



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 184 OF 2020

GLAXO SMITHKLINE PHARMACEUTICAL (K) LIMITED....1<sup>ST</sup> APPLICANTS

STELLA KAGUJA NGANGAI.....2<sup>ND</sup> APPLICANT

VERSUS

JOSEPH MULINGE KILO.....RESPONDENT

RULING

1. For determination is the application dated 4<sup>th</sup> June, 2020 by **Glaxo Smithkline Pharmaceutical (K) Ltd and Stella Kaguja Ngangai** (hereafter the Applicants) and expressed to be brought *inter alia* under Order 42 Rule 6(1) and 6(6) and Order 50 Rule 6 of the Civil Procedure Rules (hereafter CPR). Seeking that execution of the judgment delivered on 24<sup>th</sup> January, 2020 in **Nairobi CMCC No. 119 of 2020** in favour of **Joseph Mulinge Kiilo** (the Respondent) be stayed pending hearing and determination of the Applicants' intended appeal and that time within which to file appeal from the said judgment be enlarged.

2. The motion is supported by the affidavit of the Applicants' advocate **Jackson Muema Kisinga**. To the effect that the Applicants were aggrieved by the judgment of the lower court delivered on 24<sup>th</sup> January, 2020 and intended to file an appeal against the said judgment. However, having prepared the memorandum of appeal for filing the same was inadvertently archived away in the advocate's offices; that with the onset of the COVID-19 pandemic, the said offices were closed until the end of April 2020 even as Court operations were scaled down, hence the delay in filing the appeal. The deponent further deposed that the intended appeal has a high chance of success as it raises arguable issues that ought to be ventilated at the hearing of the appeal and the Applicants should not be driven from the seat of justice. It was asserted that the Respondent will not suffer any undue prejudice and that the Applicants are willing to abide by any conditions on stay of execution that may be imposed by this court.

3. The Respondent opposed the motion through a replying affidavit dated the 22<sup>nd</sup> July, 2020. It was the Respondent's position that there is no appeal filed with respect to the judgment in Nairobi CMCC No. 119 of 2019, and hence this court cannot assume its appellate jurisdiction to entertain the instant motion; that the motion does not meet the laid down conditions to warrant the grant of stay of execution pending appeal, and in particular, a demonstration of substantial loss and offer of security ; and that that despite the onset of the COVID-19 pandemic, the delay herein is inordinate as courts resumed operations in May 2020. The Respondent took the position that that the motion for enlargement of time to file an appeal was premature as the Applicants ought to have first filed the appeal and thereafter sought enlargement of time. In his view, the motion was an abuse of the court process being merely an attempt to deny him the fruits of successful litigation and is therefore prejudicial to him. He therefore urged this court to dismiss the application with costs.

4. The motion was canvassed through written submission. On the part of the Applicants, it was submitted, citing the provisions of Order 42 Rule 6(2), the decisions in **Tabro Transporters Ltd V Absalom Dova Lumbasi [2012] Eklr** and **Mukuma V Abuoga (1988) KLR 645** that the Respondent's means are unknown and that the Applicants will suffer substantial loss as any payments made to him may be irrecoverable in the event the appeal succeeds. As for the delay in filing the application, the Applicants reiterated that it was due to inadvertence by counsel, and took refuge in the famous statement by **Apaloo JA** (as he then was) regarding such blunders in the case of **Phillip Chemwolo & Another V Augustine Kubede [1982-88] Kar 103** . The Applicants reiterated their willingness to deposit security and urged that the motion be allowed.

5. On his part, the Respondent's counsel submitted that a lawful execution process cannot be deemed to portend substantial loss, as stated in **James Wangalwa & Another V Agnes Nailiaka Cheseto [2012] eKLR**. The Respondent argued that the delay in the circumstances of this case is unreasonable and no satisfactory explanation has been offered by the Applicants; and further that no security has been pledged.

6. Concerning the prayer for enlargement of time, the Respondent relied on the requirements in the proviso to section 79 G of the Civil Procedure Act and the decision in **Gerald M’limbine V Joseph Kanganagi [2009] eKLR** to submit that the purport of the proviso was that the Applicants ought to have first filed the appeal and thereafter sought the admission thereof. On the exercise of the court’s unfettered discretion under the proviso, the Respondent asserted that the onus lay with the Applicants to demonstrate that they were entitled thereto. Pointing to the Applicant’s delay in bringing the application, counsel contended that no satisfactory explanation had been given by the Applicants and that the motion herein is an afterthought which will occasion prejudice to the Respondent whose decree is yet to be satisfied. Reliance was placed on the Court of Appeal decision in **Stanley Kahoro Mwangi & 2 Others V Kanyamwi Trading Company Ltd [2015] eKLR**. He urged the Court to dismiss the motion.

7. The Court has considered the rival affidavit material and submissions made in respect of the motion. It is evident on a plain reading of Order 42 Rule 6(1) of the CPR that an order to stay execution pending appeal presupposes the existence of an appeal. In this case, no appeal has been preferred and there is therefore no basis upon which this court could exercise its appellate jurisdiction under the said provision. The filing of an appeal is a condition precedent to the exercise of this court’s appellate jurisdiction under Order 42 Rule 6 (1) of the Civil Procedure Rules. Although the provision does not expressly say so, this can be inferred from the rule. Further an analogy can be drawn from Order 42 Rule 6 (4) of the Civil Procedure Rules which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given. Equally, Order 42 Rule 6 (6) of the Civil Procedure Rules states:

**“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”** (emphasis added).

8. It would seem to me that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the Civil Procedure Rules). Until the Memorandum of Appeal is filed, the court may be acting in *vacuo* by considering the Applicants’ prayer for stay of execution pending a non-existent appeal.

