



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. APPLICATION NO. 459 OF 2019**

**OROKISE CO-OPERATIVE SAVINGS AND CREDIT SOCIETY...APPLICANT**

**VERSUS**

**SALOME WANJIRU GETARI .....RESPONDENT**

**RULING**

1. The applicant filed the notice of motion dated 22/6/2019 pursuant to **Section 1A, 1B, 3A, and 63 (e) of the Civil Procedure Act Cap 21, Order 22 Rule 22, Order 50 Rule 5 and Order 51 Rule 1 of the Civil Procedure Rules 2010** seeking orders that

**a. Spent**

**b. That this honorable court be pleased to reinstate the orders granted on the 10/7/2019 by this honorable court and thereafter enlarge or extend time within which to comply with the said court orders pending the hearing and determination of this application.**

**c. That this honorable court be pleased upon reinstatement, to extend and grant interim orders of stay of execution of judgment/decree issued by the trial court on 16/5/2019 pending the hearing and determination of the intended appeal**

**d. That this honorable court grant the applicants leave to file their memorandum of appeal out of time**

**e. That this honorable court be pleased to give any order and or further orders that it may deem fit just and expedient in the circumstances and in the interest of justice.**

**f. That costs of this application be provided for.**

2. The application is based on the grounds set out on the face of it and on the supporting affidavit of Pauline Waruhiu, legal counsel for Direct Line Insurance, the insurer of Motor vehicle Registration No. KBX 566N. In it she stated that on 10/7/2019 the court gave an order on the application dated 2/6/2019 allowing stay of execution with conditions that they file their memorandum of appeal within 30 days and pay the respondent's counsel Ksh. 150,000 and deposit the balance of Ksh. 150,000 in an interest earning account with the joint names of advocates appearing in this matter within 30 days from the date of the order.

3. She stated further that the applicants failed to comply with the said orders on time due to financial constraints that was exacerbated by the outbreak of covid 19 pandemic. The applicant stated that it is now financially capable of paying a deposit of Ksh. 150,000 and give a bank guarantee of Ksh 150,000 as security for the due performance of this Appeal. It is also argued that granting the order shall not prejudice the respondent since it has come to this court within a reasonable period without undue delay.

4. The application is opposed by the respondent which filed the replying affidavit of Salome Wanjiru Getari sworn on 23/3/2021 where she stated that the court orders of 10/7/2019 were as a result of a consent recorded between the parties which the applicant has not made any attempts to comply with.

5. The respondent added further that the applicants never filed a memorandum of appeal even after they were granted leave to do so and therefore the delay has been inordinate and therefore the applicant is guilty of laches. The respondent also argued that if the orders are granted, the respondent would be highly prejudiced as it would deny her the fruits of her judgement.

6. I have considered the applicant’s application, the main issue for determination therefore is whether the application has any merit.

7. **Section 79G** of the **Civil Procedure Act** provides that:

**“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.”**

8. On perusal of the file, the decision that the appellant seek to appeal against was delivered on 16/5/2019. The applicant had then filed the motion dated 22/6/2019 where it sought for leave to file an appeal out of time and for a stay of execution of the judgment issued on 16/5/2019. The parties recorded a consent on 10/7/2019 where the application was granted on condition that that the applicant files the memorandum of appeal within 30 days and that it pays half of the decretal sum Ksh 150,000 to the respondent’s advocates and the balance be deposited in an interest earning account in the joint names of the advocates appearing herein within in 30 days failure to which execution to issue.

9. The applicant has since then failed to comply with the consent orders and 19 months later seeks for extension of time to comply with the said orders.

10. In the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR**, the Court of Appeal reiterated the conditions to be considered in deciding whether or not to grant the extension of time to file an appeal out of time. These are the length of the delay, the reason for the delay, possibly, the chances of success of the appeal if the application is granted, and finally, the degree of prejudice to the respondent if the application is granted.

11. On the length of the delay the applicant waited for 19 months after consent orders was recorded to file this application for extension of time. It is the applicant’s assertion that it failed to comply with the orders due to financial constraints attributed to the outbreak of Covid 19 pandemic.

12. It is apparent from the material supplied in support of the application that the applicant failed to tender evidence showing how the outbreak of the Covid 19 pandemic affected its finances. The applicant also failed to justify why it took 19 months to file instant application for extension of time fixed by consent.

13. In the end, I find the applicant’s motion dated 22.6.2019 to be without merit. The same is dismissed with costs being awarded to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE, 2021**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent