



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS APPLICATION NO 393 OF 2019

PATRICK MUTUNGI.....APPLICANT

VERSUS

AHMED KORE ABDI & BATULA KORE ABDI

(suing as personal representatives for and on

Behalf of the dependants and estate of ADAN

KORE ABDI (Deceased).....RESPONDENT

RULING

INTRODUCTION

1. The Applicant's Notice of Motion application dated 22nd May 2019 and filed on 29th May 2019 was brought pursuant to the provisions of Order 22 Rule 22, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya and all enabling provisions of the Law. Prayer Nos (1) and (3) were spent. It sought the following remaining orders:-

1. Spent.

2. THAT this Honourable Court be pleased to grant leave to the Applicants to appeal out of time against the Judgment of the Honourable D.M. Kivuti (Senior Resident Magistrate) delivered on 22nd March 2019 in Milimani CMCC No 5594 of 2012 Ahmed Kore Abdi & Batula Kore Abdi (suing as Legal representatives of the Estate of Adan Kore Abdi (Deceased) versus Kaizen Self Help Group and Patrick Mutungi.

3. Spent.

4. THAT the Honourable Court be pleased to stay execution of the Decree issued pursuant to the Judgment delivered on 22nd March 2019 in Milimani CMCC No 5594 of 2012 Ahmed Kore Abdi & Batula Kore Abdi (suing as Legal representatives of the Estate of Adan Kore Abdi (Deceased) versus Kaizen Self Help Group and Patrick Mutungi pending the hearing and determination of the Appeal.

5. Costs of the application be in the cause.

2. His Written Submissions were dated 2nd August 2019 and filed on 14th August 2019 while those of the Respondent were dated and filed on 1st August 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 the Claims and Legal Services at the Monarch Insurance Company

Limited who were the insurers of Motor Vehicle Registration number KBN 046G, Philomena Theuri by dint of the insurers rights of subrogation under the relevant policy of insurance, that was sworn on 22nd May 2019.

5. She stated that vide their letter of 4th April 2019, their advocates wrote to them informing them of the entry of judgment against the Applicant herein but that the said letter was inadvertently filed away in a different file and she did not therefore get to see the letter when it reached their offices.

6. She stated that she only realised the mistake a month later during which time the time to file an appeal had lapsed. Upon perusing the said Judgment, she instructed their advocates to file an appeal out of time as they were aggrieved by the same. She was therefore praying that the said time be extended.

7. She pointed out that they were ready and willing to furnish security for the due performance of the decree or order as the court deemed fit. She added that if the Respondents proceeded to levy execution, they would suffer irreparable substantial and irrecoverable loss and the intended appeal rendered nugatory in view of the uncertainty of the Respondents' ability to refund the decretal sum should the appeal succeed.

8. The Applicant therefore urged this court to allow his application as prayed.

THE RESPONDENT'S CASE

9. In response to the said application, on 3rd July 2019, one of the Respondent's herein, namely Ahmed Abdi Kore swore a Replying Affidavit on his own behalf and on behalf of his co-Respondent. The same was filed on 17th July 2019.

10. He stated that his advocates wrote to the Applicant's advocates on 5th April 2019 tabulating the decretal sum and the costs payable which was within the period the Applicant would have filed an appeal against the judgment. He contended that the Applicant had not given a good reason for the delay in filing the appeal and that he had not demonstrated that he had an arguable appeal.

11. He stated that they would be greatly prejudiced if an order for stay of execution and leave to appeal out of time was granted to the Applicant because they would be denied their fruits of judgment by a party who had slept on his right to appeal. They were emphatic that there had been unreasonable and inordinate delay of two (2) months in the bringing of the application herein and further that the Applicant had not demonstrated what substantial loss they would suffer if the order was not granted.

12. They urged this court to dismiss the present application with costs to them but that in the event that the court was inclined to grant the orders that had been sought by the Applicant, then it should direct that half of the decretal sum be released to them and the other half be deposited in a joint interest earning account within fourteen (14) days pending the hearing and determination of the appeal.

LEGAL ANALYSIS

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. In this regard, he relied on the case of **Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another [2018] eKLR**.

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 thirty (30) 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 Respondents placed reliance on the case of **Paul Musili Wambua vs The Attorney General & 2 Others [2015]**

eKLR where similar factors for consideration as in the case of Mwangi vs Kenya Airways Limited were also set out.

18. They were categorical that the Applicant had not given good reason for the delay as his advocates were in constant communication with their advocate.

19. Taking into consideration that the Applicant filed the present application without undue delay, it was the considered view of this court that it ought to be given an opportunity to have its Appeal heard on merit. This was despite the Appellant having failed to call a witness to prove its counter-claim or having failed to properly submit in this matter.

20. Indeed, every party 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. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.

21. 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.

22. 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”.

23. 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”.

24. 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.

25. 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.

26. Both the Applicant and the Respondent entered into a consent on 7th December 2018. Bearing in mind that the present application was filed on 11th February 2019, it could be said that it was filed without unreasonable delay. Indeed, a delay of about two (2) months could not be said to have been inordinate. In that regard, the Applicant had satisfied one of the conditions of being granted an order for a stay of execution pending appeal.

27. Having said so, it did not demonstrate that it was willing and ready to deposit security for the due performance of the decree to be appealed from as would be binding on it or that it would suffer substantial loss in the event its application was not allowed as prayed. It was its case and had to satisfy the court that it had met all the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules.

28. Notably, the Respondent addressed itself to both issues of extension of time to file an appeal out of time and the prayer for the stay of execution pending appeal. However, the Applicant only addressed itself to the issue of extension of time to file an appeal out of time. It did not submit on why it should be granted an order for stay of execution pending appeal. To assume that the Applicant still wished to pursue the prayer for stay of execution pending appeal would definitely prejudice the Respondent as it would seem that the court would be prosecuting the case on behalf of the Applicant. The court ought not to descend into the arena of the dispute because it is expected to be a neutral arbiter in the dispute.

29. In the absence of any indication that the Applicant was still keen on pursuing the said prayer for an order of stay of execution pending appeal and the lack of demonstration of the two (2) other pre-requisites under Order 42 Rule 6(2) of the Civil Procedure Rules, this court was not persuaded that it should grant the Applicant the said order. The mandatory compliance of Order 42 Rule 6(2) of the Civil Procedure

Rules was well demonstrated in the case of **Magnate Ventures vs Simon Mutua Muatha & Another [2018] eKLR**.

30. Accordingly, having considered the parties' respective Written Submissions and the case law they each relied upon, this court came to the firm conclusion that while the Applicant had not demonstrated that it should be granted an order for stay of execution pending appeal, it could not be denied an opportunity to appeal against the decision that aggrieved it. This court was satisfied that the Applicant would suffer great prejudice if it was denied an opportunity to fully present its Appeal to be heard on merit.

DISPOSITION

31. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application that was dated and filed on 21st March 2019 is hereby allowed in terms of Prayer Nos (3) therein in the following terms:-

1. The Applicant is hereby directed to file and serve its Memorandum of Appeal within fourteen (14) days from today i.e. by 11th February 2020.

2. The Applicant is hereby directed to file and serve its Record of Appeal within forty five (45) days from today i.e. by 16th March 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.

32. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY 2020

J. KAMAU

JUDGE