



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO. 403 OF 2019

JOSEPH SCHMADERER.....INTENDED APPELLANT

VERSUS

SERAH NJERI NGENE.....RESPONDENT

RULING

1. The Intended Appellant herein filed a Notice of Motion Application dated 15/10/2019 brought pursuant to Section 3A, 79G and 95 of the Civil Procedure Act (Cap 21), Order 22 rule 22, Order 42 Rule 6, Order 50 rule 6 and Order 51 rule 1 and 3 of the Civil Procedure Rules, 2010 and all other enabling provisions of the Law. In the application, the Applicant prays for the following orders:

1. Spent;

2. THAT this honourable court be pleased to grant leave to the Applicant's to appeal out of time against the judgment of the Honourable Magistrate P.M Wambugu Senior Resident Magistrate in Kwale SRMCC No. 17 of 2017 and judgment delivered on 6th June, 2019;

3. Spent;

4. THAT this Honourable court be pleased to stay execution of the Judgment and decree in Kwale Senior Resident Magistrates Court Civil Suit No. 17 of 2017 pending the hearing and determination of the intended appeal herein; and

5. THAT the costs of this Application abide the outcome of the intended Appeal.

2. The Application is premised on the grounds set out therein, *inter-alia* that the trial court issued its judgment on the 6/6/2019 and 30 days within which to appeal have since lapsed, and the Applicants seek to appeal out of time. The Applicant also prays that this Court grants them stay as this application has been brought before court without undue delay, their appeal is arguable with a good chance of success, they stand to suffer substantial and irreparable loss and that the intended appeal will be rendered nugatory if this Application is not allowed. The Applicant further avers that the Respondent will not suffer any prejudice or damage that cannot be compensated by way of costs if this application is allowed.

3. The Application is supported by an Affidavit sworn on 15/10/2019 by one Isabella Nyambura, Legal Counsel at Direct Line Assurance Company Limited.

The Response

4. The Respondent filed a Replying Affidavit sworn by Serah Njeri Ngene where she avers that her appointed Advocates M/s Shem Kebongo & Co. Advocates wrote to the Applicants on several occasions and not once did the Applicants intimate they intended to appeal the decision of the trial court.

5. The Respondent also avers that there is inordinate delay in bringing the present application to court, the application having been brought four (4) months after the delivery of judgment with no plausible reasons given for the delay.

6. The Respondent states that the memorandum of appeal annexed does not elicit any triable issues and the Applicants are only intent on frustrating the recovery and full enjoyment of the fruits of her Judgment.

7. The Respondent further states that this Application should be dismissed as the Applicant has not satisfied the requirements for the grant of stay of execution or leave to Appeal out of time and that no sufficient reason has been given to explain why the applicant failed to file their Application and/or Memorandum of Appeal within the stipulated time.

8. The Respondent avers that any further delay will cause irreparable injury as this suit before the trial court took over three (3) years to be heard and concluded.

9. The Respondent goes on to aver that if the court is inclined to granting stay of execution, the Applicant be ordered to pay half of the decretal sum being Kshs. 361,500/= plus reasonable costs of Kshs. 114,680/= and the balance deposited in an interest earning account in the joint names of both advocates pending the hearing and determination of the Appeal.

10. Lastly, the Respondent states that this Application has been brought in bad faith and ought to be dismissed.

Directions of the Court

11. The parties were directed to canvass the appeal by way of written submissions. The Applicant filed its submissions on the 3/11/2020 while the Respondent filed her submissions on the 1/12/ 2020. Parties opted to rely on their written submissions. The parties opted to rely on their written submissions.

Analysis and Determination

12. I have considered all the pleadings and issues raised by the parties. In my view, the only two (2) issues that arise for determination are:

a) Whether the Applicant can be allowed to file their appeal out of time;

b) Whether the Applicant has met the threshold for grant of stay of execution of the trial court's judgment pending appeal

Leave to appeal out of time

13. The Applicant's instant appeal is premised on Sections 79G and 95 of the Civil Procedure Act which provide for filing of appeals from the subordinate courts and for enlargement of time respectively. Section 79G provides as follows:

"79G. 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."

Section 95 provides thus: -

"95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

14. It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. However, whether or not to extend time for filing an appeal is an exercise of this court's discretion which should be based on reasons and not on whims or caprice.

15. For this court to grant an extension of time it must consider; the length of the delay; the reason for the delay; the chances of the Appeal succeeding if the application is granted; and the degree of prejudice to the Respondent if the application is granted.

16. The trial court in this case delivered its judgment on the 6/6/2019, the application herein was filed on 22/10/2019 more than four (4) months after the delivery of the Judgment.

