



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APPLICATION NO. 85 OF 2020

MFI DOCUMENT SOLUTIONS LTD.....APPLICANT/INTENDED APPELLANT

VERSUS

PARETTO PRINTING WORKS LIMITED.....RESPONDENT

RULING

1. The application for consideration is the Applicant's notice of motion dated 4th of February 2020, brought under Order 9 Rule 9 of the Civil Procedure Rules, Order 42 Rule 6 of the Civil Procedure Rules, Order 50 of the Civil Procedure Rules and all other enabling provisions of the law. The application seeks the following orders:

i. Spent

ii. Spent

iii. Spent

iv. That the Honourable Court be pleased to grant leave to the Applicant to file an appeal out of time.

v. Spent

vi. That the honourable court be pleased to grant stay of execution of the judgment and orders given on 1st November 2019 pending hearing and determination of this application.

It is supported by the grounds on its face which could be summarized as follows:

i. The new date of delivery of the judgment after being deferred on 5th September 2019 was never communicated to the applicant nor its counsel.

ii. The delivery of the judgment only came to their knowledge on 20th December 2019, and by then the 30 days period within which the appeal was to be filed had lapsed.

iii. By virtue of Order 50 Rule 4 of the Civil Procedure Rules the delay cannot be said to be inordinate.

iv. That in the light of the above facts and in the interest of justice this matter be certified as urgent, heard in the first instance and the orders sought herein be granted forthwith.

2. The application is supported by two affidavits sworn by **Mr. Sandeep Sharman** the general manager of the applicant, on different dates. In the supporting affidavit sworn on the date of the application, he averred that the judgment was scheduled for 5th September 2019 but was not delivered as the court was not sitting.

3. The judgment was delivered on 1st November 2019 against the applicant which was ordered to pay Kshs 2,000,000/= with costs and interests. He deposed that the period between 1/11/2019 and 13/01/2019 ought not to be considered in computing the time within which the appeal ought to have been filed. He further avers that in the interest of justice that this application should be allowed.

4. In his further affidavit sworn on 5th day of June 2020 **Mr. Sandeep Sharman**, averred that he never received any notice for delivery of the judgment before the same was delivered and that standard practice by all courts is service of a judgment notice upon the firms on record to ensure attendance which was not done. He avers that the applicant on 12th March 2020 made it known to counsel that they had intended to file a memorandum of appeal with its further affidavit. (*annexed and marked exhibit 'exhibit A'*).
5. Further, he avers that there was no inordinate delay in filing the application and if it is allowed the respondent would not suffer any prejudice. He depones that the applicant will also suffer as business is low owing to the Covid 19 pandemic and should execution issue their business and employees will be put at risk of the disease.
6. A replying affidavit sworn by **Mr.G.M. Gachura** the Managing director of the respondent on 9th March 2020 was filed in opposition to the application. He averred that an extension of time to lodge an appeal is not a right of a party but an equitable remedy that is available to a deserving party. He also depones that the applicant is guilty of laches and delay in filing the application and it is inordinate and inexcusable since the judgment sought to be appealed against was delivered 4 months ago.
7. He depones that the notice of delivery of judgment was duly served and further listed in the cause list. He contends that the application is an abuse of the process and an afterthought meant to forestall execution of the decree. He also depones that the appeal is a sham, lacking in merit but purely intended to deny the respondent enjoyment of the fruits of its judgment. That he had already commenced execution proceedings and had obtained warrants of sale and attachment hence it is in the interest of justice that the respondent be allowed to proceed with the execution.
8. A further replying affidavit sworn by **Migui Mungai** advocate for the respondent on 19th June 2020 was filed. He has averred that notice of entry of judgment is far fetched in this matter since it is only required under **Order 21 Rule 6 of the Civil Procedure Rules** where there has been an ex parte judgment against a party who neither entered appearance nor filed defence. The said notice must be served before execution of the decree.
9. Further, he has deponed that the case belongs to the client and not the advocate hence it is the duty of the clients to check on the progress of their cases as leaving cases to advocates without checking progress is negligence on their part. He deponed that the applicant has not demonstrated sufficient reasons for the delay in moving the court to allow the appeal out of time and has failed to explain any predicament that was beyond its control.
10. Directions were given for the application to be disposed of by way of written submissions, which was complied with by both parties.
11. Learned counsel for the applicant – M/s Kilonzo submitted that the court does exercise its discretion to admit an appeal out of time if there are good and sufficient reasons for failing to file it within time. He has referred to the case of **Gk Associates Limited & another v National Bank of Kenya Limited (2017) eKLR** where the court relied on Section 79G of the Civil Procedure Act to allow the applicant to file the appeal out of time which 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, 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”.***
12. She submitted that the delay of three weeks is not inordinate and that the applicant took all the necessary steps and diligently followed up on the matter. That the applicant has shown sufficient cause for its failure to file the appeal within the required time. She cited the case of **Agip (Kenya) Limited v Highlands Tyres Ltd (2001) eKLR** where there was delay of 8 months.
13. The plaintiff's advocates in that case explained that the delay was occasioned by their relocation of offices and that they were willing to take an early hearing date. The High Court found the explanation to be satisfactory and that 8 months delay was not inordinate in the circumstances of the case. The court considered its vigilance and spirited effort in defending the application for dismissal and concluded that the plaintiff was not indolent as alleged.
14. She further submitted that if the application is not allowed, the applicant will have been denied the right to be heard on appeal and suffer substantial loss. She has relied on the case of **Henry Sakwa Maloba v Bonface Papando Tsubuko (2020) eKLR** where the High Court reiterated the finding in the case of **Century Oil Trading Company Limited vs. Kenya Shell Limited Nairobi (2008) eKLR**, where the court stated:
- “Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment”.***
15. She also relied on the Supreme Court decisions of (i) **Shabbir Ali Jusab v Anaar Osman Gamrai & another (2013) eKLR**; (ii) **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR** where the court focused on substantive justice and disregarded all procedural technicalities. In the **Shabbir Ali** case (supra) the court dismissed the preliminary objection raised where a Notice of Appeal was filed and served late. The Supreme Court granted leave for an appeal to be filed out of time.

