



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. CIVIL CASE NO. 23 OF 2021

**EMBU WATER & SANITATION LTD.....APPLICANT**

**VERSUS**

**STERA KAGENDO (suing as personal Representative of**

**REGAN KARITU alias KARIUKI KAGENDO alias EGHAN KARIUKI)....RESPONDENT**

**RULING**

1. Before this court is a notice of motion dated 22.04.2021 and despite the applicant seeking a myriad of orders, it is clear most of the prayers were sought at the interim and as thus, spent. The only remaining prayers and which are subject of this ruling are the prayers for leave to the applicant to file an appeal out of time against the decision of Hon. H. N. Nyakweba delivered on 23.02.2021 in Embu CMCC No. 230 of 2018, Stera Kagendo (Suing as personal representative of REGAN KARITU alias KARIUKI KAGENDO alias EGHAN KARIUKI) –vs- EMBU WATER AND SANITATION CO. LTD; an order for stay of execution of the decree issued in Embu CMCC No. 230 of 2018, Stera Kagendo (Suing as personal representative of **REGAN KARITU alias KARIUKI KAGENDO alias EGHAN KARIUKI**) –vs- **EMBUI WATER AND SANITATION CO. LTD** and stopping any further execution by M/S Mugambi Rutere T/A Giant Auctioneers or any other auctioneers appointed by the Respondent pending the hearing and final determination of the appeal; and costs of the application.

2. The application is premised on the grounds on its face and further supported by the affidavit sworn by Eng. Felix G.N Mutuura the applicant's managing director. In a nutshell, the applicant's case is that the trial court delivered a ruling in the above-mentioned suit, the same was not brought to the attention of the applicant so as to enable the applicant lodge an appeal in good time. As such, the time limited for filing an appeal lapsed and hence the need for leave to file the appeal out of time. Further that if stay is denied, the applicant stands to suffer substantial loss or damage as the auctioneers have proclaimed and attached applicant's tools of trade and execution will proceed and cripple the applicant's operations. Further that the intended appeal has overwhelming chances of success and it raises triable issues.

3. The application is opposed by way of a replying affidavit sworn on 17.05.2021 and wherein the respondent deposed that the applicant has all along been served with the proceedings before the trial court but failed to take any steps in that regard. Further, it was deposed that a case belongs to a litigant and not the advocate and that the applicant was not diligent in its matter. Further that the firm of Ireri & Co. Advocates is not properly on record as it has not obtained leave of the court to come on record yet there is judgment in the matter. The respondent deposed further that the appeal has no merit and the application has been brought after unreasonable delay which has not been explained and that the respondent is entitled to enjoy the fruits of the judgment she holds.

4. The applicant filed a further affidavit without the leave of this court and as such, the same cannot be considered. The applicant reiterated the contents of its application

5. The application was canvassed by way of written submissions. On the part of the applicant, it was submitted that this court is bestowed with discretion to extend time within which to appeal under Section 79G of the Civil Procedure Act and the test is always whether sufficient reasons have been shown. That in the instant case, the applicant was not able to file the appeal in time as it was not aware of the progress of the matter and only came to be aware of the same when auctioneers tried to proclaim its assets and which application was prosecuted ex-parte.

6. It was further submitted that the ruling was delivered in the absence of the applicant and it was not until 20.04.2021 that the applicant came to learn of the said ruling. Further that failure to grant the orders will prejudice the applicant whose assets are at the risk of being attached and that the appeal has high chances of success. It was also submitted that the applicant deserves the orders of stay of execution as it had met the requirements of Order 42 Rule 6 in that the appeal has high chances of success. Reliance was made on the case of **Butt –vs- Rent Restriction Tribunal (1979)**.

7. The respondent on her part submitted that the applicant does not deserve leave to appeal out of time as it had not been following

proceedings diligently when the matter was before the trial court and which shows lack of interest and unwillingness to pursue the suit when it was going on. Further that, the applicant has not satisfied the conditions for grant of stay of execution orders as provided under Order 42 rule 6 of the Civil Procedure Rules 2010 because the application was brought after undue delay and that the applicant did not prove that it will suffer substantial loss if the orders are not granted.

8. The respondent submitted that should the court be inclined to allow the application, then the applicant should be ordered to deposit full decretal sum as security. It was further submitted that the applicant's former advocates are still on record and the new advocates did not seek leave to come on record as the law provides. As such, the application has been brought in contravention of clear provisions of the law. Further that the intended appeal does not have high chances of success.

