



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APPLICATION NO. E267 OF 2021

MARTHA WANGARI NG'ANG'A.....1ST APPLICANT

TSUSHO CAPITAL KENYA LTD.....2ND APPLICANT

-VERSUS-

JEREMIAH OCHIENG NINGA.....RESPONDENT

RULING

1. The motion dated 31st May, 2021 by **Martha Wangari Ng'ang'a** and **Tshusho Capital Kenya Ltd** (the Applicants) seeks *inter alia* leave to the Applicants to file appeal out of time against the ruling delivered on the 29th January, 2021 and stay execution of the ruling pending hearing of the intended appeal; and that the annexed memorandum of appeal be admitted and deemed as to filed within time. The motion is expressed to be brought under section 100 of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules *inter alia*. On grounds, among others, that being dissatisfied with the ruling of the lower court delivered on 29th January, 2021 desired to appeal but the time stipulated for appeal has lapsed. That the Respondent has evinced an intention to execute the decree in the lower court.

2. The motion is supported by an affidavit sworn by **Martha Ng'ang'a**. To the effect that being aggrieved by the decision delivered on 29th January, 2021 the Applicants have preferred an appeal but the time within which to file the said appeal has lapsed; that the intended appeal has a high chances of success; that the Applicants are apprehensive that the Respondent may levy execution at any time for the decretal sum which is substantial and may not be recovered if the appeal were to succeed; that the Applicants will suffer substantial loss in that event and their appeal rendered nugatory. The deponent asserts that the delay on the Applicants' part is not so inordinate as to be inexcusable and further expresses willingness to furnish such reasonable security for the eventual performance of the decree.

3. The motion was opposed by way of a replying affidavit dated 21st June, 2021 sworn by Jeremiah Ochieng Ninga (the Respondent). The Respondent views the motion as representing abuse of the court process and a dilatory tactic aimed at denying him the fruits of successful litigation. He points out that the ruling of the lower court was delivered five (5) months prior to the filing of the instant motion and the delay is inordinate, in the absence of an explanation by the Applicants. He asserts that he has means and can refund the decretal sum should the intended appeal resolve in the Applicants' favour. He also raises argumentative matters which have no place in an affidavit.

4. The motion was argued by way of written submissions. It was the Applicants' submission based on the principles espoused in **Edith Gichugu Koine v Stephen Njagi Thoithi [2014] eKLR** that delay in filing the present motion was not occasioned by any mistake on the part of the Applicants but that it was due to circumstances beyond their control. Calling to his aid the decisions in **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another [2018] eKLR** and **Selestical Limited v Global Rock Development [2015] eKLR** counsel submitted that the Respondent has not shown that he will suffer prejudice if the motion is allowed and that if execution proceeds the Respondent is unlikely to have the capacity to refund of the decretal sum. Citing the case of **Athuman Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 Others, CA No. 14 of 2013** counsel submitted that the appeal has a high chance of success and that the Applicants are willing to furnish security as the court may direct.

5. Counsel for the Respondent citing the provisions of Section 79G of the Civil Procedure Act and the decision in **Dilpack Kenya Ltd v William Muthama Kitonyi (Civil Appeal No. 142 of 2013) eKLR**, reiterated that it took the Applicants more than (90) ninety days to file the present motion and that even so, no reason has been offered by way of explanation. Concerning the prayer for stay of execution, he underscored the conditions in Order 42 Rule 6 of the Civil Procedure Rules and cited the decision in **In Re Estate of Michael Kiarri Njoroge (deceased) [2019] eKLR**. On the question of substantial loss, counsel while placing reliance on the cases of **In the matter of Andrew Okoko v Johnis Waweru Ngatia & Another [2008] eKLR** and **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR** submitted that it is core to the application before the court but has not been sufficiently demonstrated in this case. It was submitted that the Respondent has established that he can refund the decretal sum in the event of a successful appeal.

6. The Court has considered the rival affidavit material and submissions made in respect of the motion. It is evident on a plain reading of Order 42 Rule 6(1) of the CPR that an order to stay execution pending appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the Civil Procedure Rules. Although the provision does not expressly say so, this can be inferred from the rule. Further, an analogy can be drawn from Order 42 Rule 6 (4) of the Civil Procedure Rules which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given. Equally, Order 42 Rule 6 (6) of the Civil Procedure Rules states:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.” (emphasis added).

