



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**MISC. CIVIL APPLICATION NO. E046 OF 2021**

**GEDE ENTERPRISES LIMITED.....1<sup>ST</sup> APPLICANT**

**SILAS MWORIA.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**SHADRACK MUOKI MUTUA.....RESPONDENT**

**RULING**

1. Before the court is the motion dated 25<sup>th</sup> January, 2021 by **Gede Enterprises Limited** and **Silas Mworia** (the Applicants) seeking leave to file an appeal out of time and an order to stay execution of the judgment delivered on 11<sup>th</sup> September, 2020, pending the hearing and determination of the intended appeal. The prayer does not cite the particulars of the suit in the lower court from which the application emanates, but from the draft memorandum of appeal attached to the motion that suit was **CMCC No.3228 of 2019**.

2. The motion is expressed to be brought under Section 1A, 1B, 3A, 3B, 79G & 95 of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules and based on the grounds on the face of the motion as amplified in the supporting affidavit sworn by counsel for the Applicants, **Joyce Chichi**. To the effect that she was unable to obtain a copy of the lower court judgment in time to advise her clients, receive instructions and file an appeal within the prescribed period on behalf of the said aggrieved Applicants; that the Applicants stand to suffer "*irreparable loss and damage*" if their motion is denied; and that they are willing to furnish security by way of a bank guarantee for the entire decretal sum.

3. The motion was opposed by the replying affidavit sworn by **Shadrack Muoki Mutua** (the Respondent). The Respondent asserted that the Applicants had filed a similar motion dated 15<sup>th</sup> April 2021 before the lower court and that no reasonable explanation for delay in filing the intended appeal has been offered by them and that execution process is lawful as he is entitled to enjoy the fruits of successful litigation. He contended that the motion has not met the conditions for granting of an order of stay of execution pending appeal. He takes the view that the motion is without merit, is merely dilatory and should be dismissed with costs.

4. The motion was canvassed by way of written submissions. Citing the provisions of Section 79G & 95 of the Civil Procedure Act, the dicta in **Mwangi v Kenya Airways Ltd [2003] KLR** and the holding in **Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR** counsel for the Applicants submitted that that delay herein was not inordinate and has been explained. She contended that the intended appeal is arguable, raises pertinent points of law and fact and therefore has potential to succeed. On the prayer for stay of execution counsel once more cited the case of **Amal Hauliers** concerning the applicable principles as articulated in **Butt v Rent Restriction Tribunal [1982] KLR 417**. She reiterated the Applicants' willingness to furnish bank guarantee for the entire decretal amount as security.

5. Counsel for the Respondent cited the decisions in **Dilpack Kenya Ltd v Wiliam Muthama Kitonyi (2018) eKLR** and **Gerald M'Limbine v Joseph Kangangi** (incomplete citation) to submit that the Applicants have not brought their motion within the requisite threshold. In that they have not satisfactorily explained their delay by proving efforts allegedly made in pursuit of the copy of the judgment and did not file the appeal before seeking enlargement of time. As regards the prayer for stay of execution, counsel described as core the requirement to demonstrate substantial loss under Order 42 Rule 6 of the Civil Procedure Rules and asserted that the Applicants had failed on that score as well. He relied on the decisions in **Mukuma v Abuoga (1988) KLR 645** and **Jeny Luesby v Standard Group Ltd [2014] eKLR** and stated that no just cause had been shown to justify an order to stay execution and in the event the court was otherwise persuaded, it should impose the condition that the Applicants pay half of the decretal sum to the Respondent while depositing the balance in an account.

6. The Court has considered the rival affidavit material and submissions made in respect of the motion. Starting with the prayer for stay pending appeal, it is evident on a plain reading of Order 42 Rule 6(1) of the Civil Procedure Rules that such an order 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 is clear therefore that 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 with 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**).

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 Civil Procedure Rules 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 cause. 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 followed by the relevant motion. The prayer for stay of execution pending the intended appeal in this miscellaneous cause, is therefore misplaced. In the circumstances, the prayer seeking stay execution pending the hearing and determination of the intended appeal has no anchor and is disallowed.

10. The foregoing addresses in part the Respondent’s submission that the Applicants ought to have first filed the appeal and then sought enlargement of time. 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.”**

11. In my considered view, the words that *“an appeal may be admitted out of time”* in Section 79G of the Civil Procedure Act, appears to admit both retrospective and prospective application. So that leave under the section may be sought before or after a memorandum of appeal is filed. The Court of Appeal determined the import of the above phrase in the proviso to section 79 G of the Civil Procedure Act in **Abubaker Mohamed Al-Amin v Firdaus Siwa Somo** (supra) by stating:

**“25. There appears to be two schools of thought with regard to the said proviso. The first is steadfast that the appeal sought to be admitted under the proviso should first have been filed out of time. This position is reflected in the persuasive decisions of the High Court to mention but a few, *Gerald M’limbine vs. Joseph Kangangi [2009] eKLR, GK Associates Limited & another vs. National Bank of Kenya Limited [2017] eKLR* and *Amri Mchoro Mwamuri vs. Indian Ocean Beach Club [2018] eKLR.***

**26. The second holds a similar view as the appellant, that is, that the proviso makes room for both admission of appeals already filed out of time and allowing for an appeal to be filed out of time. These decisions include *Martha Wambui vs. Irene Wanjiru Mwangi & another [2015] eKLR* and *Masoud M Y Noorani vs. General Tyre Sales Limited [2014] eKLR.***

**27. This calls for the interpretation of the said provision in order to discern the intention of the legislature.... Establishing the legislature’s intention entails looking at the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. See *Cusack vs. Harrow London Borough Council [2013] 4 ALL ER 97.***

**28. In our view, the essence of the proviso to Section 79G and more specifically, the phrase *‘an appeal may be admitted out of time’* does not exclude an appeal that is yet to be filed. In *Charles Karanja Kiiru vs. Charles Githinji Muigwa (supra)* this Court was dealing with the issue of an appeal that had been filed out of time without leave of the Court. The learned Judge of the High Court was being cudgelled for granting leave and deeming as having been duly filed, an appeal that had in the first instance been filed without leave of the court.**

**29. This Court held that an appeal can be filed out of time and validated later by way of seeking and obtaining leave of court to admit it out of time. This decision seemed to validate the decision in *Martha Wambui vs. Irene Wanjiru Mwangi & another (supra)* and the other decisions in the second school of thought referred to above. Did the decision invalidate the position taken by the first school of thought? We answer this in the negative and add that this decision sanctioned both positions. We echo with approval the words of Aburili, J. in *Martha Wambui (supra)* where she stated: -**

**“In my view the use of the term ‘admitted’ connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time...”**

**30. We hold the view that the above expression by Aburili, J. portrays the correct interpretation of the proviso to Section 79G of the Civil Procedure Act. Having arrived at that finding, it goes without saying that the learned Judge fell into error when she dismissed the prayer to file the appeal out of time on grounds that leave could not be granted before the appeal itself had been lodged”.**

12. In the result, the court is not persuaded that the Applicants’ failure to first file the appeal before seeking extension of time to appeal defeats their prayer for extension of time.

13. Turning now to the merits of the said prayer, 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 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] 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.”**

14. 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 their favor. 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] eKLR**.

15. The delay in the present matter is about five months. The Applicants have through their counsel asserted that the delay was occasioned by the fact that after the judgment was delivered counsel was unable to obtain a copy of the judgment in time to enable her advise the Applicants. That after *“recently”* obtaining a copy of the judgment, she was able to advise the Applicants, receive instructions to appeal and thus move the court with the present motion.

16. The Respondent has challenged this explanation citing the failure by the Applicants to attach evidence of alleged efforts to obtain a copy of the judgment. He has a point; counsel for the Applicants neither deemed it important to give precise dates on any request(s) allegedly made for copies of the judgment and receipt thereof nor attach copies of correspondence with the lower court in that regard. Indeed, no copy of the judgment has been exhibited before the court and it cannot be ascertained whether the parties attended the delivery. As for the Applicants who own this cause, they chose to remain silent and in the shadows.

A party seeking extension of time should not appear to presume on the court’s discretion, regardless of the period of delay. In this instance, the Applicants have sought to explain the delay of almost five months in the vaguest terms possible and without offering a scintilla of evidence thereto. Such a casual approach flies in the face of the discretionary jurisdiction invoked and relevant pronouncements of superior courts. In the circumstances, the court agrees with the Respondent that the Applicants have not demonstrated *“good and sufficient cause”* for not filing the appeal in time and the extension sought cannot be granted. In the result the entire motion dated 25<sup>th</sup> January 2021 must fail and is hereby dismissed with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 25<sup>TH</sup> DAY OF NOVEMBER 2021.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**Ms Wanjala for the Applicant**

**Mr Wachira for the Respondent**

**C/A: Carol**