REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

MISC. APPLICATION E 084 OF 2021

2NK SAVINGS & CREDIT CO-OPERATIVE

SOCIETY LIMITED.....1st APPLICANT

BENSON WAMBUGU.....2ND APPLICANT

-VERSUS-

KAVINYA MULI.....PLAINTIFF/RESPONDENT

RULING

1. This is an application by the Applicants dated 10/5/2021 seeking principally two main prayers; firstly; leave to file an appeal out of time from a judgement and decree entered against them and delivered on 24.03.2021 in **Machakos CMCC No. 810 of 2016** and that an order of stay of execution of the judgement and decree be granted pending the hearing and determination of the intended appeal.

2. The Application is supported by an affidavit by George Mongeri, an advocate for the applicants. He deponed that the delay was due the fact that there was a delay by the Applicants in issuing their feedback and opinions to their Advocates on record regarding the need to lodge an appeal. He further averred that the applicants are aggrieved by the judgement of the trial court and have already prepared a draft of a Memorandum of Appeal exhibiting their grounds of dissatisfaction with the learned trial magistrate's judgement which is annexed to the affidavit. It was also averred that execution is imminent as shown by the annexed copy of letter from the Respondent's counsel threatening execution. It was averred that the Applicants are willing to provide security for the performance of the decree pending determination of the appeal by furnishing a bank guarantee of Kshs. 30,000,000/- a copy of which was annexed to the affidavit. It was also averred that the intended appeal raises pertinent points of law and fact and has overwhelming chances of success. Finally, it was averred that the delay is highly regretted and that the applicants should not be penalized but be given a chance to ventilate their appeal.

3. The Application is opposed. The Respondent filed a replying affidavit sworn on 21/5/2021 wherein it was averred inter alia; that the application is unfounded and intended to frustrate the fruits of his judgement; that the applicants have not demonstrated the loss they stand to suffer if execution orders are not stayed; that no reasons for delay to lodge appeal have been given; that should the court be inclined to grant the prayer for stay then 2/3 of the decretal sums should be paid to the respondent while the balance be deposited in a joint interest account in names of both advocates.

4. The application was canvassed by way of written submissions. The applicants' submissions are dated 16/7/2021 while those of the respondents are dated 24/6/2021.

5. The Applicants counsel placed reliance on section 79G as read with section 80 of the Civil Procedure Act as well as Order 42 Rule 6 of the Civil Procedure Rules and submitted that the mistakes on the part of the insured (client) ought not to impede access to justice. Learned counsel pointed out that the Respondent would have an opportunity to be heard on appeal. On the issue of stay of execution, counsel submitted that the applicants have provided sufficient reason to warrant grant of the order sought and in rejoinder reiterated a willingness to offer security as the courts may direct.

6. The respondent in opposing the application through learned counsel Mr. Musili Mbiti submitted that the Applicants had not explained the delay and no evidence had been tendered before this court to substantiate the allegations and has not demonstrated that they fit within the conditions set under Order 42 Rule 6 of the Civil Procedure Rules. It was also submitted that the deponent of the replying affidavit has been instructed by a stranger since the purported insurer is not a party to the proceedings and that the instructions ought to have emanated from the applicants themselves. It was also submitted that the court should do a balancing act by directing the applicants to pay 2/3 of the sums to the respondent while the balance be deposited in a fixed joint interest account in the names of both advocates. Counsel urged that the application dated 13.05.2021 be dismissed.

7. The issue for determination is whether the Applicants are entitled to an extension of time to lodge appeal and orders for stay of execution.

8. Section **79G** of the **Civil Procedure Act** is the law applicable in deciding 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.''***

9. It follows therefore that the court can allow appeal to be filed out of time if a party shows sufficient cause despite the 30 days' limit to file appeals. Indeed, the court in **Patrick Kiruja Kithinji Vs. Victor Mugira Marete [2015] EKLR** held that: -

> ***"In our view whether or not an appeal is filed on time goes to the jurisdiction of this court. It is trite that this court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the court. To hold otherwise would upset the established clear principles of institution of an appeal in this court. Consequently, we find that an appeal filed out of time is not curable under Article 159."***

10. The use of the word 'may' connotes discretionary power of the court. What is 'good and sufficient cause' is as was held in **Feroz Begum Qureshi and Another Vs. Maganbhai Patel and Others [1964] EA 633,** there is no difference between the words "sufficient cause" and "good cause". In **Daphne Parry Vs. Murray Alexander Carson [1963] EA 546** that: -

