



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**MISC. CIVIL APPLICATION NO. 72 OF 2020**

**BETWEEN**

**KENNEDY OCHIENG MBANI.....APPLICANT**

**AND**

**JACOB OGUTU OGALO.....RESPONDENT**

**RULING**

1. By a notice of motion dated 28.02.20 and filed on 03.03.2020 brought under Section 3A and 63(e) of the Civil Procedure Act; Order 42 Rule 6(1) and Order 51 rule 1, the Applicant prays for orders that

**a. This Honourable Court be pleased allow the Applicant to appeal the judgment in NYANDO PMCC NO. 141 OF 2019 delivered on 25th July, 2019 out of time.**

**b. This Honourable Court be pleased to grant a stay of execution of the judgment delivered on 25th July, 2019 pending the hearing and determination of the intended appeal.**

**c. Costs of this application be in the cause.**

2. The application is based on the grounds among others that the Applicant is aggrieved by the judgment in NYANDO PMCC NO. 141 OF 2019 delivered on 25th July, 2019, is likely to suffer irreparable loss if stay is not granted and is ready and willing to deposit security.

3. The application is supported by an affidavit sworn on 28th February, 2019 by **Lazarus Mose**, advocate for the Applicant who reiterates the grounds on the face of the application. Annexed to the affidavit is a draft memorandum of appeal.

4. The application is opposed by way of a replying affidavit sworn on 10th March, 2020 by **Dorcas Akinyi Oluoch**, advocate for the Respondent who avers that its over 8 months since the impugned judgment was delivered and that the Applicant who is guilty of indolence does not merit the equitable orders sought.

**Analysis and Determination**

5. I have considered the application in the light of the supporting affidavit and the replying affidavit.

6. The main issue for determination is whether the Applicant ought to be granted leave to appeal out of time. The powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered.

7. The law on extension of time is to be found in Section 95 of the Act which states as follows:

**“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”**

8. Order 50 of the Civil Procedure Rules on the other hand states that:

**“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”**

9. The parameters for exercise of court’s discretion were concisely laid out in the case of **Mwangi v Kenya Airways Ltd [2003] KLR** where the Court of Appeal expressed itself thus: -

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.**

10. In determining this application; I will endeavor to address each of the principles laid down in the above cited case.

**i. Length of delay**

11. Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which states: -

**“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period anytime 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”.**

12. The judgment from which the Applicants propose to appeal against was delivered on 25.07.2019. The applicants had up to 25.08.2019 to file the intended appeal. The present application was filed on 03.03.2020 which is about 7 months outside the time limited for filing the appeal.

**ii. Reason for delay**

13. The Applicant has not made any effort to offer any explanation for his failure to file an appeal in time.

**iii. Security**

14. Security is a legal requirement under 42 (6) (2) (c) of the Civil Procedure Rules. The Appellant has offered to furnish security for due performance of the decree herein pending the hearing and determination of the appeal.

15. While it is not my duty at this stage to determine if the Applicant has an arguable appeal, I am minded, in the interest of justice to exercise this court’s discretion under section 3A of **the Act** to afford the Appellant an opportunity to prosecute his appeal.

16. The upshot of the foregoing is that the notice of motion dated 28.02.20 and filed on 03.03.2020 is considered and the same is allowed in the following terms:

**a. That there be a stay of execution of judgment and decree in NYANDO PMCC NO. 141 OF 2019 pending the hearing and determination of the intended appeal on condition THAT:**

**i) ½ of the total decretal sum is paid to the Respondent within 14 days from today’s date**

**ii) The balance of the decretal sum and costs and interest be deposited into an interest earning account in the names of the advocates both parties within 14 days from today’s date**

**b. In default of Order (1) and (2) above, the stay order shall lapse**

**c. Costs of this application shall be borne by the Applicant**

**DELIVERED THIS 23rd DAY OF April 2020**

**T. W. CHERERE**

**JUDGE**

**Court Assistant - Ms. Amondi**

**For the Applicant - Mose, Mose& Millimo Advocates**

**For the Respondent - D.A.Oluoch & Associates Advocates**

Order

**This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID -19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March, 2019.**