



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC CIVIL APPLICATION NO 365 OF 2019

PETER ASHITIBA KUYA (suing as the personal representative of the estate of the late

Ryan Samuel Kuya.....APPLICANT

VERSUS

KENYA POWER & LIGHTING SERVICES.....RESPONDENT

RULING

1. In his Amended Notice of Motion application dated 15th July 2019 and filed on 18th July 2019, the Applicant sought an order for stay of execution of the judgment that was delivered against him on 21st June 2019 in **MilimaniCMCC No 6155 of 2015** pending hearing and determination of the appeal herein and leave to file his appeal out of time. His said application was supported by the Affidavit of the Legal Officer of his insurers, APA Insurance Limited. The same was sworn on 17th May 2019.
2. The deponent therein pointed out that they were informed that judgment was entered against the Applicant herein for the sum of Kshs 1,296,000/= on a hundred (100%) per cent basis. She averred that a stay of execution was granted for forty five (45) days from the date of judgment. She added that they did not instruct their advocates to an appeal within the mandatory thirty (30) days because their advocates had not furnished them with the judgment to enable them consider whether they would appeal or not. She urged the court not to punish them for the mistakes of their advocates.
3. The insurer was apprehensive that if it was not granted the orders it had sought, then its appeal against the excessive award considering the age of the deceased, which was arguable and had high chances of appeal, would be rendered nugatory. It further contended that if the said orders were not granted, it would suffer substantial loss as there was no guarantee of them recovering the decretal amount if paid to the Respondent because his assets and income were unknown.
4. It was its averment that it was willing to abide by such reasonable conditions as may be set by the court and this urged this court to allow the present application.
5. In opposition to the said application, on 16th August 2019, the Respondent's advocate, Ambrose Mulandi swore a Replying Affidavit on behalf of the Respondent herein. The same was filed on 20th August 2019.
6. Through his advocate, the Respondent termed the Applicant's application an afterthought, incompetent, frivolous, vexatious, bad in law and brought after unreasonable delay. It was his averment that the Applicant ought to have commenced negotiations out of court while the stay of execution was still in place but that his advocates only approached them after the said stay of execution had lapsed.
7. He further stated that the present application was an attempt to deny him the fruits of his judgment and that the Applicant had not given any substantial reason to show why this court should grant him the orders that he had sought and/or interfere with the award of the lower court. He therefore urged this court to dismiss the application.
8. Both parties were agreed that an appeal had to be lodged within thirty (30) days from the date of delivery of the decision to be appealed from as has been provided in Section 79G of the Civil Procedure Act Cap 21 (Laws of Kenya).
9. They were also agreed on the factors to be considered before an application to file an appeal out of time could be granted. These were the period of delay, the reason for the delay, the chances of the appeal succeeding and/or the arguability of the appeal and the prejudice that would be suffered by a respondent if the said application for leave to file an appeal out of time was granted.

10. In this regard, the Applicant relied on the cases of Jennifer Njuguna & Another vs Robert Kamiti Gichuhi [2017] eKLR and Paul Musili Wambua vs AG & Others [2015] eKLR while the Respondent placed reliance on the case of Stanley Kahoro Mwangi & 2 others vs Kanyamwi Trading Co Ltd [2015] eKLR to buttress their respective arguments.

11. This court took cognisance of the fact 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.

12. While Section 75 G of the Civil Procedure Code provides for the period of thirty (30) days for an aggrieved party to lodge an appeal, it does provide that an appeal can be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not having filed his appeal within the prescribed time. A similar conclusion was arrived at by Odunga J in Dilpack Kenya Limited vs William Muthama Kitonyi [2018] eKLR.

13. Further, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It 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...”

14. For the reason that the extension to file an appeal out of time was not a matter of course, this court also had due regard to the case of Mwangi vs Kenya Airways Limited (2013) KLR in which the factors to be taken into account before an application for extension to file suit out of time could be granted were also considered.

15. Notably, the decision the Applicant’s insurer intended to appeal against was delivered on 29th March 2019. It emailed its advocates on 9th April 2019 calling for copies of the submissions that were filed and the judgment that was delivered to enable it review the same and issue further instructions. It sent another reminder to the said advocates still requesting them to forward the said documentation before the stay period lapsed. There was no indication whether its advocates sent the said documentation and if so, when they sent the same to it.

