



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

MISCELLANEOUS APPLICATION NO. E008 OF 2021

ERNEST KIPSIGEI NGETICH.....PLAINTIFF/APPLICANT

V E R S U S

MOSES KIRUI.....DEFENDANT/RESPONDENT

R U L I N G

1. The Application coming for consideration in this ruling is the Notice of Motion dated 20/1/2021 seeking extension of time for filing of the intended appeal and further that the intended appeal be filed within twenty one (21) days of granting the leave.
2. The Application is supported by the Affidavit of **ERNEST KIPSIGEI NGETICH** dated 20/1/2021 in which it is deposed that **MR. JAPHET KOSKEI** who had conduct of this suit was taken ill and the file was forwarded to his partner **MR. KIBET ARAP SAINA TENGEKYON** at their Molo Office but the same was inadvertently not placed before him for action.
3. The Respondent filed a Replying Affidavit dated 15/2/2021 opposing the Application and stating that the Application seeking extension of time was filed four (4) months after the judgment was delivered and further that there is no proof that the Applicant's counsel was taken ill.
4. The issues for determination in this application are as follows

(i) Whether leave to file the appeal out of time should be granted;

(ii) Whether stay of execution pending appeal should be granted;

(iii) Who pays the costs of the Application.

5. The applicant's application is premised on sections 79 (G) and 95 of the Civil Procedure Act which provide for filing of appeals from the subordinate courts out of time and for enlargement of time respectively.

Section 79 (G) of the Civil Procedure Act states 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. "

Section 95 of the Civil Procedure Act provides thus:

"Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired. "

6. In **FIRST AMERICAN BANK OF KENYA LTD VS. GULAB P SHAH & 2 ORS NAIROBI MILIMANI HCCC NO. NAI 2255 OF 2000 [2002] 1 EA 65** the Court set out the principles to be considered in exercising the discretion whether or not to enlarge time and these are:

(i) *the explanation if any for the delay;*

(ii) *the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;*

(iii) *whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.*

7. Similarly in **LEO SILA MUTISO VS. ROSE HELLEN WANGARI MWANGI, (CIVIL APPLICATION NO. NAI. 255 OF 1997 (UNREPORTED))**, the Court expressed itself 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 in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.

8. I find that the court has the discretion to grant leave to file the appeal out of time.

9. I have considered the reason advanced for the delay and I find that there is sufficient reason to grant leave to file the appeal out of time.

10. The said reason advanced in the Supporting Affidavit was that **MR. JAPHET KOSKEI** who had conduct of this suit was taken ill and the file was forwarded to his partner **MR. KIBET ARAP SAINA TENGEKYON** at their Molo Office but the same was inadvertently not placed before him for action.

11. I accordingly allow the Applicant leave to appeal out of time.

12. On the issue of stay of execution pending appeal, the guiding law is Order 42 Rule 6 of the Civil Procedure Rules which states as follows;

“(1) 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.

(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub rule (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.”

13. In **VISHRAM RAVJI HALAI VS. THORNTON & THORNTON & TURPIN CIVIL APPLICATION NO. 15 OF 1990 [1990] KLR 365** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay of execution pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

14. In the current case, the Applicant's suit was dismissed with costs to the Respondent. I allow the Application dated 20/1/2021 on the following conditions;

(i) **THAT the intended appeal is filed served within thirty (30) days of this date.**

(ii) **THAT stay of execution is granted in respect of recovery of costs until the appeal is heard and determined.**

(iii) THAT the Applicant pays costs of this Application

DELIVERED, SIGNED AND DATED AT KERICHO THIS 19TH DAY OF NOVEMBER 2020.

A.N. ONGERI

JUDGE