9. I have considered the application herein, the response by the respondent together with the rival submissions. The applicant primarily seeks two orders; leave to appeal out of time and stay of execution of the decree issued in Embu CMCC No. 230 of 2018. However, at the preliminary, I note that the respondent raised an issue as to the competence of the application herein on the basis of the applicant's advocate not being properly on record. The issue which then ought to be determined at the preliminary is whether the firm of Ireri & Company Advocates is properly on record for the applicant.

10. From the record, it is clear that the applicant herein filed the application dated 28.10.2020 through the firm of Ms. Metto & Company Advocates and the instant application was filed by the firm of Ms. Ireri & Company Advocates.

11. **Order 9 Rule 9 of the Civil Procedure Rules 2010** provides that; -

**“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”**

12. It follows that in this case since judgement had been delivered dismissing the applicant's suit, for the change of the applicant's advocates to have been effected leave of the court was required which could be obtained either on an application or by consent of the incoming and outgoing advocates.

13. However, in the instant case, the applicant in response to the same deposed that the said advocates are properly on record as the matter is indeed distinct and in a separate court of higher jurisdiction and thus no leave is required. The question which ought to be determined therefore is whether leave was required in the circumstances of the case. Justice G.V Odunga dealt with a similar situation in **Nginyanga Kavole –vs- Mailu Gideon [2019] eKLR** and he held as follows (which holding I find persuasive) that the phrase “having previously engaged an advocate” must refer to proceedings in which the judgement was entered. The Learned Judge proceeded to hold that;-

**“19. What is before me is a post judgement matter commenced by way of miscellaneous application. Under section 2 of the Civil Procedure Act, “suit” means all civil proceedings commenced in any manner prescribed and “prescribed” means prescribed by rules while “rules” means rules and forms made by the Rules Committee to regulate the procedure of courts. While I appreciate that miscellaneous applications are not expressly provided for in the Rules, that procedure has acquired a force of law in this country by way of practice. It is therefore an accepted mode of commencing civil proceedings. By virtue of that practice it is now deemed as a prescribed manner of commencing civil proceedings by the Rules Committee. Therefore, the matter before me is a suit. That being the position, an advocate does not require leave of the court to commence a suit. Leave is only required for continuation of a suit where judgement has been entered. I therefore find that the application before me is not incompetent.”**

14. In the instant case and being guided by the above authority and which I duly agree with, the applicant did not need leave to change an advocate. As such, the application before this court is competent.

15. Having decided on the competence of the application herein, it is my considered view that this court now has to consider the merits of the application. As I have already noted, the applicant seeks leave to appeal out of time and further for stay of execution of the decree. However, since the applicant seeks leave to appeal against the ruling of the lower court, it is my view that the said issue ought to be determined first since, if leave is denied, there will be no need of granting stay of execution.

16. Appeals from the subordinate court to the High Court, is provided for under **Section 79G of the Civil Procedure Act**. The said section provides that appeals must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section however allows for extension of time where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion and the applicant seeking enlargement of time must show that he has a good cause for doing so. In exercise of that discretion, the court is supposed to take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. (See **Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997** (unreported) and **Thuita Mwangi –vs- Kenya Airways Limited [2003] eKLR.**)

17. In **Muringa Company Ltd –vs- Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019**, the Court of Appeal further held that; -

**“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”**

18. In the instant case, I note that the ruling subject of the instant application was delivered on 23.02.2021. Essentially, the appeal ought to have been filed by 23.03.2021. The application herein was brought on 22.04.2021 and which is about one month from the lapse of the statutory period. In my view, a delay of one month cannot be said to be inordinately long or excessive.

19. As for the reasons for the delay, the applicant’s case is that the ruling delivered in the trial court was not brought to its attention in good time to lodge the appeal and it only came to learn about it when the respondent sent the auctioneers for proclamation of the applicant’s assets. The applicant submitted that mistakes by an advocate should not be revisited on an innocent client/litigant and in the same way, the applicant should not be condemned for the mistakes of its former advocates. The respondent opposed these averments and deposed that the applicant participated in the proceedings before the trial court but failed to file submissions in relation to the said application. In **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** the Court of Appeal held that; -

**“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”**

20. Odunga J observed in **Dilpack Kenya Limited –vs- William Muthama Kitonyi [2018] eKLR**, that where an appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

21. I have perused the trial court’s record and noted that the respondent herein filed the suit before the trial court and interlocutory judgment was subsequently entered. The respondent fixed the matter for formal proof hearing and which hearing proceeded ex-parte. The applicant filed an application to set aside the ex-parte judgment and stay of execution of the decree therefrom. The trial court gave directions that the application be canvassed by way of written submissions (amongst other directions). Both parties were represented on the said date. When the matter came up on 8.12.2020, the applicants herein were not present and another date was given. However, the trial court noted that both parties had not filed their submissions. The next date the matter came up in court was 2.02.2021 and the applicant was not present. The court gave a date for ruling.