> ***"…though the provision for extension of time requiring 'sufficient reason' should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had 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."***

The Supreme Court of India in **Civil Appeal 1467 Of 2011 Parimal Vs Veena Bharti (2011)** observed that:

> ***"Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently …"***

11. The power to enlarge time by the court being discretionary, the courts have suggested guiding principles on what will be considered as good and sufficient cause for purposes of permitting a party who is aggrieved by a lower court's judgment or ruling to file an appeal out of time. The Court of Appeal in **Mwangi V Kenya Airways Ltd [2003] KLR** listed them as follows: -

> ***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 Respondent is 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.***

12. Again under the provisions of **Order 50, Rule 6** of the Civil Procedure Rules upon which the applicants' application is premised, the courts have power to enlarge the time required for the performance of any acts stipulated in the Rules notwithstanding the fact that such time has expired. ***Njuguna J.*** in **Equity Bank Limited V Richard Kerochi Ayiera [2020] EKLR** at paragraph 16 stated that the discretionary power of the courts was reaffirmed by the Court of Appeal in the case of ***Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi [1999] 2E A 231***, where the court held that:

> **"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are <u>first the length of the delay</u>, <u>secondly, the reason for the delay</u>, <u>thirdly (possibly) the chances of the appeal succeeding if the application is granted</u> and <u>fourthly, the degree of prejudice to the respondent if the application is granted."</u>**

13. I shall now proceed to consider the applicants' application for extension of time against the above principles. On the first principle, the applicants filed the application before court on **13/05/2021** which was **one month and 13 days** after the judgement had been delivered on **24/03/2021**. I agree with the decision of **Asike-Makhandia JA** in **Gerald Kithu Muchanje Vs Catherine Muthoni Ngare & Another [2020] EKLR** where the learned Judge stated that: -

"*There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In* ***Andrew Kiplagat Chemaringo V Paul Kipkorir Kibet [2018] EKLR*** *this Court stated:*

"*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."*

14. I am also in agreement with the decision in **Amal Hauliers Ltd Vs Abdulnasir Abukar Hassan [2017] EKLR** submitted by the Applicant where ***Korir J.*** held that two months is not an inordinate delay hence I find the one-month delay to file the instant application is not inordinate.

15. On the second principle, the applicant's counsel avers that the intended appeal has overwhelming chances of success. The draft Memorandum of Appeal is against quantum. The Respondent on the other hand maintains that the appeal does not raise weighty issues against the trial court judgement. **Nambuye J.** in **Vishva Stone Suppliers Company Limited V RSR STONE [2006] Limited [2020] eKLR** stated that the principles to be distilled from the case of **Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi [1999] 2E A 23, Fakir Mohammed V Joseph Mugambi & 2 Others [2005] EKLR** and others may be enumerated inter alia as follows: -

"(x) ***An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court"***

The learned Judge held that:

"In my view, that in itself is arguable notwithstanding that it may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court. In my view, the issue of whether the applicant's claim was meritorious or otherwise is arguable notwithstanding that it may not succeed."

16. In **Divya J. Patel V Guardian Bank Limited[2020] eKLR, Mohammed JA** held that an arguable appeal is not one that must succeed but one which is not frivolous and merits consideration by the court. In my view the grounds of appeal raise arguable triable issues that warrant the appeal being entertained by the court.

17. The Respondent has submitted that she is being curtailed from enjoying the fruits of the judgement. The Applicants on the other hand maintain that they will suffer prejudice and irreparable loss if the decretal sum is paid to the Respondent who is unable to pay when the appeal is successful.

18. From the foregoing, the reasons given by the applicants are in my view reasonable and plausible to warrant extension of time to file the appeal. Accordingly, I grant leave to the applicants to file the appeal out of time.

19. As regards the issue of stay of execution, it has been submitted by Gachoka Kimondo on behalf of the applicants that the applicants will suffer substantial loss as there is a likelihood that it will not recover the decretal amount from the respondent whose means are unknown as no documentary evidence has been attached to prove her financial standing. To rebut the applicants' assertion, the Respondent avers that her financial incapability alluded by the Applicants has no justification since the applicants have not placed any evidence to prove substantial loss.

20. Applicants application is premised on **Order 42 Rules 6** of the Civil Procedure Rules, 2010 which stipulates as follows: -

"No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the Court Appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the Appeal is preferred may apply to the appellate Court to have such order set aside.

