



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CIVIL APPLICATION No. E26 OF 2020.

MOURICE SANGALE AMUDAVI.....PLAINTIFF

VERSUS

KAN TRAVELLERS.....DEFENDANT

RULING

1. The applicant filed this application under a notice of motion seeking for orders; -
 - i. That this Honourable Court be pleased to grant leave to the applicant to appeal out of time against the judgment of the of Honourable E. Kigen (S.R.M) in Eldoret CMCC No. 870 of 2018, delivered on the 10th day of September, 2020.
 - ii. That this Honourable Court be pleased to grant stay of execution of the judgment and decree in Eldoret CMCC No. 870 of 2018, delivered on the 10th day of September, 2020, pending the hearing and determination of the application **herein**.
 - iii. That this Honourable Court be pleased to stay execution of the judgment and decree in Eldoret CMCC No. 870 of 2018, delivered on the 10th day of September, 2020, pending the hearing and determination of the intended appeal herein.
2. The application is based on the grounds that judgment in Eldoret CMCC No. 870 of 2018, was delivered on the 10th day of September, 2020 and the 30 days within which an appeal is to be filed have lapsed.
3. The applicants are aggrieved by the whole of the judgement and seeks leave to appeal out of time.
4. Further, that the application is timely made and without any unnecessary delay.
5. There is an imminent threat of execution by the respondent as the period of stay granted has already lapsed.
6. The applicants stand to suffer substantial and irreparable loss and damage which will be hard to recover if the decretal sum awarded herein is paid and the appeal succeeds.
7. Lastly, that unless the application is allowed, the applicant's intended appeal will be rendered nugatory as the appeal is arguable both on quantum and liability and has high chances of success.
8. The respondent did not file any response to the application. It was agreed that the application be canvassed by way of written submissions.
9. The respondent submitted that the applicant ought to have exhausted the provisions set out under Order 42 rule 6 of the civil procedure rules. He ought to have filed the present application before the trial court.
10. The applicant has neither demonstrated the substantial loss that will be incurred nor has he produced evidence to show financial disability of the Respondent. The Respondent relied in **Bungoma Hcca no. 25 of 2011 Geoffrey Situma Wanyonyi vs Abigael Khavesta Sikuku.**
11. As regards to costs, the Respondent submitted that in the event that the court allows the application, it orders that the applicant proceeds to pay the respondent a $\frac{1}{4}$ of the decretal amount and that the balance be deposited in a joint account held by both counsels on record.
12. Lastly, that the application has been filed more that one and a half months from the date of delivery of

judgment. The application is made in bad faith with the same merely targeting arresting execution even when the applicants had time to settle the decretal sum or file an appeal. The applicants did not file their submissions.

13. The main issue for determination is whether the application has merit. **Order 42 Rule 6(1) of the Civil Procedure Rules, 2010** empowers this Court to stay execution, either of its judgment or that of a Court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by Rule 6(2) as follows:

14. Order 42 Rule 6 (1) & (2) provides:-

1. No appeal or second appeal shall operate as a stay of execution or proceedings 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 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 of stay shall be made under sub rule (1) unless-

a. The court is satisfied that substantial loss may result to the applicant unless the order is made and 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.

15. The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out.

16. However, it is necessary to consider the grounds for granting applications for stay pending hearing and determination of an appeal.

17. The Court of appeal in the case of ***Butt vs Rent Restriction Tribunal (Madan, Miller and Porter JJA)*** while considering an application of this nature had this to say:-

The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

ii. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

18. It is vivid from the wording of Order 42 Rule 6 (1) that for an applicant to succeed in an application of this nature, he must satisfy the following conditions: -

(a) Substantial loss may result to the applicant unless the order is granted;

(b) The application has been made without undue delay;

(c) Such security as to costs has been given by the applicant.

19. It has to be demonstrated that the applicant would suffer substantial loss; that the Respondent is a person of straw and that he may not repay the said sum in the event of the appeal succeeding. In ***Equity Bank Ltd vs Taiga Adams Company Ltd***, the Court stated as follows:-

"In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent (that is execution is carried out) in the event the appeal succeeds, the respondent would not be in a position to

pay or reimburse -as/he is a person of no means. Here, no such allegation is established by the appellant."

20. Apart from proof of substantial loss the applicant is enjoined to provide security. It is trite law that failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. However, the offer for security must come from the applicant as a "price" for stay.

21. In considering whether a money decree or a liquidated claim would render the success of appeal nugatory, the Court of appeal in the case of ***Kenya Hotel Properties Ltd vs. Willesden Properties Ltd*** held that:-

"The decree is a money decree and normally the Courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the respondent is not a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all. "

22. As regards to the principles guiding the Court on an application for extension of time, the same are premised upon Rule 4. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered.

23. It is therefore upon an applicant under this rule to, explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favor.

24. In exercising the discretion, the Court ought to be guided by consideration of the factors stated in previous decisions of the Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and any interested parties if the application is granted, and whether the matter raises issues of public importance.

25. In considering whether the explanation given by the applicant for the delay in lodging his appeal is reasonable and excusable, it is upon the applicant to place sufficient material before the Court which would explain the delay in filing the Memorandum and Record of Appeal.

26. The Court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case ***M/S Portreitz Maternity V. James Karanga Kabia, Civil Appeal No. 63 of 1997*** where the Court stated:

"That right of appeal must be balanced against an equally weighty right of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right."

27. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. In the case of ***Wasike V Swala (1984) KLR 591*** the court stated that:

"As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors;

- a. That there is merit in his appeal.
- b. That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and,
- c. That the delay has not been inordinate.

28. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favor. There has to be valid and clear reasons upon which discretion can be favorably exercised.

29. The applicant herein has offered reasonable explanation for the delay in filing the appeal. The said delay is also not inordinate. There's good cause for the Court to extend the time for filing the intended appeal. Likewise, the applicant has made out a case requiring granting of stay of execution of Judgment and decree in Eldoret CMCC No. 870 of 2018 pending hearing and determination of the appeal.

30. Leave to file an appeal out of time is granted for the appeal to be filed within 14 days from the date hereof, that's 24th, March, 2021. Order of stay of execution is granted, subject to the applicant/appellant depositing half of the decretal sum into an interest earning account in the names of both advocates on record in this suit, within 45 days from the date hereof.

31. Costs be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF MARCH, 2021.

In the presence of:-

Mr. Cheruiyot for the Applicant.

Mr. Mbugua for the Respondent.

Gladys - Court Assistant