16. On whether the request for stay is justified counsel relied on the case of **Peter Samoei Vs Isaac K Ruto (2012) eKLR** where the court held that the principles guiding the grant of a stay of execution pending appeal are provided as under **Order 42 rule 6(2)** of the **Civil Procedure Rules**.

17. Submissions by learned counsel for the respondent Mr. Mungai are dated 22nd March 2021. He submitted that the power to extend time within which to prefer an appeal is discretionary and the courts have set requirements for allowing or disallowing such an application. He referred to the case of **County Executive of Kisumu vs County Government of Kisumu and 8 others Civil Application No. 3 of 2016** where the Supreme Court held that:

“Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time the whole period of delay should be stated and explained to the satisfaction of the court.”

18. Counsel submitted that there was no explanation that had been proffered by the applicant as to why the current application was not filed on 20th December 2019 when they became aware of the judgment, or when the advocates on record had instructions to lodge an appeal. He further submitted that the delay of four months has not been satisfactorily explained.

19. He further relied on **Nginyaga Kavole vs Mailu Gideon (Misc Application No.401 of 2018)** where the High Court sitting in Machakos in dismissing a similar application held as follows:

“Five months delay is clearly an afterthought and the applicant is under a duty to satisfactorily explain such delay.”

While quoting the Court of Appeal in **Union Insurance Co. Of Kenya Ltd vs Ramzan Abdul Dhanji Civil Application No.179 of 1998** the court proceeded to hold:

“The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it”.

20. The respondent accuses the applicant of being indolent and has offered no reason for its delay in filing this application in good time. He referred to the court of Appeal case of **Donald O. Raballa vs Judicial Service Commission & A.G. (Civil Application No. 10 of 2015 (UR))** to support his argument.

Analysis and determination

21. I have considered the application, grounds, affidavits, submissions and authorities cited. The applicant seeks leave to file appeal out of time and stay of execution of the judgment and decree pending the hearing of the intended appeal.

22. It is not disputed that the matter before the lower court was slated for judgment on 5th September 2019 but the same was deferred since the trial magistrate was not sitting on that day. It is also not disputed that the judgment was eventually delivered on 1st November 2019 in the absence of the applicant and its counsel.

23. The big issue is whether the applicants were aware of the new date of delivery of judgment. How was this new date communicated to both parties? The respondent insists that the notice of judgment was served on all the parties.

