



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**MISCELLANEOUS APPLICATION NO 201 OF 2019**

**SAMUEL NJENGA T/A SAMSURE ENTERPRISES.....APPLICANT**

**VERSUS**

**EDWARD BITANYWAINA RUGAMAYO.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant's Notice of Motion application dated 26<sup>th</sup> February 2019 and filed on 27<sup>th</sup> February 2019 was brought pursuant to the provisions of Section 3A, 79G and 95 of the Civil Procedure Act Cap 21, Order 42 Rule 6, Order 50 Rule 6 of the Civil Procedure Rules, 2010 and all enabling provisions of the Law. It sought the following orders:-

- 1. THAT this Honourable Court be pleased to grant leave to the Applicants to appeal out of time against the Ruling of the Honourable M. Murage (Ms) delivered on 10<sup>th</sup> January 2019 in Milimani CMCC No 8535 of 2009.**
- 2. THAT the Memorandum of Appeal annexed hereto be deemed as duly filed.**
- 3. THAT this Honourable Court be pleased to issue stay of execution of the Judgment entered in Milimani CMCC No 8535 of 2009 and all consequential orders pending the hearing and determination of the intended appeal.**
- 4. THAT costs of and occasioned by this application be in the cause.**

2. His Written Submissions were dated 6<sup>th</sup> June 2019 and filed on 17<sup>th</sup> June 2019 while his List of Authorities was dated 1<sup>st</sup> July 2019 and filed on 4<sup>th</sup> July 2019. The Respondent's Written Submissions were dated 25<sup>th</sup> June 2019 and filed on 26<sup>th</sup> June 2019.

3. The parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE APPLICANT'S CASE**

4. The Applicant's present application was supported by the Affidavit of his advocate, Lilian Atuo Opondo, that was sworn on 26<sup>th</sup> February 2019.

5. The deponent stated that after delivery of the Ruling, the Applicant was not granted leave to appeal against the same. She explained that she did not file the Appeal on time because the same was to be delivered on notice, the same not having been delivered on 26<sup>th</sup> November 2018 as the Learned Magistrate was away on official duties. On following up the matter, they were informed that the said Ruling was delivered on 10<sup>th</sup> January 2019 and consequently, the Applicant did not give them instructions to appeal within the stipulated period.

6. She was categorical that they were aggrieved by the said Ruling and wished to appeal against the same out of time as the delay to file on time was unfortunate.

7. She added that the appeal had overwhelming chances of success and that if the stay of execution pending appeal was not granted and the Respondent executed the judgment, then he would suffer irreparable loss and damage and further that his application would be rendered nugatory.

8. It was the Applicant's contention that there was sufficient cause in seeking the orders he had sought and that it was just and equitable that the application which had been brought without undue delay be granted.

### **THE RESPONDENT'S CASE**

9. In response to the said application, on 21<sup>st</sup> March 2019, the Respondent's advocate, Anne Ameyo swore a Replying Affidavit on his behalf. The same was filed on 25<sup>th</sup> March 2019.

10. The deponent averred that the present application was not merited because the Applicant had not indicated his willingness and readiness to furnish security for the due performance of the decree as may be ultimately binding on him. She annexed a copy of a letter in which the Applicant had admitted owing the Respondent, the monies in contention. She stated that the present application was a delaying tactic to frustrate the efforts of the Respondent who was elderly and residing in Uganda from realising the fruits of his judgment.

11. It was the Respondent's contention that the present application was not meritorious and urged this court to dismiss the same.

### **LEGAL ANALYSIS**

12. The court noted that the Applicant's application had two (2) limbs for determination. One was for an order for stay of execution pending appeal and the other was for the order for extension to file an appeal out of time. The court found it prudent to deal with the issue of extension of time to file an appeal out of time first.

13. The Applicant submitted that Section 79G of the Civil Procedure Act provides that an appeal may be admitted out of time if an applicant satisfies the court that he had a good and sufficient cause for not filing the appeal on time. They added that Section 95 of the Civil Procedure Act further provides that the court has the discretion to enlarge time where time to do a particular act has expired.

14. He also placed reliance on the case of **Mwangi vs Kenya Airways Limited [2003] eKLR** where it was held that the factors to be considered by the court in determining whether or not to allow an application to file an appeal out of time are:-

**a. the period of delay;**

**b. the reason for the delay;**

**c. the arguability of the appeal;**

**d. the degree of prejudice which would be suffered by the respondent if the extension is granted;**

**e. the importance of compliance with time limits to the particular litigation or issue; and**

**f. the effect of any on the administration of justice or public interest if any is involved.**

15. He submitted that he had explained the cause of the delay and that the same was not inordinate as the present application was filed seventeen (17) days after the expiration of the period for filing the appeal. He added that his appeal was arguable and that as was held in the case of **Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another [2018]** (Supra), it was sufficient to show that the appeal was arguable and not that it had a high probability of success.

16. He further argued that the Respondents would not suffer any prejudice if the leave was granted as he would be exercising his right of appeal.

17. On their part, the Respondent submitted that the Applicant had failed to demonstrate the merits of his contemplated action and arguability of the appeal and in this regard, he placed reliance on the case of **First American Bank of Kenya Limited vs Gulab P Shah & 2 Others [2002] 1 EA 65** where similar factors for consideration as in the case of **Mwangi vs Kenya Airways Limited** were also set out.

