



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 406 OF 2013

ADEN IBRAHIM ABDI.....1ST PLAINTIFF/RESPONDENT

HASSAN ABDI GULED.....2ND PLAINTIFF/RESPONDENT

VERSUS

EZEKIEL ANGWENYI.....1ST DEFENDANT/APPLICANT

SAMUEL ANGWENYI T/A

UKAY CENTRE FOREX BUREAU LIMITED.....2ND DEFENDANT/APPLICANT

RULING

NOTICE OF MOTION

The Applicant filed a Notice of Motion Application dated **3rd September 2020** for orders ; -

1. A temporary order issues staying execution of decree and warrants herein pending the hearing and determination of this Application inter partes.
2. Leave be granted to the Applicant to file and serve Notice of Appeal out of time and/or Notice of Appeal dated **3rd September 2020** be deemed properly filed and served.
3. Temporary stay of execution of decree and/or warrants herein pending hearing and determination of Applicants' intended Appeal.

Which Application was supported by the sworn Affidavits of **Ezekiel Angwenyi** and **Justus Nyaberi** dated **3rd September 2020** on the following grounds; -

1. The Applicant and/or their Advocate were never served with a notice of delivery of ruling which had been scheduled for **7th October 2019** and delivered on **22nd May 2020**.
2. The Court delivered the Ruling on **22nd May 2020** dismissing the Applicant's Notice of Motion and he wishes to Appeal against the said decision.
3. The Respondents/Plaintiffs had been paid fully by Ukay Centre Forex Bureau Limited who issued several cheques and the sums claimed are paid.
4. The Applicant has an arguable Appeal with chances of success and seeks leave to file Notice of Appeal out of time.
5. The Respondents/Plaintiffs had been fully paid and they will not suffer loss or damage.
6. The Ruling of **22nd May 2020** directed parties to reconcile and establish the balance due to the Respondents.
7. The Court further directed that execution shall be in respect of the balance only and the parties have not established how much (if

any) the balance is.

REPLYING AFFIDAVIT

The Application was opposed vide the sworn Affidavit of **Aden Ibrahim Abdi** dated **12th October 2020** and stated that; -

1. The Matter was listed on the cause list for the delivery of the Ruling and the Ruling Notice was published on the Kenya Law Website accessible to all and sundry.
2. The grant of orders of Stay of Execution of a Decree is discretionary, which discretion must be exercised judiciously. The court will not grant a Stay of Execution for a monetary Decree where the Decree Holder is able to repay the Applicant if the intended Appeal were to succeed.
3. The Applicant has not adduced evidence or demonstrated that substantial loss will be occasioned if the Court does not grant the Stay of Execution.
4. Further, the Applicant prayed for Stay of Execution without undertaking to furnish security as per **Order 42 Rule 6 (2) (b) of the Civil Procedure Rules** and as such Stay of Execution should not be granted to the Applicant.
5. The matter is *res judicata* within the meaning of **Section 7** of the **Civil Procedure Act** as the Applicant already sought temporary orders staying the execution of the Judgment and Decree given on 8th December 2017 together with all the consequential orders vide Notice of Motion Application dated 14th December 2018.
6. The Court cannot entertain this Application as the general principle of law is that after passing judgment, the Court becomes *functus officio* and cannot revisit the judgment on merit or purport to exercise judicial power over the same matter.
7. The Applicant has not shown any sufficient reasons as to why leave to file their intended appeal out of time should be granted and on the face of it the intended appeal is frivolous, lacks merit and has no chance of success on the grounds that; -
 - a. The Court held that the Applicant's 'Draft Defence' had no triable issues.
 - b. The Applicant has not attached a draft Memorandum of Appeal to prove an arguable Appeal.
8. The Applicant's Application is an abuse of the court process and should be dismissed.

APPLICANT'S SUBMISSIONS

The Applicant submitted that he is likely to irreparable loss of over **Kshs.25, 000, 000** if condemned unheard on technical reasons. The 2nd Applicant had settled the Plaintiffs' claim and that there has never been a reconciliation done as ordered by the Ruling of 22nd May 2020 to determine if the Plaintiffs are owed any money.

It was the Applicant's submission that there was no inordinate delay in filing this Application once the Applicant learnt that the ruling had been delivered. The Ruling was scheduled for 7th October 2019 and delivered on 22nd May 2020. The Applicants became aware that the Ruling had been delivered on 28th August 2020. The Application was filed on 3rd September 2020. The length of the delay was for about 60 days.

The Applicant relied on the case of ***Leo Sila Mutiso –versus- Rose Hellen Wangari [1999] 2 EA 231*** where the court stated; -

“It is settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled in deciding whether or not to grant an extension of time the court takes into account;

- a. The length of the delay;***
- b. The reason for the delay;***
- c. Possibly the chances of the appeal succeeding if the application is granted; and***
- d. The degree of prejudice to the Respondent if the Application is granted.”***

RESPONDENTS' SUBMISSIONS

The Respondents submitted on two issues;

Whether the Court should grant leave to the Applicant to file Notice of Appeal out of time.

