



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

MISC APPLICATION NO. E002 OF 2021

JOSEPH KINGORI KIONI.....APPLICANT

-VS-

KENYA WOMEN MICROFINANCE BANK LTD.....1ST RESPONDENT

PHILIP KAMUNYA T/A CRATER VIEW AUCTIONEERS.....2ND RESPONDENT

RULING

1. By a Notice of Motion under Section 1a, 1b of the Civil Procedure Act, Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 and all enabling provisions of the law, the Applicant sought the following orders;

i. Spent

ii. Spent

iii. That the Applicant be granted leave to appeal out of time against the Ruling delivered on 18th November 2020.

iv. That pending the hearing and determination of the intended appeal or further orders of the court there be a stay of execution of the orders granted on 18th November 2020 in Nyahururu CMCC No. 227 of 2018 adopting the consent dated 8th July 2019.

v. That the costs of this application be provided for.

2. The application was premised on the grounds set forth by the Applicant that he be allowed to file an appeal out of time for the reasons that the parties had initially started negotiations with a view of settling Nyahururu CMCC No. 227 of 2018 however the Applicant initially signed the consent dated 8th July 2019, the consent herein believing that it contained the agreed terms only to learn later that the terms had been varied by the Respondent's advocates. The Applicant objected to the adoption of the consent but in the Ruling delivered on 18th November 2020, the court overruled his objection and proceeded to adopt it. Immediately on delivery of the said Ruling, the Applicant applied for a copy of the Ruling to enable him appeal against it but he was given a copy on 18th December 2020. The Applicant was further prevented from filing the appeal in time because of his medical condition. Further, the Applicant asserted that the intended appeal has high chances of success and as such it is fair and just that he be granted leave to appeal of time as the Respondent will not suffer any prejudice if the current application is allowed.

3. The application was further based on the supporting affidavit sworn by the Applicant himself wherein he reiterated the grounds in support of the application, annexing discharge summary papers from Ol' Jabet Hospital, Notice of Motion and supporting affidavit both dated 30th October 2019, a copy of the Ruling dated 18th November 2020 and a copy of the draft intended memorandum of appeal.

4. In his supporting affidavit, the Applicant deposed that the 1st Respondent advanced to him a loan of 2,000,000 and he pledged his parcel of land LR Nyandarua/ Ol Joro Orok Salient/ 7360 as security. The 1st Respondent then indicated that it had debited an amount of 3,000,000 thus making the monthly installments and interest to be higher than what the Applicant had bargained for.

5. Further, the 1st Respondent instructed the 2nd defendant to realize the said security on the grounds that the Applicant had failed to meet the repayment terms thus prompting him to file Nyahururu CMCC No. 227 of 2018.

6. The Applicant attested that he approached the 1st Respondent with a view of settling the matter out of court after which he met the latter's regional manager whereby he stated that they agreed that the principal sum be Kshs 2,000,000 out of which there was to be a deduction of all that he had paid plus savings and the balance was to be subjected to interest with effect from the month of September 2019 from which he would be making monthly payments of 30,000/-

7. The Applicant deposed that he entrusted the 1st Respondent's advocates to prepare the consent in terms of the aforesaid agreement but by the time the consent was ready for signing he was admitted to hospital and on the date of discharge he passed by the advocates office whereby he was shown where to sign and he complied. He asserted that he did not have a chance to read or understand the consent and he execute it believing it contained what they had agreed to with the 1st Respondent's regional manager.

8. Further, the Applicant asserted that he noted that there were terms in the consent that were not agreed upon, such as payment of accrued interest which would imply that he should pay interest based on a principal sum of Kshs.3,000,000/- and in view of that he filed an application dated 30th October 2019 seeking the consent not be adopted as the orders of the court. The application was heard and the court in its Ruling dated 18th November 2020 dismissed it and proceeded to order for the adoption of the consent thus leading up to his efforts to lodge an appeal against the aforesaid Ruling.

9. The application is opposed by the 1st Respondent, who filed replying affidavit dated by 13th April 2021 sworn by their legal counsel, Esialila Metrin Mmboga, deposing in contention that the application is full of falsehoods and misrepresentation of facts and law and lacks grounds hence it should be dismissed with costs.

10. The 1st Respondent deposed that the Applicant is a serial contemnor and a litigious character; his sole purpose and aim being to evade the performance of his contractually obligated duty bound by the charge agreement dated 27th May 2015. Further, it was the Applicant's default in repayment of the credited amount of Kshs. 2,000,000/- that forced the 1st Respondent to commence execution proceedings prompting the suit serialized as Nyahururu CMCC No. 277 of 2017 which suit was accompanied by an interlocutory application seeking injunctive reliefs by the Applicant.