17. In the case of **Jaber Mohsen Ali & another v Priscillah Boit & another E & L NO. 200 OF 2012 [2014] eKLR** where it was stated:

"...The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter..."

18. The Applicant in his pleadings has stated that the delay is because the intended Appellant's suit was entirely handled by the insurer, the Intended Appellant's insurer is Direct Line Assurance Company limited (herein after "the insurer").

19. The Applicant avers that the insurer was late on instructing the Advocates to appeal the Judgment as delivered on the 6/6/2019. The Applicant states that he should not be penalized for the actions of the insurer and be allowed to appeal out of time.

20. The insurer legal counsel further claims that their Advocates on record at the time were unable to secure a copy of the judgment on time and the same was sent after the 30 days had lapsed.

21. The Applicant claims that, it is not his fault that instructions to the Advocate were issued late, but it is on the insurer who took more than the required 30 days to review the Judgment and consider its viability of success.

22. The Intended Appellants have not attached any form of evidence to prove their efforts to secure a Judgment within the timelines prescribed. They also did not approach the court to explain themselves. This court is therefore not satisfied with the reasons accorded by the Intended Applicants requiring the extension of time. In the case of *Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR*, Odunga J states that:

“...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...”

23. I have, however, considered the draft memorandum of appeal as annexed to the application. The Applicant intends to appeal against the whole Judgment on quantum of damages which he found as too high and yet no proper evidence was before the trial court.

24. I am inclined to allow the application as the Respondent will not suffer any prejudice and both parties will have an equal chance to be heard before this Appellate court.

Stay of Execution

25. Grant of stay of execution pending appeal is provided for under **Order 42 Rule 6 of the Civil Procedure Rules, 2010**. The Respondent/Applicant is required to satisfy the court that the intended appeal is arguable and that if the court does not grant the stay, the intended appeal will be rendered nugatory.

26. In the case of *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others eKLR*, the learned judges stated the principles to consider whether to grant a stay of execution or not as thus: -

“...The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated...”

27. Additionally, in the case of *Stephen Wanjohi v Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991*, the Court held that: -

“For the court to order a stay of execution there must be: -

i. Sufficient cause;

ii. Substantial loss;

iii. No unreasonable delay;

iv. Security and the grant of stay is discretionary”.

28. The Applicant in an application for stay must satisfy the court that he/she stands to suffer substantial loss if stay is not granted and that the application has been filed without unreasonable delay. The applicant must also show that he is willing to offer such security as may be ordered by the court.

29. In the instant application, the Applicant is apprehensive that the Respondent will commence execution of the Judgment/decree to their detriment, and should this happen the intended appeal will be rendered nugatory. In the case of *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.”

30. On the issue of substantial loss, the Applicants argued that the Respondent is of unknown means and if the decretal sum is paid then the Applicants may be unable recover the same in the event that the appeal is successful. To that fear of the difficulty to recover the decretal sum should the appeal succeed, the Respondent has not given an answer or rebuttal. In the case of *National Industrial Credit Bank Limited v Aquinas Francis Wasike and Another (UR) C.A. 238/2005* stated: -

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

31. On security for costs, the Respondent submitted that if this court is inclined to allow stay of execution, that they be met in the middle and the Applicant be directed to pay **Kshs. 361,500/=** which is half the amount of the Decretal sum plus costs of **Kshs. 114,680/=** and the balance be deposited in an interest earning account in the joint names of both advocates pending the hearing of the appeal.

32. On the other hand, the Applicant's in their Supporting Affidavit at paragraph 8 have stated that they are ready to furnish such reasonable security as shall be ordered by court.

33. The offer of security by the Applicant is *bona fides* that the stay application is not a mere exercise to deny the Respondent the fruits of its judgments. The offer for security therefore satisfies a ground for stay. This is as was held in the case of ***Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR.***

34. Consequently, the prayer for stay of execution is hereby allowed but on condition the Applicants deposit the full decretal amount in a joint interest earning account in the name of both advocates pending the hearing and determination of the appeal.

35. The upshot of my finding therefore is that:

(a) The time to file appeal is extended and the appeal to be filed within 60 days from today's date;

(b) The Applicants to deposit the full decretal amount in a joint interest earning account in the name of both advocates within 30 days from the date hereof;

(c) In default of prayer (b) above the stay orders granted shall lapse unless they are otherwise enlarged by the court.

(d) Cost shall be in the cause.

It is so ordered.

Dated, Signed and Delivered at Mombasa this 12th day of February, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O. CHEPKWONY