



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CIVIL NO. E082 OF 2021

ESTHER NJOKI NGUTU T/A

RAEL TECHNOLOGY WISDOM.....APPLICANT

VERSUS

ERICK MUTUGIRESPONDENT

RULING

1. The Application dated 2/11/2021 seeks in the main an order for leave to appeal out of time against the decision in Nkubu PMCC No. 18 of 2020 29/7/2021 and an order for stay of execution by way of notice to show cause said to have been due on the 3/11/2021.
2. The grounds set out to premise the application are a little difficult to understand. On one hand it is said that an appeal has been lodged and on another hand it is said that the applicant only became aware of the decision when served with a notice to show cause and that he intends to appeal on some five proposed grounds of appeal and that grant of stay will not occasion to the respondent any prejudice. That in elegance in crafting pleading however does not defeat the cause.
3. With the leave of the court, the applicant filed a supplementary affidavit on 7/12/2021 which largely gave the history of the application and reiterated that the notice to show cause was due for hearing on the 8/11/2021 without disclosing what did transpire on the said date. The affidavit then contends that there are new developments which entitles him to the orders sought. He then unexpectedly blames the court for being so expeditious with the matter on the respondent brags of sending him to jail.
4. The application was opposed by the respondent who swore the replying affidavit filed on the 6/12/2021 and contended among other things that the sole purpose of the application is to frustrate the realization of the decree; that the applicant is engaged in forum shopping and thus abusing the court process which is alleged to emerge from the fact that she was not keen to serve the application for setting aside forthwith as directed by the court and even failed to file submissions as ordered by the court. It is therefore said that the application was brought too late in the day and that the hearing of the notice to show cause targeted with the order of stay took place and the disclosed threat has been overtaken by events.
5. When a court of law would extend time to file an appeal out of is governed by well crystalised and established principles which guide the exercise of discretion by the court. These principles dictate that the delay which ought not be inordinate be explained with plausible reasons and there ought to be demonstrated on arguable appeal.
6. Here the applicant says nothing about the delay. While the delay of between 29/7/2021 and 2/11/2021 when the application is just about 3 months, where there is no reason for the delay, there cannot be a basis for the court to exercise a discretion and in that event any attempt would be no much more than a judicial whim. In an application of this nature it was important for the court to be told why no step was taken during the time the liberty to appeal subsisted and even what happened between the day the time lapsed and when the application was brought. That failure coupled with the equivocal position taken that an appeal has been filed, when none is, depicts the application as either lacking in candour and forthrightness or she is just but ambivalent. That is not the attribute a court should get from an applicant seeking its discretion. I find that there is no reason for the delay and thus no basis would suffice to exercise the discretion in enlarging time to appeal on account of explanation for delay.
7. That notwithstanding, the court is equally bound to consider the arguability of the intended appeal. It is clear from the record availed that the application that was dismissed by the order now sought to be challenged was also brought in an omnibus manner seeking orders of review, variation and set aside would have just surfaced. The reason given for the order of disturbing a default judgment. The reason advanced was that upon service she instructed an advocate to represent her but the said advocate did nothing until she was served with a decree when it downed on her that counsel she had instructed had done nothing on the matter. She then exhibited a proposed defence in which it was alleged that the two now disputants were lovers who cohabited and that by virtue of that relationship the respondent would be sent by the applicant to deposit money into her account at Sidian Bank and that no money was advanced to the applicant, none was thus recoverable and that the claim and demand was accentuated by the bile of a jilted lover.

8. In my assessment, that proposed defence cannot be termed a bare denial. It has an arguable point which should not be shut out on the account of failure by counsel even if it be negligent. On its basis, I do grant leave to appeal out of time. Let the memorandum of appeal be filed within 7 days from today.

9. That brings me to the prayer for stay pending appeal. I consider the remedy for stay to serve the purpose of keeping the substratum of the litigation alive while protecting the interests of the successful litigant so that if the appeal fails, he does not go the whole journey of having to initiate the execution process a fresh.

10. Now that I have granted leave I equally grant stay of execution but on terms that:-

i) The full decretal sum be deposited into an escrow account within 30 days from today.

ii) The record of appeal together with submissions be filed within 30 days from today to enable the respondent file and serve own submissions within 30 days of the service.

iii) The appeal if filed as ordered be mentioned before the court it shall have been located on the 4/4/2022.

11. Even though the applicant has succeeded, the default leading to this cause was occasioned by her. She cannot get the benefit in costs but ought to pay such costs to the respondent

12. I direct that costs of the application which I assess at Kshs. 15,000/- be paid to the respondent with 30 days from today and in default the execution shall issue.

DATED SIGNED AND DELIVERED AT MERU THIS 17TH DAY OF DECEMBER, 2021

PATRICK J.O. OTIENO

JUDGE

In presence of

No appearance for parties.

PATRICK J.O. OTIENO

JUDGE