



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 318 OF 2019

JOHN KAMAU MUTHONI.....1ST APPLICANT

WILSON WAWERU.....2ND APPLICANT

VERSUS

DENNIS NYARWATI OMARI and .

EUNICE KERUBO MAERI (*suing as the administrators*

of the estate of the late MOFAT NYARWATI (Deceased).....RESPONDENT

RULING

1. This is the notice of motion dated 17th April 2019 seeking the following orders:

(i) Spent

(ii) That this court be pleased to grant the applicants leave to file a memorandum of appeal out of time.

(iii) Spent

(iv) That this court be pleased to order a stay of execution of the judgment issued by the trial court on 8th February 2019 pending the hearing and determination of the intended appeal.

(v) Spent

(vi) That the costs of this application abide the outcome of the appeal.

2. It is supported by the grounds on its face and the sworn supporting affidavit of Joyce Chichi an advocate representing the applicant. The main ground is that the applicant being dissatisfied with the judgment intends to file an appeal but is time barred.

3. On the issue of stay of execution its deponed that if stay of execution is not granted the intended appeal will be rendered nugatory and the applicants will suffer irreparable loss and damage. They are ready, willing and able to furnish such reasonable security according to the court's directions. Its further deponed that the applicants' intended appeal (*copy marked JC1*) raises pertinent issues and has a high chance of success.

4. The 2nd administrator filed a replying affidavit sworn on 23rd May 2019, and opposes the application. She avers that judgment in the matter was delivered on 8th February 2019 in the presence of the applicants' counsel. A tabulation of the respondent's costs was made on 8th March 2019 and immediately delivered to the applicants' counsel. She depones that there is no explanation for the delay in filing the appeal in good time. She states that the applicants have equally not demonstrated or shown any substantial loss to be suffered if stay of execution is not granted.

5. The application was canvassed by way of written submissions. Counsel for the applicants' M/s Kimondo Gachoka & Co. Advocates in submissions dated 26th November 2020 has referred the court to sections 79G and 95 of the Civil Procedure Act on the time for filing appeals. Referring to the cases of **Mwangi v Kenya Airways Ltd [2003] KLR** and **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugu & anor [2018] eKLR** he listed some of the factors to be considered in the issue of extending time to file an appeal. They include the following:

- (a) *The period of delay;*
- (b) *The reason for the delay;*
- (c) *The arguability of the appeal;*
- (d) *The degree of prejudice which could be suffered by the Respondent if the extension is granted;*
- (e) *The importance of compliance with time limits to the particular litigation or issue; and*
- (f) *The effect if any on the administration of justice or public interest if any is involved.*

6. He cited the case of **Amal Hauliers Ltd vs Abdunlasir Abukar Hassan [2017] eKLR** where Justice W. Korir found four (4) months delay not to be inordinate. He therefore submits that the applicant herein was only two (2) months late which is not inordinate delay.

7. He contends that the appeal is merited, arguable and raises pertinent point of law and fact and has an overwhelming chance of success. Further that the respondent will not suffer any prejudice if the applicant is granted leave to appeal out of time. He also referred to Order 42 Rule 6(1) & (2) Civil Procedure Rules and the case of (i) **Amal Hauliers** (*supra*) (ii) **Butt v Rent Restriction Tribunal [1982] KLR 417**.

8. In the latter case guidance was given on the principle to be applied when deciding on whether or not to grant a stay of execution pending appeal, as follows:

“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.”

9. He finally submitted that the applicants have always been ready and willing to furnish reasonable security especially in form of a bank guarantee as guided by the court.

10. The respondent in its written submissions dated 19th October 2020 and filed by M/s Waiganjo Wachira & Co. advocates has referred to section 75G of the Civil Procedure Act and the case of **Gerald M’Limbine v Joseph Kangangi [2009] eKLR** where Justice Emukule (*as he then was*) held that one should file an appeal before seeking extension of time. Counsel therefore submits that the applicants should have first filed an appeal and thereafter sought the leave now being sought.

11. Counsel has submitted that the granting of the leave sought is discretionary and unfettered and the applicants have a duty to explain why they are deserving of the order sought herein. To support this he has referred to the case of **Stanely Kahoro Mwangi & 2 others v Kanyamoi Trading Company Ltd [2015] eKLR**. He argues that the applicants have not given any explanation as to why the appeal was not filed within the stipulated time frame.

