala HCCC No. 536 of 1958 (SHERIDAN, J) (HCU) [1971] EA 188.

23. As regards stay, Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:

“(1) *No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

(2) *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.”*

24. In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A(2) of the *Civil Procedure Act* “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

25. In Stephen Boro Gittha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA on 20/11/09 held *inter alia* that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.

26. The same Judge in Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010 held that:

**“where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case.”**

27. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the *Civil Procedure Act* are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589. This was the position of Warsame, J (as he then was) in Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

**“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner ...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court..”**

28. In this case, the Applicant is a school. Execution against it would impact directly on third parties who are students rather than the Applicants herein. Being a school, it is unlikely that by the time the appeal is heard and determined, it would not be in a position to settle the judgement. Therefore as regards the issue of security, the Court of Appeal in Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

**“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at**

**one stage open to negotiation to reduce it”.**

29. In this case, I see no impediment that is likely to be placed on the path of the Applicant in recovering the fruits of his judgement in the event that the intended appeal does not succeed. On the other hand, substantial loss is likely to occur to the Applicants and their students in the event that the execution proceeds and if the appeal was to succeed.

30. Accordingly, I grant leave to the applicants to file the appeal out of time. Let the Memorandum of Appeal be filed and served within 10 days from the date hereof. In default the application shall stand dismissed.

31. Taking all relevant factors into account and in order not to render the intended appeal illusory, in the unique circumstances of this case, I hereby grant stay of execution pending the hearing and determination of the intended appeal.

32. The costs of the application will be in the intended appeal.

33. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 24<sup>th</sup> day of February, 2021.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Ms Ayuma for the Applicant**

**CA Geoffrey**