



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISCELLANEOUS APPLICATION NO: 53 OF 2019

PETER GACHOKI MUCHIRA.....1ST APPLICANT

ELIJAH MURAGE MURIUKI.....2ND APPLICANT

ELIJAH KARIUKI.....3RD APPLICANT

VERSUS

JAMES KARANI KUTHUA.....RESPONDENT

RULING

The application pending before this court is the one dated 30th July, 2019 seeking orders that

1. Spent
2. Spent
3. Spent.
4. The Court be pleased to grant leave to the 1st and 3rd Defendants/ Judgment debtors to appeal out of time against the Judgment made by the Hon. Y. M. Barasa (SRM) on 1st February, 20119 in Kerugoya Chief Magistrate court No. 37 of 2018.
5. The said leave do operate as a stay of all proceedings.
6. The costs of this application be provided for.
7. An other orders that meets the ends of Justice.

It is based on the following grounds:

1. That Hon. Y. M. Barasa (SRM) delivered a Judgement on 1st February, 2019.
2. That the 1st and 3rd Defendants only learnt of the Judgment on 17th July, 2019 when they appeared in court to answer to a Notice to show cause why they should not be committed to Civil Jail
3. That at the time they learnt of the Judgment which had been entered against them the time for appeal had run out.
4. That the 1st and 3rd Defendants were unrepresented and they hurriedly instructed the firm of Messrs Kabati & Company Advocates to properly come on record and represent them in court.
5. That the firm of Messrs Kabathi & Company Advocates made an application for typed proceedings on 23rd July, 2019.
6. That the previous Counsel consented to Messrs Kabathi & Company advocates coming on record on 29th July, 2019 but did not give a reason as to why he had not notified the 1st and 3rd defendants of the judgment entered against them on 1st February, 2019.

7. That it is in the interests of justice that the 1st and 3rd defendants be allowed to appeal against the Judgment.

8. That the Plaintiff/Respondent will not be prejudiced if the said leave is granted.

The respondent James Karani Kuthua opposed the application and filed a replying affidavit sworn on 7th August, 2019. He prays that the application be dismissed.

I have considered the application and the submissions, the applicant seeks the exercise of discretion of this court. It is trite that courts discretion must be exercised judiciously. I have considered the authorities cited by the applicants that is: **Mariam Guyato Awadhi & Another -versus- Mamuna Ali Omar (2015) eklr.** Jennifer Njuguna & Another -vs- **Robert Kamiti Gichuhi (2017) eklr.** where the courts observed that;

That the fundamental principle is that the court should take whichever cause appears to carry a lower risk of Injustice and it should turn out to have been wrong.

The power to grant leave to extend time is discretionary and must be granted on case to case basis and while not a right it must be exercised judiciously and only after a party seeking exercise of discretion places before the court sufficient material to persuade the court that discretion should be exercised in their favour. In the **case of; Mwangi -versus – Kenya Airports Airways limited (2003) eklr.** The Court of Appeal listed the factors which aid court is exercising the discretion whether to extend time to file an appeal out of time were listed as follows;

- (a) The period 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 is granted.
- (e) The importance of compliance with time limits to the particular litigation or issue and
- (f) The effect if any on the administration of justice or public interest if any is involved.

There is no dispute that the applicants were not in court and that the Judgment in the trial court was delivered.

The respondents are stating that the applicants are always served through the advocate and contend that the Notice of Motion is frivolous, vexatious, misconceived and an abuse of the court process.

The applicants have contended that they were not informed by their advocate who was on record. The judgment was delivered on 1st February, 2019 and the applicants became aware when they were served with a Notice to show cause why they should not be committed to Civil Jail.

By then the time for filing the appeal had run out. The advocate Okong'o Wandago & Company Advocates were instructed by the Insurer and he filed a memorandum of appearance and thereafter he did not communicate with the applicants in respect of the conduct of the defence.

I find that the applicants have given a plausible explanation as to why they did not file the appeal in time. They moved to court and as soon as they learnt that there was a notice to show cause.

The proceedings were ex-parte, therefore the appeal is arguable and no prejudice that will be suffered by the respondent as they can be compensated by an award of damages. The applicants have made out a case to warrant this court to exercise discretion in their favour.

On stay of execution order 42 Rule 6 (2) Provides as follows;

Order 42 Rule 6 (1) (2) of The Civil Procedure Rules, which provides:

“ (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may, for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (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.

The applicant brought this application under a certificate of urgency soon after they were served with the Notice to show cause. The applicants have demonstrated that they are likely to suffer substantial loss as they are likely to be put in prison if stay is not ordered, and they are ready to provide security.

I find that the applicants have made out a case for the grant of stay of execution of the Judgment.

The applicant will not suffer any prejudice. It will ensure that the applicant gets an opportunity to exercise his rights to defend the suit. I therefore exercise discretion in favour of applicant in the interest of justice.

I therefore allow the application and order that leave is granted to the 1st and 3rd applicants to appeal out of time against the Judgment in Kerugoya CMCC No. 37 of 2018.

There be stay of execution of the Judgment pending filing of the Appeal.

The appeal be filed within 30 days.

Dated, Signed at Kerugoya this 29th day of May 2020.

L.W. GITARI

JUDGE