24. In paragraphs 11-15 of the replying affidavit sworn on 9th March 2020 Mr. G. M. Gachura states:

“11. That as a custom the Chief Magistrate’s Court sitting at Milimani Commercial courts at Nairobi usually informs litigants of the dates of delivery of judgments by affixing the notices on the notice boards, cause list and on the door leading into the court rooms.

12. That any litigant litigating at the Chief Magistrate’s court Milimani Commercial Courts is usually aware that any notices to be served upon parties by the said court are usually served by affixing the same on the notice boards, cause list and on the doors leading into the court rooms and are not always personally sent to the litigants.

13. That we invite the Honourable court to take judicial notice of the averments in paragraph 11 above and of the fact that the notices were duly served and were it not for the Applicant’s indolence an Appeal would have been preferred on time.

14. That it was thus the duty of the Applicant and its advocates to constantly be checking out the notice boards and the cause list for the notices and having failed to act diligently the Applicant is undeserving of the orders sought herein.

15. That the notice of delivery of judgment was duly served and the matter was further listed on the cause list for the day on 1st November 2019. Annexed hereto and marked “MM 1” is the Trial court’s cause list for 1st November 2019.”

25. What Mr. Gachura has explained is what is normally done at Milimani Commercial Chief Magistrate’s Court. He has not explained what exactly happened in this particular case. Besides the assumptions he has no concrete evidence to prove that the applicant was aware of

the new date of judgment. Notices may have been placed on the notice boards but what proves that the applicant and/or counsel were served?

26. The applicant has explained that he learnt of the delivery of judgment on 20th December 2019 when somebody visited the registry. By then the 30 days within which an appeal should have been filed had lapsed.

27. This application dated 14th April 2020 was filed on the same date of the application.

Section 79G of the Civil Procedure Act provides:

“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.”

28. The applicant’s request to file appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal out of time. The supreme court of Kenya sitting at Kisumu in the case of **County Executive of Kisumu vs County Government of Kisumu & others [2017] eKLR** while relying to its decision in the case of **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others Application No. 16 of 2014 [2014] eKLR** the Hon. Judges reiterated the considerations to be made in such a case to be as follows:

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;***
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;***
- 6. Whether the application has been brought without undue delay; and***
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”***

29. The applicant had a duty to explain to this court why it did not file this application upon realizing that judgment had been delivered on 1st November 2019. According to the applicant he had acted diligently upon learning of the delivery of the judgment. This explanation is not very satisfactory though it has some little weight.

30. I have had an opportunity of perusing the draft memo of appeal and the incomplete copy of the impugned judgment delivered on 1st November 2019. From the judgment it is clear that the applicant/appellant filed a defence and counter claim and the case proceeded to hearing. The claim was for the balance of Kshs 2,000,000/= for which judgment was entered.

31. In the grounds of appeal in the draft annexed the applicant is faulting the court for failing to order for a refund of Kshs 2,000,000/= together with the storage charges, and/or specific performance. The grounds appear to raise issues which may only be canvassed in a hearing on appeal.

32. I have considered the amount of delay from 20th December 2019 to the filing of the application which was about 7 weeks. In the case of **Almas Hauliers Ltd v Abdulnasir Abukar Hassan [2017] eKLR** a delay of four months was found not to be inordinate.

33. I therefore find that the delay by the applicant is not so inordinate as to make this court deny it the opportunity to challenge the judgment by the trial court.

34. On the issue of stay of execution Order 42 Rule 6(2) of the Civil Procedure Rules provides:

“(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.”

35. In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:

“1. 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.

2. 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.

3. 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.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

36. The decree herein is a monetary decree. Both parties are limited liability companies. The applicant has shown willingness to offer security for due performance of the decree.

I therefore find merit in this application and issue the following orders:

(i) Leave to file appeal out of time is granted. The Appeal should be filed within 14 days.

(ii) There shall be stay of execution of the judgment/decree in Nairobi Milimani Commercial Court CMCC No. 2300 of 2016 on condition that Kshs 2,000,000/= be deposited in an interest earning account in the names of the two law firms appearing for both parties within 14 days.

(iii) Failure to comply with any of the orders will lead to an automatic vacation of the orders Nos (i) and (ii).

(iv) Costs to the respondent in any event.

Orders accordingly.

DELIVERED ONLINE SIGNED AND DATED THIS 31ST DAY OF MAY 2021 IN OPEN COURT AT NAIROBI.

H. I. ONG’UDI

JUDGE