(2) ***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.''

21. On the first condition, In **Bungoma High Court Misc Application No 42 Of 2011 - James Wangalwa & Another Vs. Agnes Naliaka Cheseto** it was stated that: -

"***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.''***

22. The above decisions place the burden of proof on the applicants to show that they will suffer substantial loss. However, the evidential burden shifted to the respondent once the Applicants raised their reasonable fears of the respondent's inability to recover the decretal sum paid from the Respondent if the appeal is successful. In **National Industrial Credit Bank Ltd V Aquinas Francis Wasike & Another [2006] eKLR** Court of Appeal held thus:

> ***"Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge…"***

23. I note in that the Respondent in her replying affidavit has not provided any evidence on her source of income despite the applicants claiming that they are apprehensive of the respondents inability to pay back if the appeal is successful. In **Stanley Karanja Wainaina & Another Vs Ridon Anyangu Mutubwa [2016] eKLR** where **Njuguna J**. relied on the Court of Appeal decision in **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited Vs Aquinas Francis Wasike & Another (UR)** where the court dealt with the shifting of evidential burden to the Respondent. The court stated: -

> ***"…it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge." In my view, the Respondent was unable to discharge his burden."***

24. On the other hand, noting that it is the insurance that will satisfy the decretal sum by dint of the law of subrogation, it was incumbent upon the applicants to show what business loss the insurer will suffer or whether by paying the decretal sum of Kshs. 186, 228/- plus costs and interest of the suit, the insurer's business operation will be affected negatively. The applicants failed this test as they only averred that the applicants are apprehensive as they will not recover the decretal sum if paid to the Respondent in the event the appeal succeeds.

25. On the second condition, the delay of **one month and 13 days** in my view is not unreasonable as analyzed hereinabove. On the third condition, Gachoka Kimondo on behalf of the applicants avers that the applicants are willing to furnish a reasonable security by furnishing the court with a Bank guarantee depositing the whole decretal amount in court or a joint interest earning account. The Respondent through it's counsel averred that should the court be inclined to find merit in the application then the applicants be ordered to pay him 2/3 of the decretal sum and the other 1/3 be placed in a joint interest earning account in the name of the firms of advocates herein.

26. In **Focin Motorcycle Co. Limited Vs. Ann Wambui Wangui & Another [2018] eKLR**, it was held that: -

> "*Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground for stay."*

27. The applicants have stated that they are ready and willing to abide by conditions to be imposed by the court. Indeed, security is a pre-requisite for a grant of stay of execution of a judgement or decree. The applicants Memorandum of Appeal is mainly on the issue of quantum of damages but not on liability. If that is the case, then I find that the respondent is not likely to leave the court empty handed at the determination of the Appeal. The Respondents have sought for the release of **Kshs. 177,062.67/=** while the balance is to be deposited into an interest earning account in the joint names of both advocates. The applicants did not file a further affidavit in response to the said suggestion. However, that notwithstanding, I find the amount suggested by the Respondent's counsel to be on the higher side since the appeal is yet to be heard and determined. Further it can go either way in that the quantum might be reduced somewhat and hence a reasonable figure ought to be given. I find a sum of **Kshs. 100,000/=** would be adequate as security and which is to be deposited with the Respondent while the balance be deposited into a joint interest earning account in the names of both Advocates or alternatively a bank guarantee thereof be furnished pending the determination of the appeal. That arrangement takes care of the concerns of the parties.

28. In the result, I find the Applicant's application dated **13/05/2021** has merit. The same is allowed in the following terms: -

> ***i. The Applicants are granted leave to lodge appeal out of time and to file Memorandum of Appeal within Fourteen (14) days from the date hereof.***
>
> ***ii. An order of stay of execution of judgement and decree in <u>Machakos CMCC No. 810 of 2016</u> is hereby granted upon the applicants depositing the sum of <u>Kshs. 100, 000/=</u> with the Respondent while the rest of the decretal sums be deposited in a joint interest earning account in the names of both Advocates for the parties or alternatively a bank guarantee be furnished within the next Fourty five (45) days from the date of this ruling failing which the stay shall lapse.***
>
> ***iii. The costs of the application shall abide in the appeal.***

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 27TH DAY OF SEPTEMBER, 2021.

D. K. KEMEI

JUDGE