



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APPLICATION NO. E097 OF 2021

PETER WILLIAM KINYANJUI.....1ST APPLICANT

SOLOMON MWANGI NJOROGE.....2ND APPLICANT

-VERSUS-

PAULINE NJERI WANJIKU.....RESPONDENT

RULING

1. For determination is the motion dated 5th March 2021 by **Peter Kinyanjui** and **Solomon Njoroge** (hereafter the Applicants). Seeking *inter alia* for the court to enlarge time and grant leave to the Applicants to lodge a memorandum of appeal out of time in respect of the judgment delivered in favour of **Pauline Njeri Wanjiku** (hereafter the Respondent) in **Milimani Civil Suit 5757 of 2019** on 15th January 2021 and that the court be pleased to stay execution of the said judgment pending the hearing and determination of the intended appeal. The motion is expressed to be brought pursuant to the provisions of section 79G & 95 of the Civil Procedure Act and Order 42 Rule 6 and Order 50 Rule 6 of the Civil Procedure Rules, among others. On grounds, *inter alia*, that being dissatisfied with the decision delivered on 15th January, 2021 the Applicants desire to appeal but the prescribed period has lapsed and that the Respondent could levy execution against the Applicants at any time.

2. The motion is supported by an affidavit sworn by **Purity Waikwa**, counsel for the Applicants and having the authority to depose the affidavit pursuant to instructions from **Directline Assurance Company Limited** who are the insurers of motor vehicle **KBX 812R** in respect of which the claim in the lower court was filed. In amplifying the grounds on the face of the motion, the deponent asserts that the Applicants are aggrieved by the judgment of 15th January 2021; that the delay in filing the appeal was occasioned by difficulty encountered by counsel in communicating the decision to the Applicants and that eventually when contact was made, and instructions to appeal received, the time for appealing had expired. She states further that the intended appeal is arguable; that the Applicants stand to suffer substantial loss as they may be unable to recover the decretal amount if paid over to the Respondent in the event of the appeal succeeding; and that the Applicants are willing to provide such reasonable security as the court may require.

3. The Respondent opposed the motion through her replying affidavit dated 9th April, 2021. At the outset, she takes issue with the affidavit supporting the motion which she asserts to be sworn by a stranger to the proceedings and thus the motion is fatally defective. The deponent further states that the Applicants have not demonstrated the likelihood of substantial loss or given persuasive reasons for the 2-month delay in bringing the motion.

4. The motion was argued by way of written submissions. The Applicants citing **Joseph Kangethe Kabogo & Anor v Micheal Kinyua Ngari [2012] eKLR** argued that the motion was competent as it was supported by an affidavit deposed by counsel on record in the matter. On the question of extension of time counsel submitted that the delay in presenting the intended appeal was not inordinate and the reason for the delay was reasonable that the intended appeal was arguable and that and no prejudice would be occasioned to the Respondent if the motion is allowed. Thus, the Applicants have demonstrated good and sufficient cause to warrant the court's exercise of its discretion in their favour. In bolstering these submissions, counsel cited the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another [2018] eKLR**.

5. Regarding the prayer for stay of execution pending the intended appeal counsel relied on **Halai & Another v Thorton & Turpin (1963) Ltd [1990] KLR 365** and **Kenya Orient Insurance Co. Ltd v Paul Mathenge Gichuki & Another [2014] eKLR** to urge that the Applicants will likely suffer substantial loss if stay of execution is not granted as the Respondent has not demonstrated his ability to refund the decretal sum in the event the intended appeal is successful. Further, that counsel had moved with alacrity upon receiving instructions to file the present appeal. Counsel reiterated the Applicants' willingness to furnish security as may be required by the court and concluded by

stating that the motion satisfies the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules.

6. The Respondent's counsel, citing **P.M.M Private Safaris v Kevin Ijatia [2006] eKLR, Misc. App. 232 of 2006** and **Kenya Power & Lighting Company Limited v Julius Wambale & Another [2019] eKLR** submitted that the motion is fatally defective as the supporting affidavit was deposed by a person authorized by Directline Assurance Co. Ltd, a stranger to the proceedings and should therefore be struck out. On the merits, counsel cited the provisions of section 79G of the Civil Procedure Act and the case of **Mwangi v Kenya Airways Ltd [2003] KLR** and others to contend that the Applicants have not given any reasonable explanation for delay in filing the appeal in persuading the court to exercise its discretion in their favour.

7. Concerning the prayer for stay of execution, counsel submitted that the Applicants ought to meet the conditions for stay of execution in the Rules and especially the requirement to demonstrate substantial loss as articulated in **Antoine Ndiaye v African Virtual University (2015) eKLR** and **James Wangalwa & Another v Agnes Naliaka Cheseto (2012) eKLR** and other decisions. It was counsel's submission that the Applicants have failed to prove the substantial loss and that the Respondent is entitled to some form of security should the prayer for stay of execution be allowed.