22. It is settled law that a case belongs to a litigant and not his advocate and not every mistake committed by an advocate would be a ground for a court to exercise its discretion in favour of an applicant. It is the duty of the litigant to constantly check with her advocate the progress of her case. In **Bi- Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR** the court held inter alia that:

**“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.”**

23. Similarly, in **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR** the court stated thus:

**“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel”.**

24. The applicants never deposed as to the efforts it took to pursue its matter. I say so having noted the previous conduct by the applicants to the effect that despite being served with the summons to enter appearance, they never entered appearance within the prescribed period.

25. Further, despite the applicants having deposed that the application proceeded at the trial court ex-parte, the record indicates that the applicant was represented by an advocate when filing the application and even when directions were given as to how the same will be dispensed with. The application having been at the instant of the applicant, it was expected that it would be more diligent in prosecuting the same. However, the said diligence is missing.

26. I therefore find that the reasons for the delay are neither plausible nor satisfactory.

27. Considering the chances of the appeal succeeding, the applicant’s case is that the intended appeal has high chances of success. The applicant annexed to the application a draft memorandum of appeal and wherein it challenges the ruling by the trial court. I am alive to the principle that in determining whether the appeal has a likelihood of success, this court should not delve into the merits of the said appeal but should only consider the possibility thereof. However, and without considering the merits of the appeal, it is doubtful that the intended appeal will be successful. The application which was before the trial court was filed at the instance of the applicant herein. The respondent opposed the said application by way of a replying affidavit sworn on 9.11.2020. Despite the court having given directions that the application be canvassed by way of written submissions and which directions were given in presence of the counsel for both parties and by their consent, the applicant herein did not file its submissions and when the matter came up for mention, there was no one to explain the delay.

28. As such, the trial court had no evidence on record which it could have considered in deciding on whether to allow the application or not. Basically therefore, the respondent's averments in the replying affidavit stand uncontroverted. In **Joseph Kiprepeli Lotukei –vs- Stephen Toroitich Korkou [2021] eKLR**, the Learned Judge discussed the importance of submissions while canvassing applications and held as thus; -

**“10. It is an inescapable fact and indeed it is the correct position that paragraph 5 of the impugned ruling states that the applicant in that application, who is also the applicant herein never filed submissions. The question that arises is whether given the facts outlined before the orders of this court issued on 17/12/2020 can be reviewed on the ground that there is an error on the face of the record.**

**11. The respondent states that the submissions would not have had any impact on the decision the court made since the substance of the matter was contained in the supporting and other affidavits. However, as this court has stated before in many other cases previously brought before it, an applicant who has failed to file his submissions on an application as ordered by the court has been deemed as a person who has failed to prosecute his application and that application is liable to dismissal. Indeed, many an application have been dismissed on that account.....”**

29. As such, even if this court was to reconsider the application again on appeal, it is my considered view that the same will still fail as there are no submissions for consideration by this court. There is nothing to compare the respondent's averments (as per her replying affidavit and submissions) with. The application is not supported by any evidence. It is my considered view therefore that the chances of the appeal succeeding are dim.

30. Taking into account the above, it is my considered view that the applicant herein has not satisfied the legal requirements to warrant this court's exercise of the discretion in his favour and in doing so grant leave to the applicant to appeal out of time. The reasons for the delay were not plausible and satisfactory. Further the intended appeal has no possibility of success. As such, the prayer for leave to appeal out of time fails.

31. That being the case, it follows that the prayer for staying execution of the decree issued in Embu CMCC No. 230 of 2018 has no legs to stand on, having disallowed the prayer for leave to appeal out of time.

32. The application is hereby dismissed with costs to the respondent.

33. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 28<sup>TH</sup> DAY OF JULY, 2021**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent