



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO 354 OF 2019

TIMOTHY KAMAU.....1ST APPLICANT

BERLIN ENGINEERS SUPPLIES & CONTRACTORS LIMITED.....2ND APPLICANT

NATHAN MUTHUIYA FRANCIS.....3RD APPLICANT

VERSUS

FAITH WAITHIRA GACHAGUA..... RESPONDENT

RULING

1. In their Notice of Motion application dated and filed on 13th May 2019, the Applicants sought an order for stay of execution of the judgment that was delivered against them on 28th December 2018 in Nairobi **CMCC No 687 of 2016 Faith Waithira Gachagua vs Timothy Kamau & 2 Others** pending hearing and determination of the appeal herein and leave to file their appeal out of time. Their said application was supported by the Affidavit of their advocate, Moses Olando Ngaywa and that of the Assistant Legal Manager, Madison General Insurance Kenya Limited. Both affidavits were sworn on 13th May 2019.

2. The Applicants contended that the lower court was to deliver a ruling on notice. However, the same was delivered in the absence of their advocates, the same having been deferred several times. They averred that thereafter, the file went missing. The same was, however, traced on 15th March 2019 when their advocates established that the said Ruling was in fact delivered on 18th December 2018 by which time the prescribed period of filing an appeal had lapsed.

3. It was their contention that they had a good and arguable appeal necessitating them to be granted leave to file an appeal out of time. In addition, they contended that if an order for stay of execution was not granted, then their appeal would be rendered nugatory. They added that they filed their application without undue delay and that they were ready and willing to abide by such terms as the court would impose on them.

4. To support their case, their insurer averred that they were not served with the Summons to Enter Appearance and hence it was not aware of the proceedings in the lower court. It stated that it only became aware of the suit when a Notice of Execution to Issue, Warrants of Attachment and Warrants of Sale were issued on 29th May 2018. It urged this court to allow the Applicants' application and not visit its mistakes on them.

5. In opposition to the said application, on 19th June 2019, Michael Amiani, the Recoveries Officer of Jubilee Insurance Company Limited, who were the insurers of the Respondent's Motor Vehicle registration Number KAN 514H swore a Replying Affidavit on her behalf. The same was filed on even date.

6. Through her said advocate, the Respondent's contention was that the Applicants' advocates never attended court on all the days they purported that the Ruling was deferred and eventually delivered. She averred that the Applicants were guilty of laches and that their actions clearly demonstrated that they were not interested in prosecuting their intended appeal. She denied that the court file had been missing because her own advocates filed some documents on 15th January 2019 which was evidence that the Applicants had gone to slumber.

7. It was her averment that the present application was misconceived and an abuse of the court process and was only intended to deny her the fruits of her judgment. She therefore urged this court to dismiss the present application with costs.

8. Both parties were agreed that an appeal has to be lodged within thirty (30) days from the date of delivery of the decision to be appealed from as had 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 Applicants relied on the cases of Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another [2018] eKLR, Edith Gichugu Koine vs Stephen Njai Thoithi [2014] eKLR and Mwangi vs Kenya Airways Limited (2013) KLR while the Respondent placed reliance on the case of Lawrence Nguthiru Riccardahw 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 appellants 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 had due regard to the factors to be taken into account before an application for extension to file suit out of time could be granted in line with the aforesaid cases which it fully associated itself with.

15. Notably, the decision the Applicants intended to appeal against was delivered on 18th December 2018. Their advocates indicated that they traced the lower court file on 15th March 2019 which the Respondent vehemently denied because her advocates were able to file documents in the court file on 15th January 2019. This court gave the Applicants the benefit of doubt that the court file could not be traced for the reason that the Respondent had already commenced execution proceedings necessitating the court file to be moved from the registry to the relevant office for purposes of re-issuing Warrants of Attachment and Sale.

16. There was a delay of two (2) months from the time the Applicants' advocates traced the court file and the date the present application was filed. No explanation was advanced by the said advocates why they did not file the present application immediately. The blame lay squarely on them as there was evidently lack of diligence on their part. They ought to have exercised due care to ensure that they proceeded expeditiously. Failure to do so greatly prejudiced the Applicants herein.

17. 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.

18. Despite not having found a good reason to explain the delay in filing the present application, this court nonetheless found that a period of two (2) months from the date the lower court file was traced to the date the present application was filed could not be said to have been inordinate.

19. 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 Applicants be granted leave to file an appeal out of time.

20. The Applicants were the only ones that submitted on the question of a stay of execution pending appeal. They averred that they would suffer substantial loss as the Respondent had not shown that she would be able to refund them the decretal sum in the event their appeal was successful. They added that the application had been brought without undue delay and that they were ready to furnish security as provided for in Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010. They relied on the case of Kinyunjuri Muguta vs Wotuku Muguta [2018] eKLR to buttress their arguments.

21. As they 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.

22. 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.

23. The decretal sum was Kshs 2,042,694.70. It was not a colossal amount of money. However, the Respondent did not file an Affidavit of Service to demonstrate her ability to refund the Applicants the money in the event they were successful in the intended appeal.

24. 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.”

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

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

27. The Applicants had indicated that they were willing to provide security and consequently, it was therefore the considered opinion of this court that they had demonstrated that they had complied with the third condition of being granted an order for stay of execution pending appeal.

28. Weighing the Applicants’ 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 Applicants if they were denied an opportunity to ventilate their Appeal on merit in the event an order for stay of execution was not granted.

DISPOSITION

29. For the foregoing reasons, the upshot of this court’s decision was that the Applicants’ Notice of Motion application dated and filed on 13th May 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 CMCC No 687 of 2016 Faith Waithira Gachagua vs Timothy Kamau & 2 Others 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 2,042,694.70/= within thirty (30) days from the date of this Ruling.

5. For the avoidance of doubt, in the event, the Applicants shall default on Paragraph 29(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.

30. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of April 2020

J. KAMAU

JUDGE