



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 390 OF 2019

WAKO ADAN.....1ST APPLICANT

WASHARA AYALA.....2ND APPLICANT

VERSUS

PHYLLIS WANJIRU MWANGI.....RESPONDENT

RULING

1. In their Notice of Motion application dated 21st May 2019 and filed on 27th May 2019, the Applicants sought an order for stay of execution of the judgment that was delivered against them on 10th April 2019 by Hon A.M. Obura (Mrs) Senior Resident Magistrate in **Milimani CMCC No 4628 of 2016** pending hearing and determination of the appeal herein and extension of time to file the appeal of the said decision out of time. Their said application was supported by the Affidavit of their advocate, Ascar Kwamboka Ooga that was sworn on 21st May 2019.
2. They pointed out that they had filed their present application without undue delay. They were apprehensive that if they were not granted the orders they had sought, then their appeal, which was arguable and had high chances of appeal, would be rendered nugatory.
3. They were emphatic that it took time for them to instruct their advocates to lodge an appeal because they had to go through the judgment and costs before they could decide whether to appeal or not against the said decision. It was their averment that they were willing to deposit the decretal sum into a joint interest earning account in the names of their advocates and those of the Respondent.
4. In opposition to the said application, on 14th June 2018, the Respondent's advocate, Lucy Wambui Kyama swore a Replying Affidavit on behalf of the Respondent herein. The same was filed on 17th June 2019.
5. She averred that despite having had ample time to do so, the Applicants did not adduce any evidence in the lower court as a result of which judgment was entered against them. She stated that the Applicants' advocates were present at the time the judgment was delivered and consequently, they had ample time to have lodged their appeal.
6. She contended that they sent the computation of the decretal sum as per the decree and followed up the same several times in writing and by telephone calls to the Applicants' advocates and that it was only after they informed the said advocates of the intention to execute against the Applicants that they filed the present application.
7. It was her averment that the present application lacked merit, was not arguable, had no chances of success and that it was an afterthought intended to delay the matter. She stated that the Applicants did not offer a plausible explanation for the delay in lodging the appeal herein and there having been an inordinate delay that was inexcusable and thus urged this court not to allow the said application.
8. It was the considered view of this court that the Applicants' advocates were not diligent in this matter bearing in mind that they were aware of the consequences of not filing the appeal within the prescribed time.
9. Having said so, 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.
10. 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.

11. 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.

12. 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.

13. The decision the Applicants intended to appeal against was delivered on 10th April 2019. The present application was filed on 21st May 2019. A period of one and a half (1½) months could not be said to have been inordinate. Though agreeing with the Respondent that the reason given by the Applicants for not filing the appeal within the prescribed time, it was nonetheless not persuaded that the failure to file the same as aforesaid was inexcusable for the reason that Section 79G of the Civil Procedure Act Cap 21 (Laws of Kenya) provides that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient reason for not filing the appeal in time. In addition, Order 50 Rule 6 of the Civil Procedure Rules, 2010 empowers the court to enlarge time where a limited time for doing an act has been prescribed.

14. They had a right to appeal against the aforesaid decision despite not having adduced evidence. Indeed, a defendant is under no obligation to adduce evidence during a trial for the reason that the burden of proof lies upon the party who asserts a fact as has been provided in Section 107 of the Evidence Act Cap 80 (Laws of Kenya).

15. Weighing the Applicants' right to have their dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicants if they were denied an opportunity to ventilate their Appeal on merit.

16. Going further, all the parties were agreed on when the court could exercise its discretion to grant an order for stay of execution pending appeal. Indeed, for an applicant to succeed in being granted an order for stay of execution, he has to demonstrate the following conditions as has been set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010:-

a. That substantial loss may result unless the order is made.

b. That 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.

17. 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.

18. The court carefully considered the Written Submissions and the case law that each of the party relied upon and determined that the Respondent had not filed an Affidavit of Means to demonstrate that she was financially able to refund the Applicants the decretal sum if the same was paid to her before the Appeal herein could be heard and determined.

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

20. As the court had hereinabove found that the present application was filed without undue delay, the Applicants had satisfied the second condition for the granting of an order for stay of execution pending appeal.

21. The Applicants had indicated that they were willing to deposit the decretal sum in a joint interest earning account in the name of their advocates and those of the Respondent. It was therefore the considered opinion of this court that the Appellants had demonstrated that they had complied with the third condition of being granted an order for stay of execution pending appeal.

DISPOSITION

22. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Notice of Motion application that was dated and filed on 3rd July 2019 was merited and the same is hereby allowed in terms of Prayer No (3) therein in the following terms:-

1. THAT there shall be a stay of execution of the decree in Milimani CMCC No 4628 of 2016 on condition that the Applicants shall deposit into an interest earning account in the joint names of their counsel and counsel for the Respondent, the sum of Kshs 2,694,500/= within the thirty (30) days from the date of this Ruling i.e. by 11th April 2020.

2. For the avoidance of doubt, in the event, the Applicants shall default on Paragraph 22(1) hereinabove, the conditional stay of execution shall automatically lapse.

3. Either party is at liberty to apply.

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

23. It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of March 2020

J. KAMAU

JUDGE