



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC APPL. NO. 535 OF 2019

THE COOPERATIVE BANK OF KENYA LIMITED.....APPLICANT

VERSUS

MICHAEL OCHOLLA AMINGA.....1ST RESPONDENT

ARDELLINE MASINDE.....2ND RESPONDENT

Both Trading as **LINMAS ENTERPRISES**

RULING

1. The application dated 26th July, 2019 principally seeks orders **that the Applicant be granted leave to file an Appeal out of time against the Judgment and decree of the Subordinate Court (Hon. A. N. Makau (Ms), PM) given on 12th June 2019 in CMCC No. 4445 of 2016: Michael Aminga Ocholla & another vs The Co-operative Bank of Kenya Limited.**

2. Secondly, **that pending the hearing and determination of the Applicant's intended Appeal, there be a stay of execution of the judgment and decree of the Subordinate Court (Hon. A. N. Makau (Ms), PM) given on 12th June 2019 in CMCC No. 4445 of 2016: Michael Aminga Ocholla & another vs The Co-operative Bank of Kenya Limited and any resultant orders.**

3. The Applicant is aggrieved by the judgment of the lower court and is desirous of filing an appeal. The delay in filing the appeal is blamed on the delay by the lower court to provide the Applicant with the copy of the judgment. It is contended that the intended appeal is arguable and stands to be rendered nugatory if the application herein is not allowed. The Applicant is willing to deposit the decretal sum of Ksh.193,169.93 in an interest earning bank account in the names of the respective counsels for the parties pending the hearing and determination of the appeal.

4. The application is opposed. It is stated in the replying affidavit that no good reasons have been given for the failure to file the appeal timeously. That certified copies of the proceedings and the judgment are not required for purposes of preparing and filing a Memorandum of Appeal. That the requirements of Order 42 rule 6 Civil Procedure Rules have not been met as there is no valid appeal. That the decree herein being a money decree, no prejudice will be suffered if the application is not allowed. It was further deposed that the Respondents are capable of refunding the decretal sum and have healthy bank balances and properties worth much more than the decretal sum herein and ought to be allowed to enjoy the fruits of the judgment.

5. I have considered the application, the response to the same and the submissions made.

6. Under Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 the conditions for stay of execution are as follows:

“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

(c) 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.”

7. Section 79G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

8. On enlargement of time, the principles applicable were set out by the Supreme Court of Kenya in the **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** as follows:

“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be consideration for extending time.”**

9. The judgment of the lower court was delivered on 12th June, 2019. The application at hand was filed on 26th July, 2019. There was a delay of about 14 days. The Applicant has exhibited a letter stamped as received in court on 17th June, 2018 requesting for typed proceedings and copy of the judgment and the decree. The copy of the judgment exhibited herein by the Applicant reflects that it was certified as a true copy of the original on 25th July, 2019. The foregoing position has not been controverted by any other evidence. This court accepts the explanation given for the delay. The delay was not inordinate.

10. The Applicant is apprehensive that the intended appeal may be rendered nugatory. Although the Respondents have demonstrated their capability to refund the decretal sum, I agree with the Applicant’s assertion that there is no guarantee that the bank balances and the properties referred to by the Respondents will still be in existence by the time the appeal is heard and determined.

11. As stated by the Court of Appeal in the case of **Wangethi Mwangi v Hon. Amb. Chirau Ali Mwakere CA Nbi.353/2009**.

“It is plain from the grounds set forth in the draft memorandum of appeal that the applicants have asked the appellate court to interfere with the awards of damages and there is possibility that the appellate court may either decline or reduce the awards considerably. In the event of the former there might be a long delay in recovering from the respondent the decretal sum as there are so many imponderables in the sale of the respondent’s land which forms the bulk of his assets. It is obvious therefore that in such a likely eventuality, the applicant might be greatly inconvenienced. The balance of convenience is definitely in favour of the applicants, we would think so.”

12. To balance the competing interest of both parties, I allow the application on condition that the decretal sum is deposited in a joint interest earning Bank account of the respective counsels for the parties herein or in court within 30 days from the date hereof. Costs of the application to the Respondents.

Dated, signed and delivered at Nairobi this 23rd day of January, 2020

B.THURANIRA JADEN

JUDGE