18. This court looked at the Applicant's letter dated 29<sup>th</sup> January 2019 addressed to the Executive Officer Chief Magistrate's Court Milimani Commercial Courts and noted that the Applicant's advocates were seeking to know when the Ruling would be delivered on notice as the same was not delivered on 26<sup>th</sup> November 2019 as the Learned Magistrate was away on official duties.

19. It was indicated that the said letter was received at the Registry on 1<sup>st</sup> February 2019. It bore the official stamp from the Milimani Commercial Courts. There was nothing to suggest that the said letter was not genuine. As the Respondent's advocates had also not contested the same, this court was persuaded that the said letter was not a forgery.

20. A perusal of the same clearly showed that the Applicant's advocates were not aware when the Ruling was dismissed. In the absence of any contrary evidence, this court found and held that they could not be penalised for not having filed their appeal within the stipulated period. Indeed, they were diligent in following up the matter because by the time they wrote to the Executive Officer, the Ruling had only been delivered ten (10) days before then. It was therefore the view of this court that the present application was for all purposes and intents filed without any undue delay.

21. A perusal of the Memorandum of Appeal showed that the Applicant was preferring an appeal against the Ruling of the Learned

Magistrate. A copy of the Ruling was not attached to the application making it difficult to ascertain the nature of the said application. Suffice it stated that in the said Memorandum of Appeal, the Applicant contended that the Learned Magistrate dismissed his application seeking a stay of execution and setting aside of the judgment that was delivered on 28<sup>th</sup> March 2018.

22. It was not clear to this court why the Applicant opted to file an appeal against the dismissal of his application that had sought a stay of execution pending appeal. Indeed, Order 42 Rule 6 of the Civil Procedure Rules further provides as follows:-

**“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 (emphasis court), 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.”**

23. It was immaterial if the Learned Magistrate had dismissed the Applicant’s application for an order for stay of execution pending appeal because he still had a life line in this court. However, as the said application was the subject matter of the Appeal herein, this court found it prudent not to address the merits or otherwise of the Applicant’s intended appeal.

24. Indeed, this court took cognisance of the fact that every party is entitled to present his case in the best way that he knows how. He has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010.

25. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice. Notably, while Section 75 A of the Civil Procedure Code provides for the period of thirty (30) days for an aggrieved party to lodge an appeal, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act.

26. Order 50 Rule 6 of Civil Procedure Rules stipulates as follows:-

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:**

**Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.**

27. Taking into consideration all the factors hereinabove, it was the considered view of this court that the Applicant ought to be given an opportunity to have their Appeal heard on merit as they would suffer great prejudice if it was denied an opportunity to fully present its Appeal to be heard on merit. On the other hand, the Respondents did not stand to suffer any prejudice.

28. Turning to the issue of an order for stay of execution pending appeal, Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows:-

**“No order for stay of execution shall be made under subrule (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”.**

29. This means that an applicant has to demonstrate:-

**a. That he will suffer substantive loss if the order of stay was not granted;**

**b. That he had filed his application for a stay of execution timeously; and**

**c. That he was willing to provide security.**

30. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **“and”**. It connotes that all three (3) conditions must be met simultaneously.

31. As can be seen hereinabove, this court found and held that the present application was filed without undue delay. The Applicant had therefore satisfied one of the conditions for being granted an order for stay of execution pending appeal.

32. As regards the ground in respect of substantial loss, this court noted from Exhibit A-1 that was annexed to the Respondent’s Replying

Affidavit, there was a letter signed by Samuel Njenga acknowledging owing monies to the Respondent. The same had set out how the same would be repaid.

33. On 16<sup>th</sup> May 2019, the Applicant indicated that he did not wish to file a Supplementary Affidavit in response to the said Replying Affidavit. This therefore meant that the Respondent's affidavit evidence remained unrebutted and/or uncontroverted. This court did not therefore see the substantial loss that the Respondent would suffer if the present application was not allowed. If there was any, then he failed to demonstrate the same.

34. Accordingly, having considered the parties' respective Written Submissions and the case law they each relied upon, this court came to the firm conclusion that the Applicant could not be denied an opportunity to appeal against the decision that aggrieved him because it was his constitutional right to do so. This court was satisfied that he would suffer great prejudice if it was denied an opportunity to fully present its Appeal to be heard on merit. However, as he did not demonstrate that he had met all the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, this court was not persuaded that it should grant him the said order.

#### **DISPOSITION**

35. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application that was dated 26<sup>th</sup> February 2019 and filed on 27<sup>th</sup> February 2019 was partially merited and the same is hereby allowed in terms of Prayer No(1) therein in the following terms:-

- 1. The Applicant is hereby directed to file and serve its Memorandum of Appeal within fourteen (14) days from the date of this Ruling i.e. by 13<sup>th</sup> February 2020.**
- 2. The Applicant is hereby directed to file and serve his Record of Appeal within ninety (90) days from the date of this Ruling i.e. by 30<sup>th</sup> April 2020.**
- 3. The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the expeditious typing of the proceedings in the lower court to enable the Applicant comply with the timelines within which to file its Record of Appeal as aforesaid.**
- 4. Either party is at liberty to apply.**
- 5. Costs of the application will be in the cause.**

36. It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of January 2020**

**J. KAMAU**

**JUDGE**