8. The court has considered the material canvassed in respect of the motion. It is apposite to first deal first with the Respondent's objection to the affidavit in support of the motion. The material depositions therein speak for themselves. Counsel deposes that she is counsel on record for the Applicants, and has been duly instructed by Directline Assurance Company Ltd, the insurers of motor vehicle KBX 812R the subject of the suit in the lower court and is therefore conversant with the issues before court. She further asserts that she filed the instant motion upon receiving instructions from the Applicants, and indeed the delay in communicating with them is the reason given for the failure to file appeal on time.

9. As correctly submitted by the Respondent, Directline Assurance Company Ltd is not a party to instant proceedings. If all counsel relied on was their purported instructions, she would have no standing in the matter. In this case however, she has deposed to instructions by her clients, the Applicants. The deposition is uncontroverted and it is reasonable to believe that in that capacity, counsel is well familiar with the facts of the case. Whereas the ideal would be for the parties to suits to swear their own affidavits there is nothing to bar counsel to swearing to routine uncontested matters that are within her knowledge in her capacity as counsel as long as the affidavits comply with Order 19 Rule 3(1) of the Civil Procedure Rules. That said it is incumbent upon advocates to refrain from giving evidence in contentious matter. The rationale behind the Rules is to bar and shield the advocate from entering the fray between his client and adverse parties. See **Nyamogo & Nyamogo Advocates v Kogo (2001) EA 174** and **Simon Isaac Nguji v Overseas Courier Services (K) Ltd (1998) eKLR**.

10. Rule 8 of the Advocate (Practice) Rules states:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

11. The Court of Appeal in **Hakika Transporters Services Ltd v Albert Chulah Wamimitaire [2016] eKLR** citing its decision in **Salama Beach Ltd v Mario Rossi, CA. No. 10 of 2015**, expressed the principle as follows:

“As regards the appellant's objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deposed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See **Pattni v. Ali & 2 Others, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters.”** (Emphasis added).

12. Undeniably in this case, the invocation by counsel of instructions from Directline Assurance Company Ltd is without basis as the said insurer is not a party herein. However, she has also cited the authority and instructions of the Applicants and for this reason only the court finds that the affidavit in support of the motion is competent. Consequently, the objection thereto by the Respondent must fail.

13. Moving onto the substantive prayers in 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. 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. 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).

14. 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.

15. I am fortified on this position by the pronouncement of the Court of Appeal in the case of **Equity Bank -Vs- Westlink MBO Limited [2013] eKLR**. 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.”

16. 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. Recently, 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** reiterated the foregoing.

17. In the circumstances the Applicants' prayer (4) seeking stay of execution pending the hearing of the intended appeal has no legal anchor and must fail.

18. Turning now to prayer seeking leave to the appeal out of time, the court's power is donated by Section 79G, as well generally, under section 95 of the Civil Procedure Act. The delay in this case is less than two months. The explanation given is that counsel despite her efforts was unable to make contact with the Applicants in time, and that by the time she succeeded and got the requisite instructions the time for lodging appeal had lapsed. The Respondent countered that delay in the circumstances of this case is unreasonable and no satisfactory explanation has been offered, as such the Applicants have failed to lay basis to warrant the exercise of the court's discretion to extend time.

19. 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.”

20. The principles governing the grant of 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.”

21. 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**.

22. 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.**

23. The delay in this case is short and has been adequately explained. In addition, there is no demonstration of undue prejudice on the part of the Respondent if the prayer is granted. She can be compensated through costs. The court is satisfied that in the circumstances of this case, that the delay is not inordinate and that the Applicants have discharged the burden of demonstrating *good and sufficient cause* for failing to file their appeal on time. Secondly, upon a cursory perusal of the draft memorandum of appeal, the appeal proposed to be filed does not, appear frivolous. The right of appeal is constitutionally guaranteed and a deserving party ought not to be hindered in the exercise of this undoubted right of appeal. As recently reiterated by the Court of Appeal in **Richard Ncharpi Leiyagu –Vs- IEBC & 2 Others Civil Appeal No. 18 OF 2013 [2013] eKLR:**

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”.

24. In the result, it seems to me that the justice of the matter lies in allowing prayer (3) of the motion dated 5th March, 2021 and awarding costs to the Respondent in any event. The Applicants are directed to file the memorandum of appeal within 14 days of today’s date. Further, in view of this court’s finding that prayer four (4) of the motion lacks legal anchoring, and in the interest of justice, the Court will *suo motu* grant a temporary order that the *status quo* be maintained in so far as the decree in the lower court is concerned, to enable the Applicants file an appropriate stay motion in the appeal to be filed pursuant to the leave granted herein. This temporary order will last for 14 days.

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

C.MEOLI

JUDGE

In the presence of:

Ms. Waikwa for the Applicants

Respondent: N/A.

C/A: Carol