



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC.APPLICATION NO. E198 OF 2021**

**MONWALK INVESTMENT LTD.....APPELLANT**

**VERSUS**

**PATRICK BAKARI KWEYU.....RESPONDENT**

**RULING**

The Applicant filed a Notice of Motion dated 29<sup>th</sup> March, 2021 seeking the following orders;

- 1. Spent**
- 2. THAT the honourable court be pleased to extend time for filing Appeal.**
- 3. THAT there be temporary stay of execution of the decree and judgment in Milimani CMCC No. 5045 of 2015; Patrick Bakari Kweyu vs Monwalk Investment Ltd pending interpartes hearing and determination of the instant application.**
- 4. THAT there be stay of execution of the decree and judgment in Milimani CMCC No. 5054 of 2015; Patrick Bakari Kweyu vs Monwalk Investment Ltd pending hearing and determination of the applicants intended appeal.**
- 5. THAT the costs of this application be in the cause.**

The application is premised on the grounds on the face of the application and the supporting affidavit of **FIDELLIS MUEKE NGULLI**, sworn on 29th March, 2021. The Respondent opposed the application through his Replying Affidavit sworn on 21st May, 2021. Parties agreed to have the application canvassed by way of written submissions and filed their submissions both dated 15th June, 2021.

The present application is premised on the grounds that the Applicant being aggrieved by the judgement of Hon. G.A. Mmasi (Mrs) SPM dated 11th December, 2020 in **Patrick Bakari Kweyu vs Monwalk Investments Ltd** now wish to prefer an Appeal against the whole judgment. However, since the judgment was delivered in the absence of its representative, the Applicant seeks leave to file the appeal out of time pursuant to Section 79G of the Civil Procedure Act. It is the Applicant's contention that unless stay is granted, the Respondent will initiate execution proceedings and it will suffer substantial loss and irreparable damage especially since the Respondent is a man of straw. The Applicant aver that it is willing to abide by the court's direction on security for due performance and that the Respondent shall not suffer any prejudice if the application is allowed.

The Respondent on their part depones that the Applicant has failed to give sufficient reason for the delay in filing the appeal and the present application. It is the Respondent's case that the judgment date was given in court in the presence of both parties and was delivered on 11th December 2020. That the Applicant through its advocate, did not move the court even after receiving his letter on 23rd February 2021 demanding payment of the decretal amount. The Respondent further contends that the intended appeal has very little chance of success as the lower court judgement preceded the Supreme Court Judgment.

The Respondent has sought to rely on the ruling of Seron J. in **Isaac Gakua Mwangi v Chief Executive Officer Women Enterprise Fund [2018] eKLR** and the case of **Brenda Karanja v Mweki Dominic [2021] eKLR** where D.K. Kemei J. while dismissing an appeal agreed with the lower court ruling rejecting the appellant's application for extension of summons to enter appearance on the ground that the Appellant and her counsel slept on their rights and that equity aids the vigilant and not the indolent.

### **Analysis/Determination;**

The only issue for determination is whether the Applicant has satisfied the conditions precedent for grant of an order of extension of time to file an appeal and an order of stay of execution pending appeal. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:-

**“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.”**

Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were established by the Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR**. They include the following:-

**i) The period of delay;**

**ii) The reason for the delay;**

**iii)The arguability of the appeal;**

**iv)The degree of prejudice which could be suffered by the if Respondent the extension is granted;**

**v)The importance of compliance with time limits to the particular litigation or issue; and**

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

The judgment was delivered on 11th December, 2020 while the present application dated 29th March, 2021 was filed on 15th April, 2021. The Applicant has submitted that the delay was occasioned by an advertence or otherwise excusable mistake; this has not been elaborated or explained. There is no proof that the Applicant took any step to follow up on the judgement or the proceedings of the lower court thereof even after being served with the Respondent's demand letter dated 22nd February, 2021. Therefore, in the absence of any proof of diligence on the part of either the Applicant or its Counsel, I am unable to find that a plausible explanation has been given for the delay of about four (4)months. I am guided by the Court of Appeal holding in **Alfred Iduvagwa Savatia vs. Nandi Tea Estate & Another [2018] eKLR**, that:

**“15. 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 exercised. Aganyanya, JA in Monica Malel & Another V. R, Eldoret Civil Application No. Nai 246 of 2008 stated;-**

**“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show ..... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”**

On whether the intended appeal has chances of success is not for this court to decide at this stage. The Applicant is required to demonstrate the arguability of the appeal; a demonstration that the Intended Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. From the draft memorandum and the pleadings before court, the Applicant only challenges the jurisdiction of the magistrate’s court to hear and determine the suit, i find that the intended appellant has misinterpreted the Supreme Court’s decision of 3rd December, 2019 in **Law Society of Kenya v Attorney General & another [2019] eKLR** which allowed proceedings that had already been initiated at the Magistrate’s Court to proceed.

Further, interest of justice also requires that a successful litigant be allowed to enjoy the fruits of his litigation. The same thought was expressed in **Portreizt Maternity vs. James Karanga Kabia, Civil Appeal No. 63 of 1997** thus:-

**“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”**

The second limb of the application invokes the discretionary powers of the court which must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 that empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows:-

**“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.”**

The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

**“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.”**

The appeal is based on the ground that the trial court did not have jurisdiction to determine an industrial accident claim. The applicant is not contesting the sum of Kshs. 220,000 as general damages. There is only one ground of appeal which is:-

**“THAT the learned Magistrate erred in Law and fact by failing to appreciate the decision made in, proceeding to hear, determine and render judgment in CMCC No.5045 of 2015 at Milimani which is a (WIBA) matter and whose jurisdiction had been ousted by the Supreme Court decision in petition No.4 OF 2019 LSK VS Attorney General & Others and which decision upheld the ruling in Civil Appeal No.133 of 2011 which had ruled that magistrates courts did not have jurisdiction to handle cases arising from the WIBA act 2007.”**

The applicant did not tender any evidence before the trial court. The respondent was employed by the applicant and the claim is based on an industrial accident. The application was filed three months later after signs of execution were forthcoming.

Having already found that there has been inordinate delay in filing the application and no evidence on the substantial loss and irreparable damage to warrant the exercise of my discretion in favour of the applicant, I accordingly find that this application has no merit.

In the end, the Notice of Motion dated 29<sup>th</sup> March, 2021 is hereby dismissed. Parties to meet their own costs.

**DATED AND SIGNED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JULY, 2021.**

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**S. CHITEMBWE**

**JUDGE**