REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

IN THE MISC CIVIL APPL. NO.14 OF 2020

DAVIDSON MUTWIRI RINGERA..APPLICANT

VERSUS

EUNICE MAKENA.. RESPONDENT

RULING

1. The court is called upon to determine a Notice of Motion under certificate of urgency dated 12th February 2020 by the applicant, brought under Article 159(2) (d) of the Constitution, Order 51 Rule 1, Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 79G of the Civil Procedure Act, and all other enabling provisions of the law. In it the applicant seeks substantively that he be granted leave to appeal out of time with stay of execution pending the determination of that appeal.

2. The grounds upon which the application is premised as far as delay is concerned was that the trial court delayed in supplying the applicant with the certified copy of the judgement coupled with the fact that the applicant was unable to instruct counsel because the court was on vacation. On arguability of the appeal. it is averred that the appeal raises arguable grounds with chances of success, and therefore the applicant will suffer irreparably if the orders sought are denied. On diligence and promptitude it is asserted that the application was brought without unreasonable delay and that respondent will not be prejudiced if the orders sought are granted. The applicant contends that the execution of the lower court decree will subvert the ends of justice and render the appeal nugatory.

3. The respondent, Eunice Makena, opposed the application by her replying affidavit sworn on 21/7/2020 where she avers that application having been filed by advocates who are not improperly on record, is bad in law, irregular, incurably defective, incompetent and as such, it is destined for dismissal. The respondent sees no basis upon which the intended appeal can succeed because, the applicant neither attended court to prosecute his defence nor tendered any evidence in support thereof. She views the intended appeal as an abuse of the court process, and urged the court to dismiss it with the contempt it deserves.

4. In response to the Replying Affidavit, and with the leave of the court, he applicant filed a supplementary affidavit on 17/5/2021 reiterating his averments in the application and adding that the draft memorandum of appeal raises triable issues and that there is no design to delay the course of justice. An assertion was made that the delay was not inordinate when regard is given to the period in December and January in each year when time stops running. There was then the assertion that the accident leading to the claim and the judgment ruined his finances and that if stay is allowed to proceed the appeal would be rendered nugatory. On the fault that the advocate who filed the application is not properly on record, the applicant averred that there has been filed a notice of change of advocate with the consent of the advocate who acted at the trial and urged the court not to feel compelled to strictly apply the rules of procedure to the detriment of substantive justice.

5. The parties agreed to canvass the application by way of written submissions which were respectively filed on 19/5/2021 and 7/7/2021. In the submissions, applicant posits that errors and lapses in litigation should not debar a litigant from the pursuit of his rights, by ousting him from the judgement seat. He contended that his current advocates filed a consent from the previous advocates, therefore they are properly on record. He relied on **Edward Kamau & anor v Hannah Mukui Gichuki & anor (2015) eKLR, Francis Likhabila v Barclays Bank of Kenya (2020) eKLR, RWW v EKW (2019) eKLR, Retreat Villas Ltd v Equatorial Bank Ltd & 2 others (2007) eKLR, Abdirmahman Mohamed Abdi v Safi Petroleum Product Ltd & 6 others (2011) eKLR and Kamlesh Mansukhla Damji Pattni v Nasir Ibrahim Ali &2 others (2005) eKLR** to buttress his submissions on when extension of time and stay may be granted and the principles appurtenant.

6. The respondent submitted that the notice of change of advocates and the consent filed by counsel for the applicant are afterthoughts as they were irregularly filed way after the application had been filed. It is averred that the applicant has not met the conditions laid down by law for grant of the orders sought. She relied on **Stephen Mwangi Kimote v Murata Sacco Society (2018) eKLR, Dishon Ochieng v SDA Church, Kodiaga (2012)eKLR, Florence Hare Mkaha v Pwani Tawakal Mini Coach & anor (2014) eKLR, National Land Commission v Johnson Okiro Misiga (2020) eKLR, Growth Africa (K) Limited v Charles Muange Milu (2018) eKLR, Naiposha Litiluu v Robert Kamau Gikonyo(2020)eKLR, Kenya National Highways Authority v Ahmednasir Maalim Abdullahi (2020) eKLR, Charles Ondiek Awour & anor v Jacob Odhiambo Otieno (2021) eKLR and John Mwangi Ndiritu v Joseph Ndiritu Wamathai**

(2016)eKLR to support her position that orders of enlargement of time to appeal out of time and stay should not be granted.