7. It would seem the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the Civil Procedure Rules). Until the memorandum of appeal is filed, the court may be acting in *vacuo* by considering the Applicants' prayer for stay of execution pending a non-existent appeal. The Court of Appeal in **Abubaker Mohamed Al-Amin v Firdaus Siwa Somo [2018] eKLR** while citing with approval the decision of the High Court in **Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased)) [2017] eKLR** concurred and adopted the foregoing reasoning.

8. Earlier, the Court of Appeal in the case of **Equity Bank -Vs- Westlink MBO Limited [2013] eKLR** while commenting on Rule 5 (2) (b) of the Court of Appeal Rules, whose wording is substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules, and on Order 42 Rule 6 (6) of Civil Procedure Rules, the Court of Appeal left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also **Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR**). Order 42 Rule 1;

“(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

9. There is no provision for the filing of a notice of intended appeal in the High Court from a decision of the subordinate court. Order 42 Rule 1 of the CPR provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, an appeal is yet to be filed and there is therefore no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter. If the Applicants desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application.

10. The prayer for admission of the of the annexed memorandum of appeal in this miscellaneous cause is misplaced. Even if such prayer were allowed, it would require the Applicants to file the appeal in a separate appeal file and then seek stay pending appeal by a subsequent application. In my considered view, the words that “*an appeal may be admitted out of time*” in Section 79G, appears to admit both retrospective and prospective applications. So that leave under the section may be sought before or after a memorandum of appeal is filed. However, it may be more prudent for a party who also seeks stay of execution in the same motion for leave to have filed the memorandum of appeal in advance

11. In the circumstances, the prayer seeking stay execution of the ruling delivered on the 29th January, 2021 pending the hearing and determination of the intended appeal has no anchor and is disallowed.

12. Turning now to the prayer seeking leave to appeal out of time, the power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the Civil Procedure Act. The Applicants' motion does not invoke any of these provisions. Neither does the deponent to the supporting affidavit attempt to explain the delay in filing the appeal at all. She merely asserted that the delay is not so inordinate as to be inexcusable. The Respondent has taken issue with this failure.

13. Section 79G of the Civil Procedure Act provides that:

“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.”

14. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “*good and sufficient cause*” for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“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 general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the

application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

15. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of **Telkom Kenya Limited V. John Ochanda And 996 Others [2015] eKLR** that:

“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court’s discretion in curing the pleadings before it. This Court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place....

It is this Court’s position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not irrelevant but are the handmaidens of justice that facilitate the right of access to justice in the terms of Article 48 of the Constitution....”

See also **Patrick Wanyonyi Khaemba V Teachers Service Commission & 2 Others [2019] eKLR**.

16. The Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

- 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
- 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**
- 7.”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR**.

17. The Applicants in this case did not give any reason for the delay of about four months but merely assert that the delay is not so inordinate as to be inexcusable. A party seeking leave to appeal out of time should not presume on the Court’s discretion, regardless of the period of delay. The period of delay and explanation therefor are twin considerations in an application of this nature. In the absence of an explanation, the Court would find it difficult to exercise its discretion in such an applicant’s favour. In this instance, the delay of four months is unexplained. Both parties had participated in the motion leading to the ruling sought to be appealed, and more, the Applicants’ advocates had subsequent to the ruling received communication from the Respondent’s advocate in regard to payment, resting with the letter dated 26th May 2021 (a copy of which is exhibited as annexure “**MW3**” to the supporting affidavit) threatening execution. It seems therefore that after the ruling, the Applicants simply went into slumber until prompted to action by the latter correspondence. The Respondent has diligently followed up on the matter. Further delay will be prejudicial to him in the circumstances of this case.

18. In the result, the court agrees with the Respondent that the Applicants have not demonstrated “*good and sufficient cause*” for not filing the appeal in time even though the period of delay in this case may appear short. The upshot is that the court is unable to exercise its discretion in the Applicants’ favour. The motion dated 31st May 2021 fails in its entirety and is dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 21ST DAY OF OCTOBER 2021.

C.MEOLI

JUDGE

In the presence of:

Ms. Waikwa h/b for Ms. Sagini for the Applicants

Ms. Okeyo h/b for Mr Rakoro for the Respondent

C/A: Carol