11. Further, the 1st Respondent averred that having gotten temporary relief from the execution proceedings by the 1st Respondent, the Applicant failed to prosecute his case leading the 1st Respondent to move the court to have the interim orders set aside vide an application dated 10th April 2019.

12. The 1st Respondent deposed that the Applicant on realization of the inevitable approached their advocates on record seeking an out of court settlement that lead up to a consent which was duly executed by the Applicant who affixed his signature and identity card number and that when the matter was mentioned in court on 16th October 2019, the latter in his usual stubbornness opposed the adoption of the filed consent and thereafter filed an application to stop the adoption of the same.

13. In addition, that the aforesaid application was dismissed and that the same reasons disregarded by the trial court are enumerated in the present application and the same are unsatisfactory and do not guarantee an exercise of this courts discretion to stay execution against the Applicant. The 1st Respondent contended that the Applicant has failed to demonstrate that the consent was entered into unwillingly

14. In conclusion, the 1st Respondent asserted that the Applicant has not given satisfactory reason as to why he failed to file the appeal on time and that there is no evidence of the letter written by the Applicant requesting a copy of the Ruling thus this honorable court should see through the antics of the Applicant and thereafter dismiss the present application with costs.

15. The application was canvassed by way of written submissions.

16. In the Applicant's written submissions dated 6th March 2021, he reiterated the prayers and grounds in support of his application as contained in the application itself and the supporting affidavit stating that he has an arguable appeal with high chances of success thus it would be unfair to allow the Respondents to execute based on a disputed consent hence it is in the interest of justice that there be a stay of execution of the terms of the said consent pending the hearing and determination of the intended appeal.

17. Opposing the application, the Respondents counsel submitted that the following issues commend themselves for determination;

- *Whether this honorable court ought to grant the Applicant leave to appeal out of time?*
- *Whether this honorable court ought to grant stay of execution of the orders granted on 18th November 2020?*

18. On whether this honorable court ought to grant the Applicant leave to appeal out of time reliance was placed on *Daphne Perry Vs Murray Alexander Carson (1963) EA 546* as quoted in *Tabro Transporters Limited V Francis Njenga (2018) eKLR* and *Mwangi V Kenya Airways Ltd (2003) KLR*.

19. On whether this honorable court ought to grant stay of execution of the orders granted on 18th November 2020 reliance was placed on *Chris Munga N. Bichage Vs Richard Nyagaka Tongi & 2 Others eKLR*. Further reliance on the court disregarding the consent between the parties was placed on *Mohammed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR* and *National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd & Another 2001 eKLR*.

Analysis and Determination

20. I agree with the Respondents counsel that the issues before court are:

I. Whether this honorable court ought to grant the Applicant leave to appeal out of time?

II. Whether this honorable court ought to grant stay of execution of the orders granted on 18th November 2020?

21. **Section 79G of the Civil Procedure Act** deals with the time allocated for filing appeals from subordinate courts and states 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.

22. In the case of **Paul Musili Wambua v Attorney General & 2 others [2015] eKLR**, the Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated that;

“...it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted.”

23. The principles to be considered by the court when determining an application for extension of time to file an appeal were restated by the Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others** (supra) 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 reasonable reason for the delay.

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.

28. The Applicant needs to satisfy the court on the following conditions before they can be granted the stay orders:

a) Substantial loss may result to the Applicant unless the order is made,

b) The application has been made without unreasonable delay, and

c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.

29. The Applicant is apprehensive that should the orders of stay not be granted; the Respondent will proceed to execute against him thus occasioning him substantial loss. There is no doubt that this application was made timeously and without unreasonable delay. It is my considered view that the 1st Respondent will not suffer any prejudice if I grant the application. In the upshot, the court grants the Applicant a conditional stay with orders that he deposits the sum of ksh 2,000,000 in court within thirty (30) days failing which execution to proceed for the entire decretal amount.

30. In the premises therefore, and for the interest of justice and fairness and having considered that there would be no prejudice suffered by the Respondent, Thus I grant the orders

I. The application for leave to file his appeal is allowed and same be filed and served within thirty days.

II. Application is also granted for stay of execution on condition that he deposits a of sum Kshs.2,000,000 in court within thirty (30) days failing which execution to issue.

III. Costs of the application to the respondent.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 30TH DAY OF JUNE, 2021.

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CHARLES KARIUKI

JUDGE