



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 665 OF 2018

JOSIAH NAURU PERTEL.....1ST APPLICANT

JOSEPH GETEMNGE MAINA.....2ND APPLICANT

VERSUS

JACINTA NDUKU MUTUNGA

CYNTHIA NZILANI (Suing as the Personal

Representatives of the Estate of PETER

NZUVE ELIJAH LWAYA.....RESPONDENTS

RULING

INTRODUCTION

1. The Applicants' Notice of Motion application dated 7 December 2018 and filed on 17th December 2018 was brought pursuant to the provisions of Order 42 Rule 6, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1, 1A, 3 and 3A of the Civil Procedure Act and all other enabling provisions of the Law. Prayer No (1) was spent. It sought the following remaining orders:-

1. Spent.

2. THAT leave be granted the defendants/applicants to file a notice of appeal out of time and/or time the extended for the applicant to lodge a Notice of Appeal against the judgment issued on 13th January 2017 in Civil Suit No 219 of 2013.

3. THAT there be a stay of execution of the judgment issued on 13th January 2017 and all consequential as arising from and/or pertaining to judgment in Civil Suit No 219 of 2013 Jacinta Nduku Mutunga, Cynthia Nzilani (sic) vs Josiah Nauru Pertet & Another until the final determination of this application or further orders.

4. That this Honourable Court further orders in issue other directions as it may deem just and expedient.

5. THAT costs of the application be in the cause.

2. Their Written Submissions were dated 17th May 2019 and filed on 20th May 2019 while those of the Respondents were dated and filed on 28th May 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 APPLICANTS' CASE

4. The Applicants' present application was supported by the Affidavits of Josiah Nauru Pertet that were sworn on 7th December 2018 and 15th May 2019.

5. The Applicants stated that they instructed the firm of M/S Mwiti & Co Advocates who in turn instructed the firm of M/S Munyaka & Co Advocates without the knowledge and/or consent. They said that latter firm failed, neglected and/or refused to attend to the matter thus prejudicing the suit. They stated that the former advocates informed them that judgment was entered against them on 13th January 2017 at the sum of Kshs 2, 605, 245/=.

6. They were apprehensive that execution arising out of the said judgment was about to commence and that their insurer, Kenya Alliance Insurance Company Limited, had refused to settle the decretal sum leading to the proclamation of the goods. They further stated that they had instructed the advocates to file a declaratory suit against their Insurer to settle the amounts.

7. It was their contention that the deceased largely contributed to the accident and consequently, the quantum of the decretal amount that was awarded was excessive. They stated that the mistake and/or negligence of their counsel not to inform them of the judgment early enough should not be visited upon them.

8. They averred that the Respondents would not suffer any prejudice if the application was allowed and that it was in the best interests of natural justice, equity and good conscience that the said application be allowed as prayed because if it was not allowed they were likely to suffer irreparable damage.

9. In addition, they stated that their advocates had informed them that the Respondents had filed a declaratory suit **Civil Suit No 10536 of 2018** against their said Insurer and that they had already obtained the certified copies of proceedings in **Civil Suit No 219 of 2013** to enable them file a Record of Appeal in the event the application was allowed.

10. They thus urged this court to allow the application as prayed.

THE RESPONDENTS' CASE

11. In response to the said application, the 1st Respondent swore a Replying Affidavit on 15th April 2019. The same was filed on 16th April 2019.

12. The Respondents stated that the Appellants had appointed several advocates to act for them and that it was not correct that the Appellants were not represented in court. They added that the fact that they entered appearance and filed a defence was a clear admission of the existence of their suit.

13. They added that the Appellants were under a duty to diligently pursue their matter by checking the progress of the case from their advocates. It was their contention that the present application was scandalous, frivolous, vexatious, an abuse of the court process as a similar application had been dismissed with costs and that the same did not meet the threshold of being granted an injunction and was highly prejudicial to them. They further averred that the complaints were in the wrong forum and should not form the basis of denying them their fruits of judgment.

14. They were emphatic that the Appellants had come to court with unclean hands and thus urged this court to dismiss the present application with costs to them.

LEGAL ANALYSIS

15. The Applicants submitted that Order 50 Rule 5 of the Civil Procedure Rules gives courts unfettered discretionary powers to grant leave to lodge a notice of appeal.

16. They relied on the cases of **Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR** and **Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others [2014] eKLR** where the court holdings were that despite delays, courts should lean towards allowing extension of time for parties to exercise their rights to be heard because they had unfettered discretion to grant such extensions of time.