9. I am fortified on this position by the pronouncement of the Court of Appeal in the case of **Equity Bank -Vs- Westlink MBO Limited [2013] eKLR**. Commenting on Rule 5 (2) (b) of the Court of Appeal Rules, whose wording is substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules, and on Order 42 Rule 6 (6) of Civil Procedure Rules, the Court of Appeal left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also **Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR**). There is no provision for the filing of a notice of intended appeal in the High Court from a decision of the subordinate court. Order 42 Rule 1 of the CPR provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In the circumstances, prayer 3 of the motion 4th June 2020 has no legal anchor and is hereby struck out.

10. Turning now to prayer 4, although the Applicants did not submit thereon nor invoke the provisions of Section 79G, the power of the Court to enlarge time for filing an appeal out of time is expressly donated by the proviso to the latter, as well as generally, under section 95 of the Civil Procedure Act. In absence of submissions on this the prayer, the Court will look at the affidavit in support of the motion.

11. The Respondent’s assertion that the instant motion is premature as it ought to have been preceded by the filing of a memorandum of appeal is not persuasive. In my considered view, the words that “*an appeal may be admitted out of time*” in the section appear to admit both retrospective and prospective application. So that leave under the section may be sought before or after a memorandum of appeal is filed. However, as has emerged from the earlier part of this ruling, it may be more prudent for a party who also seeks stay of execution in the same motion for leave to have filed the memorandum of appeal in advance.

12. Be that as it may, the principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “*good and sufficient cause*” for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

**“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 general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”**

13. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of **Telkom Kenya Limited V. John Ochanda And 996 Others [2015] eKLR** that:

**“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court’s discretion in curing the pleadings before it. This Court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place....**

**It is this Court’s position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not**

**irrelevant but are the handmaiden of justice that facilitate the right of access to justice in the terms of Article 48 of the Constitution....”**

See also **Patrick Wanyonyi Khaemba V Teachers Service Commission & 2 Others [2019] eKLR.**

14. 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.”**

15. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

**“(T)he underlying principles a court should consider in exercise of such discretion include;**

- 1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**
- 7. ....”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR.**

16. The Applicants have made the case that delay in filing the instant application and appeal was occasioned by two factors, namely, that having prepared the memorandum of appeal, the Applicants’ counsel inadvertently archived it away, and secondly, the scaling down of court operations and temporary closure of counsel’s offices following the outbreak of the Covid -19 pandemic. Thus, the mistake of counsel and obtaining extraneous circumstances are proffered as the reason for failure to file the appeal on time.

17. On his part, the Respondent countered that the Applicants’ actions were deliberate as judgment on the matter was delivered on 24th January 2020. Further, that scaling down of court operations due to the Covid-19 pandemic only began in mid-March and even if counsel had closed their offices until end of April 2020, it was not until June 2020 that the instant motion was filed.

18. The delay in this case is about 5 months. While it may be true that due to the COVID-19 pandemic Court operations were scaled down from about mid-March 2020 to May 2020, it is not unreasonable to believe that the Applicants’ counsels’ offices were closed until April 2020. Or that by mistake, the memorandum of appeal though drafted was archived rather than filed in Court. On this latter aspect the court accepts the inevitability of such occasional slips as observed by **Apaloo JA** (as he then was) in **Phillp Chemwolo & Another V Augustine Kubede [1982-88] Kar 103; (1986) eKLR :**

**“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”**

19. Further, the court takes judicial notice of the fact that the Covid-19 pandemic adversely affected all spheres of life in Kenya and the world in general. The justice sector did not escape unscathed either, and indeed Court operations were scaled down since mid-March 2020. There is no evidence of overreach, negligence, mischief, or fraud on the part of the Applicants, and it may well be true that a genuine mistake occurred in the archiving of the memorandum of appeal, which was certainly not extenuated by the subsequent closure of offices due to the pandemic.

20. The court is satisfied that in the circumstances of this case, that the delay is not inordinate and that the Applicants have discharged the

burden of demonstrating good and sufficient cause for failing to file their appeal on time. Secondly, the appeal to be filed does not, on a perusal of the draft memorandum of appeal appear frivolous. The right of appeal is constitutionally guaranteed and a deserving party ought not to be hindered in the exercise of this undoubted right. Finally, the Respondent has asserted that he will be prejudiced if forced to wait longer to enjoy the fruits of his judgment. In the circumstances of this case, the court is of the view that the Respondent will not suffer undue prejudiced though there may be some delay. At any rate, he will be compensated through costs and interest earned on the decretal sum if the appeal terminates in his favour. In the result, it seems to me that the justice of the matter lies in allowing prayer 4 of the motion dated 4<sup>th</sup> June 2020 but awarding costs to the Respondent. It is so ordered.

21. The Applicants are to file their appeal within 14 days of today's date. Further, in view of the striking out of prayer 3 of the motion and in the interest of justice, this Court will *suo motu* grant a temporary order that the *status quo* be maintained in so far as the decree in the lower court is concerned, to enable the Applicants to file an appropriate stay motion in the appeal to be filed pursuant to the leave granted herein. This temporary order will last for 14 days.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF MAY 2021**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Applicants: Mr Njanjo h/b for Mr. Kisinga.**

**For the Respondent: Mr Wachira.**

**C/A Carol**