The Respondent submitted that **Section 79G of the Civil Procedure Act** provides that; -

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 an appeal out of time.

The Applicant herein did not provide any good or sufficient cause for not filing the appeal in time and the length of delay is not reasonable and further, has not demonstrated that he has an appeal with great chances of succeeding.

The Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time in the case of **Paul Musili Wambua –versus- Attorney General & 2 Others [2015] eKLR** stated; -

“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 or not to grant an extension of time are; the length of 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.”

On whether the Court should issue a Stay of Execution, the Respondents submitted that if Stay of Execution is granted as it will be contrary to **Order 42 Rule 6(2) of the Civil Procedure Rules** which provides; -

No order for stay of execution shall be made under sub-rule (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.

In the case of **Samvir Trustee Limited –versus- Guardian Bank Limited Nairobi HCCC 795 of 1997** the court stated; -

“For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.”

The Applicant has not adduced any evidence of substantial loss that will be occasioned if the Court does not issue a grant of Stay of Execution order.

Further, the Respondent submitted that there was unreasonable delay by the Applicant in filing the Application and in addition, the Applicant did not confirm whether he is willing to offer security for the order of Stay of Execution. The Applicant did not also demonstrate how the intended Appeal would be rendered nugatory if a Stay of Execution is not granted. In the case of **James Wangalwa & Another –versus- Agnes Naliaka Cheseto [2012] eKLR** the court stated; -

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.”

DETERMINATION

The issue for determination is grant of extension of time within which to file an appeal to the Court’s Ruling of 22nd May 2020.

The main reason advanced by the Applicant is that this Court delivered Ruling scheduled for 7th October 2019 on notice on 22nd May 2020. The Defendant realized the Ruling was delivered on 28th August 2020 and filed the instant application 60 days later.

The applicant stated that there was no Notice that the Ruling would be delivered on 22nd May 2020.

With the advent of Corvid 19 pandemic the Courts shut down in March 2020 and reopened virtually with condition that if parties consented then the Court would deliver Rulings/Judgments. In this case, the Applicant herein did not know of delivery of Ruling and could not consent as they were not notified of the date.

The Applicant submitted that they are prejudiced and stand to lose Ksh 25million. The 2nd Defendant paid all money owed to the Respondent and have failed to account for the paid funds or reconcile Accounts to date.

The Respondent objected to the Application on the following grounds, the Practice Directions were published in Kenya Gazette notice of 20th March 2020, after the advent of Corvid 19 pandemic required Rulings & Judgments published on the Cause List which was sufficient Notice. There was no requirement for consent from parties /Counsel to the Court to deliver the Judgments and Rulings.

The Respondent indicated that they have never been served with the application of 18th December 2018 by the 2nd Defendant who has never participated in these proceedings.

The matter has been in Court since 2013 and the Defendants filed various applications to avoid the Plaintiff obtaining the decretal sum.

On the issue of serving Notices, at the time as agreed by all parties there was Corvid 19 pandemic which in March 2020 necessitated closure of Courts and when they reopened it was on virtual online platform. There was skeleton staff due to social distancing requirements. Admittedly, notices could not issue for service in advance save by publishing the Cause List which was done. In the circumstances this was sufficient notice.

Secondly, the Applicant has not file Notice of Appeal nor Memorandum of Appeal to officially express intention to pursue an appeal.

Thirdly, If as is alleged the Plaintiff's debt has been paid as outlined at paragraph 8 of the Replying Affidavit of Ezekiel Angwenyi of 12th November 2020 which shows cheque numbers and amounts paid by 2nd Defendant why did the Applicant 1st Defendant not also confirm what he has paid together with 2nd defendant and find out the outstanding debt.

This is the Court order the Court granted on 22nd May 2020, that parties reconcile Accounts together or individually, each party confirms payments by cheque copies/counterfoils, bank statements and then the outstanding balance will be determined?

Until this exercise is undertaken either individually or together and documents filed in Court, there is no arguable appeal.

The Parties are not contesting obtaining funds, defaulting in repayment and/or service of pleadings. The Agreement between the parties Plaintiffs and Defendants was entered into and signed on 24th December 2012 for USD 300,000 to pay interest at 5% per annum.

The Applicant will not suffer irreparable loss as the claim for outstanding amount shall be attached to the Garnishee National Land Commission and not all that is due to him from NLC. Either way proof of debt payment is key and/or reconciliation of Accounts.

Since the Applicant has an inherent right of appeal by virtue of **Order 42 Rule 6(2) of the Civil Procedure Rules** ought to furnish security for performance.

DISPOSITION

1. The Application for stay of execution pending appeal and extension of time to file an appeal for 30 days is only granted if the Applicant through Counsel shall deposit Ksh 1,000,000/- in an interest joint earning Account with the Respondents advocate within 60 days from delivery & receipt of Court Ruling.

DELIVERED SIGNED & DATED IN OPEN COURT ON 30th JULY 2021

M.W. MUIGAI

JUDGE