17. It was their submission that the counsel acting for them in **Civil Case Number 219 of 2013**, did not give them sufficient representation. They stated that they were never informed of the hearing of the matter nor did they know about entry of judgment until the proclamation was done. They added that the insurer was at one point willing to settle the decretal amount but thereafter refused to settle decision. They were emphatic that having received the certified copies of the proceedings, they were now ready to proceed with the hearing of appeal on merit.

18. On the issue of stay of execution pending appeal, they argued that the court also had unfettered discretion to make an order for stay of execution pending appeal as provided in Order 42 Rule 6 of the Civil Procedure Rules. They relied on the case of **Richard Muthusi vs Patrick Gituma Ngomo & Another [2017] eKLR** in this regard.

19. They pointed out that for an applicant to succeed in being granted an order for stay of execution, he had to demonstrate the following: –

a. Substantial loss may result unless the order is made.

b. The application has been made without unreasonable delay.

c. Such security as the court orders for the due performance of the decree has been given by the applicant.

20. They were emphatic that they would suffer substantial loss if the orders were not granted because the goods that were proclaimed which

included properties which were the joint names of the fast applicant's spouse and in particular the household properties.

21. It was their further argument that in the event the court was not to grant the order, the intended appeal would automatically be rendered nugatory. They placed reliance on the case of **Butt vs Rent Restriction Tribunal [1982] KLR up 417** when the court held that the purpose of stay of execution pending appeal order is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the applicant for the reason that an appeal can be rendered nugatory if no stay was granted. It was further held in that case that the applicant would suffer substantial loss if its appeal succeeded and the respondent was unable to refund the decretal sum.

22. They pointed out that the application was made without reasonable delay and that any delay was not intentional and/or deliberate as they had hoped that their Insurer would settle the decretal sum. They further averred that they were aware that their Insurer and the Respondents were negotiating.

23. It was their contention that they had fulfilled all the conditions of being granted an order for stay of execution qualifying them to be granted the said order.

24. On their part, the Respondents relied on the case of **Mwangi vs Kenya Airways Limited [2003] KLR** where the factors for exercising of discretion to extend time were considered. They further placed reliance on the case of **Velji Shamad vs Shamji Bros & Another [1957] EA 438** where the court therein stated that it was in the public interest that appeals are filed on time.

25. They pointed out that the present application was filed on 7th December 2018, approximately two (2) years from the time judgment was entered on 13th January 2017. They were categorical that the failure by the Applicants' insurers to pay the decretal sum was not a good reason for not having filed the appeal on time.

26. They were also emphatic that the Applicants were ably represented by counsel and that in any event, they were under a duty to constantly check with their advocate on the progress of their case. It was their contention that it was about three (3) years since judgment was delivered and consequently, their application should not be allowed.

27. They added that the Applicants had also not demonstrated that they would suffer substantial loss and that they had not given any security for the due performance of the decree and that if given time, they would dispose of their assets and thus render their decree unpaid.

28. In respect to the Appellants' prayer for extension of time to file their Appeal, this court had due regard to the case of **Samuel Mwaure Muthumbi vs Josephine Wanjiru Ngugi & Another [2018] eKLR** where the court therein cited the case of **Mwangi vs Kenya Airways Limited** (Supra). It was held that the factors to be considered before extension to file suit out of time was granted included:-

- a. the period of delay;
- b. the reason for the delay;
- c. the arguability of the appeal;
- d. the degree of prejudice which could be suffered by the respondent if the extension was granted;
- e. the importance of compliance with time to the particular litigation or issue; and
- f. the effect if any on the administration of justice or public interest if any is involved.

29. It did appear to this court that the Applicants herein filed their present application immediately they became aware of the entry of judgment against them upon the proclamation of their goods. This court fully associated itself with the holding of Joel Ngugi J in the case of **Samuel Mwaure Muthumbi vs Josephine Wanjiru Ngugi & Another** (Supra) where, in allowing an application for extension of time that had been filed thirty one (31) days after the lapse of the time for lodging an appeal, he rendered himself as follows:-

"...all the Applicants have to show at this stage is arguability- not high probability of success..."

30. This court further placed reliance on the case of **John Kahiro & 2 Others vs Virginia Wanjiru Kiboro [2019] eKLR** where in allowing an application that had been filed after a delay of about five (5) months, Meoli C J stated as follows:-

"The main interest at this stage is to do justice between the parties and notwithstanding the delay herein, it is my considered view that justice can still be done between the parties."

31. In the case of case of **Dilpack Kenya Limited vs William Muthama Kitonyi [2018] eKLR**, Odunga J held that:-

"an applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so since it was held in Feroz Begum Qureshi & Another vs Maganbhai Patel & Others [1964] EA 633, there is no difference between the words "sufficient cause" and "good cause"..."