16. Suffice it to state that the initial application seeking leave to file an application an appeal out of time was filed on 17th May 2019. It was amended on 18th July 2019. Bearing in mind that the Applicant’s insurer was aware of the need to give instructions before the stay period expired, this court was satisfied that it conducted itself diligently.

17. However, the blame lay squarely on the said advocates for not having responded to the Applicant’s insurers. There was evidently lack of diligence on the part of the advocates as they ought to have exercised due care to ensure that they sought and obtained instructions before the period of stay of execution expired. Failure to do so greatly prejudiced the Applicant herein.

18. 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.

19. So as not to prejudice the Applicant herein, this court found and held that the reason for not filing the appeal within the stipulated time was excusable. Further, it also held that a period of one and a half (1½) months from the date the judgment was delivered and the date of filing the initial and amended applications could not be said to have been inordinate.

20. Accordingly, 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 is to do substantive justice to parties. This demanded that the Applicant be granted leave to file an appeal out of time. The Respondent could not purport that the matter was *res judicata* and the litigation had to come to an end for the reason that the Applicant’s insurer had a constitutional right to appeal against a decision that aggrieved it as the burden of paying the decretal sum ultimately lay with it.

21. Notably, only the Applicant submitted on the question of a stay of execution pending appeal. His insurer’s argued that it would suffer substantial loss if the present application was allowed, that the application had been brought without undue delay and that it was ready to furnish security as provided for in Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010. He relied on several cases amongst them Masisi Mwita vs Damaris Wanjiku Njeri [2016] eKLR and George Kinanga & Another vs Joseph Omondi [2017] eKLR to buttress his arguments.

22. As he pointed out hereinabove, a court must be satisfied that the applicant has demonstrated the conditions that have been set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 before an application for stay of execution pending appeal can be granted. The said conditions are as follows:-

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.

23. 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.

24. The decretal sum was Kshs 1,296,000/=. It was not a colossal amount of money. However, the Respondent did not file an Affidavit of Service to demonstrate that it would refund the Applicant’s insurer the money in the event it was successful in the intended appeal.

25. In the case of G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR, this very court held as follows:-

“It was the considered view of this court that substantial loss does 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 his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

26. In the absence of proof that the Respondent would be able to refund the Applicant’s insurer the decretal sum without any hardship, this court was satisfied that it would suffer substantial loss. The Applicant had thus satisfied the first condition of being granted a stay of execution pending appeal.

27. This court determined hereinabove that the present application was filed without undue delay and thus the Applicant had satisfied the second condition for the granting of an order for stay of execution pending appeal.

28. The Applicant’s insurer had indicated that it was willing to provide security and consequently, it was therefore the considered opinion of this court that it had demonstrated that it had complied with the third condition of being granted an order for stay of execution pending appeal.

29. Weighing the Applicant’s right to have his 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 Applicant’s insurer if it was denied an opportunity to ventilate its Appeal on merit in the event an order for stay of execution was not granted.

DISPOSITION

30. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Amended Notice of Motion application dated 15th July 2019 and filed on 18th July 2019 was merited and the same is hereby allowed in terms of Prayer No (2) and (4) therein in the following terms:-

1. The Applicant is hereby directed to file and serve his Memorandum of Appeal within fourteen (14) days from the date of this Ruling.

2. The Applicant is hereby directed to file and serve his Record of Appeal within one hundred and twenty (120) 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 Applicant comply with the timelines within which to file his Record of Appeal as aforesaid.

4. There shall be a stay of execution of the decree in Milimani CMCC No 6155 of 2015 on condition that the Applicant shall deposit into an interest earning account in the joint names of his counsel and counsel for the Respondent, the sum of Kshs 1,296,000/= within thirty (30) days from the date of this Ruling.

5. For the avoidance of doubt, in the event, the Applicant shall default on Paragraph 30(4) hereinabove, the conditional stay of execution shall automatically lapse.

6. Either party is at liberty to apply.

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

31. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of April 2020

J. KAMAU

JUDGE