



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

MISC. CIVIL APPLICATION NO. 12 OF 2021

PATRICK NJIRU1ST APPLICANT

KINGBOROS KENYA LIMITED2ND APPLICANT

VERSUS

FELIX SANG (suing as the legal representative of the estate of JOYCE BUSIENEI)RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion Application dated 9th September 2021. The Application is brought under Order 51 Rule 1 of the Civil Procedure Rules and Section 3, 3A, 63 (e) and 95 of the Civil Procedure Act and seeks the following Orders:-

i. Spent.

ii. THAT there be stay of BOMET PMCC NO. 34 OF 2020 FELIX SANG (suing as the legal representative of the estate of JOYCE BUSIENEI (deceased) – VS – PATRICK NJIRU AND KINGBOROS KENYA LIMITED pending the hearing and determination of this application interparties.

iii. THAT the honourable court be pleased to enlarge the time for lodging an appeal arising out of the Judgment delivered on 14/12/2020 in BOMET PMCC NO. 34 OF 2020 FELIX SANG (suing as the legal representative of the estate of JOYCE BUSIENEI (dcd) – VS – PATRICK NJIRU AND KINGBOROS KENYA LIMITED

iv. THAT pursuant to prayer (II) above, the applicants be allowed to lodge their appeal out of time.

The Applicants' case.

2. The Applicants' case is stated in the Supporting Affidavit of Patrick Njiru sworn on 9th September 2021. The Applicants state that Judgment in BOMET PMCC NO. 34 OF 2020 FELIX SANG (suing as the legal representative of the estate of JOYCE BUSIENEI (dcd) – VS – PATRICK NJIRU AND KINGBOROS KENYA LIMITED was delivered on 14th December 2020. They aver that they were dissatisfied with the Judgment and decided to appeal by sending a Memorandum of Appeal dated 12th January 2021 for online filing and to the Respondent's advocates. That the Memorandum of Appeal sent to court was not assessed and filed.

3. The Applicants averred that they were apprehensive that the Respondents could commence execution proceedings and that they would suffer irreparable loss if the execution proceeded. That they recorded a Consent with the Respondent's advocates where the Respondent was to be paid half of the Decretal sum plus costs and the other half be deposited in a joint interest earning account.

4. In addition, the Applicants seek an extension of time to file an Appeal since the requisite time had lapsed. In a Further Affidavit dated 1st November 2021 the Applicants averred that they did not intend to delay the matter. They disputed the Respondents, averment that the pleadings filed in court by the Respondent were of a different case stating that they bore the same parties as the one contained in the Memorandum of Appeal in question. That the Respondent had confirmed receipt of the Memorandum of Appeal.

5. The Applicants averred that due to COVID-19, pleadings were required to be filed online. That there was an inadvertent mistake on the part of the court registry to assess the documents for payment and that the mistake should therefore not be visited upon them.

The Applicants' submissions.

6. The Applicants submitted that they had complied with the Consent recorded by the parties on 15th January 2021. They further submitted that the intended Appeal had an overwhelming chances of success and if the amount was released, the Appeal would be rendered nugatory.

7. It was the Applicants submission that they would suffer substantial loss. They relied on the cases of **Kenya Shell Limited Vs Benjamin Karuga Kiqibu & Ruth Wairimu Karuga (1982-1988) KAR 1618** and **James Wangalwa & Another Vs Agnes Maliaka Cheseto (2012) eKLR** to support their submission. It was their further submission that if the Appeal eventually succeeded, it would be difficult to recover the Decretal sum of Kshs.459,347.50 from the Respondent.

8. The Applicants submitted that there were two files filed in the lower court by the Respondent i.e. BOMET PMCC NO. 34 OF 2020 FELIX SANG (suing as the legal representative of the estate of ABIGAELE CHEPKORIR (dcd) – VS – PATRICK NJIRU AND KINGBOROS KENYA LIMITED and BOMET PMCC NO. 33 OF 2020 FELIX SANG (suing as the legal representative of the estate of JOYCE BUSIENEI (dcd) – VS – PATRICK NJIRU AND KINGBOROS KENYA LIMITED. It was their submission that the Respondent interchanged the parties and hence they could not claim that the Memorandum of Appeal referred to different parties. They submitted that the Respondent had not come to court with clean hands.

The Respondent's case.

9. The Application is opposed by the Respondent. In the Replying Affidavit dated 11th September 2021 sworn by Felix Sang, the Respondent avers that the 2nd Applicant had no locus standi to bring the application and no authority to bring the same on behalf of the 2nd Applicant.

10. The Respondent averred that the Application was intended to delay the logical conclusion of BOMET PMCC NO. 34 OF 2020 FELIX SANG (suing as the legal representative of the estate of JOYCE BUSIENEI (dcd) – VS – PATRICK NJIRU AND KINGBOROS KENYA LIMITED. He further averred that he had filed an Application dated 9th August 2021 that sought the release of the funds deposited in a joint interest earning account. That his application triggered the present application.

11. The Respondent stated that the Memorandum of Appeal that was allegedly sent to the High Court had different parties. It was his case that no Memorandum of Appeal in respect of the parties in this Application was sent to the court registry.

12. It was the Respondent's case that the Applicants have not met the threshold for grant of stay of execution and leave to file the appeal out of time. That the Applicants have not demonstrated the loss they would suffer if the execution were to proceed.

The Respondent's submissions.

13. The Respondent submitted that the present Application had been made 9 months after the date that the Memorandum of Appeal should have been filed. That there was an inordinate delay in filing the Appeal and that delay had not been explained by the Applicants. The Respondent relied on Section 95 of the Civil Procedure Act and on the cases of **Stanley Kahoro Mwangi & 2 Others Vs Kanyamwi Trading Company Limited (2014) eKLR**, **George Kang'ethe Waruhiu Vs Esther Nyamweru Munene & Solomon Ng'ang'a Waruhiu (2021) eKLR**, and **Karny Zaharya & Another Vs Shalom Levi (2018) eKLR**.

The Respondent further submitted that the Applicants were guilty of indolence and that they had not demonstrated any effort or due diligence on their part to ensure that the Memorandum of Appeal or Application for extension of time were filed within time.

14. It was the Respondent's submission that the Memorandum of Appeal that the Applicants relied on was for a different matter and thus no Memorandum of Appeal pertaining to the present matter had been filed. That the current appeal was in respect of BOMET HIGH COURT MISC APPLICATION NO. 12 OF 2021, PATRICK NJIRU AND KINGBOROS LIMITED VS FELIX SANG (suing as the legal representative of the estate of the late Joyce Busienei) while the Memorandum of Appeal being relied upon was for PATRICK NJIRU & KINGBOROS KENYA LIMITED VS FELIX SANG (suing on behalf of the minor and next friend of Abigael Chepkorir).

15. The Respondents further submitted that the Applicants have not met the threshold for grant of the orders for stay of execution as they had not demonstrated any substantial loss that they would suffer.

16. I have considered the Application dated 9th September 2021, the Replying Affidavit dated 11th September 2021, the Further Affidavit dated 1st November 2021, the Applicants Written Submissions dated 1st November 2021, and, the Respondent's Written Submissions dated 21st October 2021. They raise two issues for my determination as follows:-

(i) Whether the Applicants have satisfied the requirements for the grant of the Order of Stay of Execution.

(ii) Whether the Applicants should be granted time extension to file their Appeal out of time.

(i) Whether the Applicants have satisfied the requirements for the grant of the Order of Stay of Execution.

17. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

“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 orders 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.”

18. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the court that:-

i. Substantial loss may result to him unless the order is made;

ii. That the Application has been made without unreasonable delay; and

iii. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

19. On the first principle, the Applicants contended that they would suffer substantial loss because the Respondent would not be able to refund them the Decretal Sum of Kshs.459,347.50 in the event that the Appeal succeeded. That in the converse the 2nd Applicant was a company of repute and good standing, and would not have difficulty satisfying the decree were they to lose the appeal.

20. The likely inability of a decree holder to refund the decretal sum if an appeal succeeded can be a good ground for the court to grant stay. In this case however, the Applicants have not demonstrated that the Respondent was a man of straw who would not be able to refund any sums owing after the finalization of the appeal. I find the assertions by the Applicants as mere statements. They have not demonstrated the substantial loss which they would suffer if they failed to get stay.

21. It is my finding therefore that the Applicant has not satisfied the first condition. I am persuaded by the case of **Samvir Trustee Limited Vs Guardian Bank Limited (UR)**, Warsame J (as he was then), held that:-

“For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.”

22. The 2nd limb is whether the Application has been brought without delay. In this case judgment was delivered on 14th December 2020. On 15th January 2021, parties recorded the following consent before the trial court.

(i) Half of the decretal amount being the sum of Kshs.459,347.50/= plus costs of Kshs.144,975/= making a total of Kshs.604,322.50/= be paid to the Plaintiff's Advocate within 30 days from the date hereof.

(ii) The other half being the sum of Kshs.459,347.50/= be deposited in a joint interest account within 30 days from the date hereof pending hearing and determination of the appeal filed before the High Court.

23. Both parties concede that there was material compliance with their consent. This therefore means that the delay in bringing the present application was not a relevant factor. The parties have not asked this court to set aside their consent which clearly was binding until the “hearing and determination of the appeal.”

24. The special circumstances in this case therefore are that the parties have a consent and cannot therefore litigate about it in a round about way.

25. It is salient to note that the power of the court in deciding whether or not to grant a stay of execution is discretionary. In the case of **Butt V Rent Restriction Tribunal (1982) KLR 417** the Court of Appeal held that:-

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. *The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*

5. *The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”*

(ii) **Whether the Applicants should get a time extension to file their Appeal out of time.**

26. The Applicants have made the Application for time extension 9 months after the delivery of the Judgment in BOMET PRINCIPAL MAGISTRATE’S COURT CIVIL SUIT NUMBER 34 OF 2020 – FELIX SANG (suing on behalf of the minor and next friend of ABIGAIL CHEPKORIR). The Applicants’ reason for the delay was that the Court Registry did not assess the Memorandum of Appeal. The Applicants actions in regards to their Appeal were indolent. They did nothing after they realized that the Memorandum of Appeal had not been assessed. Their reasons and consequent conduct in failing to have the Memorandum of Appeal assessed again screams lethargy. There was inordinate delay that has not been satisfactorily explained by the Applicants. It is salient to note that equity does not aid the indolent.

27. It is trite law that an order for extension of the time to file an appeal is discretionary. In the case of **Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR**, the Supreme Court of Kenya stated that:-

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.”

28. Such discretion must however be exercised judicially. In the case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi (UR)** where the Court stated:-

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”

29. In this case the Applicants annexed a Memorandum of Appeal marked as “PN 1a” which was to be assessed and filed. This court cannot at this point make an assessment of the likelihood of the success in the intended appeal therefore, in the interests of justice it is fair to allow both parties to ventilate their case and respective positions for this court to make a determination.

30. In trying to balance between the rights of both parties, I am persuaded by the case of **Mohammed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR**, where Kariuki J upheld the decision of **M/S Portreitz Maternity –VS- James Karanga Kabia Civil Appeal No. 63 OF 1997** and stated that:-

“That right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

31. In the circumstances of this case, and exercising my discretion judiciously, it is my finding that denying the Applicants their right of appeal would be driving them away from the seat of justice. It is my finding also that no prejudice will be suffered by the Respondent who has already accessed part of the decretal sum.

32. In the final analysis, I grant the following orders:-

(i) The Applicants are granted leave and time extension of 15 days to file their Appeal and a total of 45 days from this date to have the Appeal admitted for hearing.

(ii) The 45 days granted will operate as a Stay of Execution against the Judgment and Decree in BOMET PRINCIPAL MAGISTRATE’S COURT CIVIL SUIT NUMBER 34 OF 2020 – FELIX SANG (suing as the legal representative of the estate of JOYCE BUSIENEI) VS PATRICK NJIRU AND KINGBOROS KENYA LIMITED.

(iii) The stay shall lapse upon expiry of the 45 days.

(iv) The Applicants though successful is denied the costs of this application which has been occasioned by their own missions.

33. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 21ST DAY OF DECEMBER, 2021.

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R. LAGAT-KORIR

JUDGE

RULING DELIVERED IN THE PRESENCE OF MR. NYACHIRO FOR THE APPLICANT, MR. MUGUMYA FOR THE RESPONDENT AND KIPROTICH (COURT ASSISTANT).