32. There was evidently a communication breakdown between the Applicants herein and their advocates. There was obviously negligence

on the Applicants' advocates' part. Their failure to notify the Applicants of the hearing date and entry of judgment had caused them great prejudice because they ought to have exercised due care and diligence to follow up the matter once they took action to defend the same.

33. However, it is trite law that no party should be penalised just because there was a blunder particularly by his or her advocate. Indeed, in the case of **Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR**, it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

34. Further, in the case of **Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet [2018] eKLR**, it was held that the law does not set aside the maximum and minimum period of delay and all that was required was for the delay to be satisfactorily explained.

35. In exercising its discretion to allow an application seeking extension to file an appeal out of time, a court has to be satisfied that the omission or commission was excusable. In other words, there must be a plausible explanation for the delay in doing an act. It must also consider the length of the delay, the reason for the delay, the injustice that will be caused to the party applying for extension and the prejudice the respondent would suffer if the said application was allowed.

36. Although this court found that the Applicants' advocates did not conduct themselves diligently, such failure was not an entirely unexpected omission. It was normal occurrence. This was a plausible, good and satisfactory explanation for the delay in filing the appeal on time. This court was thus satisfied that the present application was filed without undue delay.

37. Going further, this court noted that 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. 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.

38. 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”.

39. Taking all the factors hereinabove into account, it was the considered view of this court that the Applicants 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.

40. On the other hand, the Respondents did not stand to suffer any prejudice more so because they had already filed a declaratory suit against the Applicants' Insurer.

41. Turning to the question of a 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”.

42. 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.

43. 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.

44. It was necessary that the issue of who should pay the decretal sum be determined more so because the Respondents had already filed a declaratory suit against the Applicants' Insurer. If the appellate court were to determine that the said Learned Trial Magistrate had arrived at the wrong conclusion in **Civil Suit No 219 of 2013**, then the Applicants would suffer substantial loss in the event they would have paid the Respondents the decretal sum and they were successful in their appeal.

45. It was the considered view of this court that substantial loss did not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event its appeal was successful. Failure to recover such decretal sum would render its appeal nugatory if it was successful.

46. Notably, the Respondents did not file any affidavit of means to demonstrate that if he was paid the decretal sum and the Applicants were successful in their appeal, they would be able to refund the Applicants the said monies without causing them hardship.

47. In the absence of proof to demonstrate their ability to refund it the said sum, this court was satisfied that the Applicants would suffer substantial loss. They had thus satisfied the first condition of being granted a stay of execution pending appeal.

48. As can be seen hereinabove, this court took the view that the present application was filed without undue delay and hence they had satisfied the second condition for the granting of an order for stay of execution pending appeal.

49. In view of the fact that a declaratory suit had been filed, it was the considered view of this court that the Applicants ought to deposit security in the sum of Kshs 1,000,000/= so as to satisfy all the conditions under Order 42 Rule 6 of the Civil Procedure Rules. As has been stated hereinabove, the conditions under Order 42 Rule 6 of the Civil Procedure Rules cannot be severed. This was necessary so as to ensure that the Applicants did not go to sleep in the hearing and determination of their Appeal.

50. Having considered the affidavit evidence, the Written Submissions and the case law that were relied upon by the parties herein, this court found and held that the duty of the court to do substantive justice demanded that the Applicants' present application be considered favourably.

DISPOSITION

51. For the foregoing reasons, the upshot of this court's decision was that the Applicants' application that was dated 7th December 2018 and filed on 17th December 2018 was merited and the same is hereby allowed in terms of Prayer Nos (2) and (3) therein in the following terms:-

1. The Applicants are hereby directed to file and serve their Memorandum of Appeal within fourteen (14) days from the date of this Ruling.

2. The Applicants are hereby directed to file and serve their Record of Appeal within forty five (45) days from the date of this Ruling.

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 Applicants comply with the timelines within which to file their Record of Appeal as aforesaid.

4. That there be a stay of execution of the judgment issued on 13th January 2017 in Civil Suit No 219 of 2013 pending the hearing and determination of the Appeal herein on condition that the Applicants shall deposit in an interest earning account in the names of their Advocates and those of the Respondents a sum of Kshs 1,000,000/= within ninety (90) days from today.

5. For avoidance of doubt, in the event the Applicants will not have complied with Paragraph 51(4), the conditional stay granted herein will automatically lapse.

6. Either party is at liberty to apply.

7. Costs of the application will be in the cause.

52. It is so ordered.

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

J. KAMAU

JUDGE