12. Counsel has further referred to Order 42 Rule 6(1) Civil Procedure Rules and the case of **John Mwangi Nderitu v Joseph Ndiritu Wamathai [2016] eKLR** on the conditions to be satisfied before stay of execution is granted. In the said case the court held that:

“It is clear from the wording of Order 42 rule 6(1), for an applicant to succeed in an application of this nature, he must satisfy the following conditions; namely,

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

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

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

13. It is therefore his submission that execution is a lawful process and a party cannot ride on the argument that substantial loss will result from imminent execution. Relying on the case of **James Wangalwa & anor vs Agnes Naliaka Cheseto [2012] eKLR** he submits that the applicants have failed to demonstrate any substantial loss to be suffered besides pleading it.

14. He however conceded that the application was filed without undue delay but he points out that despite the timely filing of the motion they failed to expedite the hearing and determination of the same.

He finally submitted that if the court is inclined to grant the orders sought it should order the applicants to release half of the decretal sum and costs to the respondents and the other half to go to an interest earning account under the names of both advocates within 30 days of the Ruling.

Analysis and determination

15. I have duly considered the Notice of Motion, the grounds, supporting affidavits, both submissions and authorities cited. I find the issue falling for determination to be whether the applicants have demonstrated their being deserving of the two orders sought namely:

(i) *Extension of time to file appeal out of time.*

(ii) *Stay of execution of the judgment/decree in Milimani CM's court Civil case No. 4715 of 2017.*

16. The provisions of the law allowing the filing of appeal out of time are sections 79G and 95 of the Civil Procedure Act. They provide as follows:

S. 79G – “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.”

S. 95 “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.”

17. Counsel for the respondent has relied on the case of **Gerald M’Limbine v Joseph Kanyangi** (*supra*) to argue that the applicants should have filed an appeal first before seeking for extension of time. This is a decision of the High Court and is only persuasive. In cases where one files a Miscellaneous Application before filing an appeal the applicant annexes a copy of the draft memo of appeal for the court’s consideration. The applicants herein have annexed to their application a copy of their memo of appeal (JC1). I therefore do not find anything unprocedural about that to make me dismiss the application on that ground alone.

18. The impugned judgment was delivered on 8th February 2019 and any appeal ought to have been filed on or before 8th March 2019. Instead the application seeking extension of time for filing appeal which is dated 17th April 2021 was filed on 23rd April 2021. It was therefore filed five (5) weeks after the 8th March 2019, when the stipulated period for filing appeal expired.

19. The considerations to be made in a request for leave to file appeal out of time are found in several decisions. The same were suggested in the case of **Mwangi v Kenya Airways Ltd [2003] KLR**. They include the following:

(a) *The period of delay.*

(b) *The reason for the delay.*

(c) *The arguability of the appeal.*

(d) *The degree of prejudice which could be suffered by the respondent if the extension is granted.*

(e) *The importance of compliance with time limits to the particular litigant or issue; and*

(f) *The effect if any on the administration of justice or public interest if any is involved.*

20. In the case of **Stanley Kamoro Mwangi & 2 others** case (*supra*) which was referred to by counsel for the respondent, the court cited the case of **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, that 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.”

21. The grounds of appeal show that the appeal is only against the award of damages. The applicants were found to be 100% liable and this is not being challenged. The decretal sum is Kshs 1,476,460/= as stated in EKM1. No copy of the lower court judgment has been filed herein therefore this court is not sure of what led to the award though its clear the victim passed on.

22. In his submissions counsel for the respondent admitted that the application was filed without undue delay. Looking at all the factors in total I have come to the conclusion that the delay in filing this application cannot be said to be inordinate. It was filed about 1½ months after

time had run out and by then a request for execution had been made. The draft memo of appeal cannot be said to be idle and they can't therefore be denied the right of leave to appeal out of time.

23. The next issue is that of stay of execution. The conditions to be met in such an application are set out in Order 42 Rule (6) (2) Civil Procedure Rules which 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.

Also see **John Mwangi Nderitu** (*supra*) and **James Wangalwa & Anor** (*supra*).

24. I have noted from the record that this application has been unnecessarily delayed due to negotiations that were ongoing. It's not even clear whether the appeal has been settled or not as the mentions have been mainly attended by one party only. On 31st May 2021 when the matter was last mentioned Mr. Wachira for the respondents informed the court that only part payment of the decretal sum had been made. He did not say exactly how much money had been paid.

25. This being the situation prevailing the request for stay of execution shall be granted but on conditions.

26. The upshot is that the application dated 17th April 2021 is hereby allowed and the following orders made:

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

(ii) There shall be stay of execution of the judgment/decreet in Milimani Chief Magistrate's court Civil Case No. 4715 of 2017 on condition that:

“The unpaid balance of the decretal sum be secured by a bank guarantee from a reputable bank and to be deposited in court within 14 days.”

(iii) Failure to comply with condition no (ii) will lead to automatic lapse of the order for stay of execution.

(iv) Costs will abide the Appeal.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 24TH DAY OF JUNE, 2021.

H. I. ONG'UDI

JUDGE