7. The principles for consideration on an application for extension of time to appeal out of time are established to be that, the power is discretionary, and unfettered but the applicant must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay must be plausible, the appeal must be shown to be arguable and not flippant or frivolous and that the respondent will not be unduly prejudiced by the order being made. See ***Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others (2014) eKLR.***

8. Before I delve into the merits, there is the question of notice of change of advocate which I consider to have been given quite undue prominence in this matter. Parties appear to have wholly misapprehended the provisions, history and intendment of Order 9 Rule 9 of the Civil Procedure Act. This is a matter instituted by the Notice of motion dated 12.2.2020 and yet to be determined. It thus takes an absurd stretch of interpretation to apply Order 9 Rule 9 to it because it requires no legal mind to know that there is no judgment here. It was also a superfluous act to purport to file a notice of change and a consent to ground such change. That was wholly unnecessary expense on the applicant and I take the view that if there was to be a dispute as to the propriety of such expense the client here ought not to meet such costs. I find that a new file, be it an appeal, an application for extension of time or indeed one for execution, filed in a new file, requires no appointment or change just like in filling a plaint for a declaratory order based on a previous judgment an advocates needs not file any notice of appointment.

9. On the merits, I have given due regard to the length of delay and the explanation afforded for it while noting that the decision sought to be challenged was delivered on 23/12/2019 while the application now before court was filed on 12/2/2020. On the strength of Order 50 Rule 4, the computation of time could only start on the 14th January 2020. By the time the copy judgment was availed to the parties, only 29 days had passed yet the law gives to the litigants 30 days to lodge an appeal. I am therefore convinced that there was never any delay to merit invoking the power of the court to extend time. The application was that propelled more by an improper appreciation of the law. All we have done is thus to employ judicial time in a very disproportionate and inefficient manner. Such is the kind of practice that must be avoided by the counsel and discouraged by the court. Indeed, even if there had been a delay occasioned by the need for a copy the judgment, which I take the view is always not the case, the law allows counsel to obtain a certificate of delay from the court whose decision is to be appealed against rather than seeking from the appellate court extension of time. Most of the application I have handled in this registry take that erroneous and otherwise time wasting approach. I reiterate if this would serve the purpose of justice that where a litigant is unable to file his appeal only for the reason that the trial court was unable to avail to him the proceedings and judgment in time, his remedy lies in asking for a certificate of delay rather than an application for extension of time.

10. On the arguability of the appeal, I have looked at the judgement of the trial court and noted that the applicant did not adduce any evidence in support of his case. I have also looked at the annexed memorandum of appeal and I am unable to discern accurately what arguable points emerge on the intended appeal. However, having found that counsel misapprehended the law and took his client on a journey that is rather a frolic, I find it unjust to drive away the applicant from his right to pursue an appeal. I am minded to extend time for a period of 7 days from today within which the appeal must be filed and the memorandum served.

11. The next issue for consideration is whether the prayer for stay of execution pending appeal should issue. That prayer also invokes the discretionary powers of the court, which of course must be exercised judiciously. Order 42 Rule 6 of the Civil Procedure Rules, 2010, sets the thresholds and empowers a court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The prerequisite conditions to be met before stay is granted are that; the application be made promptly, the applicant satisfies the court that it stands to suffer substantial loss unless stay is granted and that security for the due performance of the decree as may be binding upon the applicant at the conclusion of the matter is provided.

12. Courts have innumerable times held that the commencement of the process of execution, does not in itself amount to substantial loss. That is so because execution is a legal process. The applicant has to establish other factors which show that the execution will create a state of affairs that will irreparably negate the very essential core of the applicant as a successful appellant. That is what substantial loss would entail. See ***James Wangalwa & anor v Agnes Naliaka Cheseto (2012) eKLR.***

13. In the matter before me very scanty information was provided by both parties to guide the court on the question of substantial loss. With such dearth of material, I chose to balance the competing interests of the two parties now that I have extended time to appeal. I do grant stay but on terms that the applicant shall, within 30 days from today, pay to the respondent one half of the decretal sum and to deposit the other half into an escrow count in the names of the advocates for the parties.

14. These orders are conditional upon the appeal being filed as ordered and the payment and deposit being effected timeously. If there shall be failure to comply with any one of conditions imposed, the orders and reprieves granted shall stand lapsed and discharged.

15. On costs, having found that the application could have been avoided, I direct that the applicant’s counsel, personally, pays the costs of the application to the respondent.

It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY VIA MICRO SOFT TEAMS THIS 27TH SEPTEMBER, 2021

PATRICK J.O OTIENO

JUDGE

In presence

Mr. Karuti for applicant

Miss Mbogo for respondent

PATRICK J.O OTIENO

JUDGE