



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CIVIL MISC. CASE NO. E008 OF 2021

BETWEEN

JULIUS THURANIRA MILUNE.....1ST APPLICANT

GEOFFREY MITHEGA.....2ND APPLICANT

AND

IBRAHIM M'ELAKU.....RESPONDENT

RULING

Background

- 1) On the 19th April, 2016, judgment in **TIGANIA CMCC NO. 16 OF 2015** which proceeded in default of appearance and defence was entered in favour of the Respondent as against the Applicants jointly and severally for Kshs. 800,000/-.
- 2) The Applicants' application dated 18th August, 2016 seeking setting aside of the ex parte judgment and leave to defend the suit was dismissed by a ruling dated 01st November, 2016.
- 3) Subsequently, the trial court ordered committal of the Applicants to civil jail in execution of the judgment which order has since been lifted.
- 4) By a notice of motion dated 12th February, 2021 and filed on 22nd February, 2021, Applicants seek orders that:
 - 1) **The firm of Kuria Karatu & Co. Advocates be allowed to come on record for the Applicants**
 - 2) **Applicants be granted leave to file an appeal out of time**
 - 3) **The annexed memorandum of appeal be deemed as duly filed**
 - 4) **Spent**
 - 5) **Spent**
 - 6) **Stay of execution of judgment in TIGANIA CMCC NO. 16 OF 2015 pending the hearing and determination of the intended appeal**
 - 7) **Costs be provided for**

5) The notice of motion is premised on grounds among others that their advocate did not inform them of the judgment and they did not appeal in time since they are elderly and sickly and further that they have a good defence to the Respondent's case.

6) The application is also supported by an affidavit sworn by the 1st Applicant on 12th February, 2021 in which reiterates the grounds on the face of the application and further on the ground that they stand to suffer substantial loss if the orders sought are not granted. Annexed to the affidavit are proceedings and judgment (**marked JT 1**) of the trial court and the Applicants' treatment notes (**marked JT 2**).

7) The application is opposed on the basis of a replying affidavit sworn by the Respondent on 08th March, 2021. He contends that the Applicants have moved the court to set aside a judgment that is 5 years old without explaining why they did not defend the suit and for not demonstrating that they have an arguable appeal.

Plaintiffs/Applicants' Submissions

8) Applicants hold the view that this court has jurisdiction under Order 50 rule 6 to extend time within which an appeal ought to be filed. Applicants urged the court to exercise its discretion to grant a stay of execution pending appeal and in support thereof relied on the Court of Appeal decision in **Butt v Rent Restriction Tribunal [1982] KLR 417** where the court held that discretion ought to be exercised in a manner that would not render an appeal nugatory.

9) The Applicants further urged the court to find that they have an arguable appeal and in support thereof relied on **Reliance Bank Ltd - vs- Norlake Investments Ltd (2002) EA 227 Page 222** and **Kenya Tea Growers Association & Another v Kenya Plantation and Agricultural Workers Union [2012] eKLR** where the court reiterated the principle that for an applicant to succeed in an application for stay of execution pending appeal, he must show that his appeal or intended appeal is arguable, is not a frivolous one but need not show that such appeal is likely to succeed.

Respondent's Submissions

10) Respondent urged the court to find that the Applicants are guilty of inordinate delay and undeserving of the orders sought.

Analysis and Determination

11) I have considered the application in light of affidavits, submissions and cited authorities and I have deduced the following issues for determination.

- 1. Whether the firm of Kuria Karatu & Co. Advocates be allowed to come on record for the Applicants**
- 2. Whether Applicants ought to be granted leave to file an appeal out of time and the annexed memorandum of appeal be deemed as duly filed**
- 3. Whether there ought to be Stay of execution of judgment in TIGANIA CMCC NO. 16 OF 2015 pending the hearing and determination of the intended appeal**
- 4. Who should bear the costs of this application**

12) Under the provisions of Order 9 rule 9, the firm of **Kuria Karatu & Co. Advocates** is properly on record for the reason that the Applicants did not act in person nor appoint an advocate in **TIGANIA CMCC NO. 16 OF 2015**.

13) The law on extension of time is to be found in Section 95 of the Act which states as follows:

“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) Order 50 of the Civil Procedure Rules on the other hand states 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”

15) The parameters for exercise of court's discretion were concisely laid out in the case of **Mwangi v Kenya Airways Ltd [2003] KLR** where the Court of Appeal expressed itself thus: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.

16) Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya states: -

“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 anytime 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”.

17) The judgment from which the Applicants propose to appeal against was delivered on 19th April, 2016. The Applicants had up to 19th May, 2016 to file the intended appeal. The present application was filed on 22nd February, 2021 which is about 4 years and 8 months outside the time limited for filing an appeal.

18) I have considered the explanation for the delay advanced by the Applicants and whilst the treatment notes and receipts demonstrate that they have been receiving treatment as outpatients, the records also demonstrate that the first treatment was on 18th June, 2016 which was outside the time limited for filing the appeal. Further to the foregoing, it has not been demonstrated that the Applicants were incapacitated due to illness and the explanation for the delay is therefore found to be unmeritorious and it is rejected.

19) Determining at this juncture that the appeal does or does not raise triable issues will amount to deciding on a matter not before this court. All that this court needs to determine at this juncture is whether the applicant has a prima facie case that is triable. (See **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR.**

20) I have considered the issues raised in the draft memorandum of appeal and especially the one challenging quantum and I have no doubt that it is triable.

21) Although the delay has not been explained to the satisfaction of the court, this court has power under Section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

22) Consequently, and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the Applicants.

23) There being no evidence that the Respondent stands to suffer any prejudice if the orders sought are granted, the notice of motion dated 12th February, 2021 and filed on 22nd February, 2021 is allowed in the following terms:

1) Applicants are hereby granted leave to file an appeal out of time and are directed to file and serve the record of appeal within 30 days from today's date

2) There shall be a Stay of execution of judgment in TIGANIA CMCC NO. 16 OF 2015 pending the hearing and determination of the intended appeal

3) Mention on 25th May, 2021 to confirm compliance with order (1) above and for further directions as to the hearing of the appeal

4) Costs shall be borne by the Applicants

DATED IN MERU THIS 29TH DAY OF APRIL 2021

T.W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Applicants - N/A

For Respondent - N/A