



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

MISC. CIVIL APPLICATION NO. 9 OF 2020

JAMES MUTUNGA MBINDA.....APPLICANT

VERSUS

STEPHEN MWALULA MULWA &

GEORGE MULWA KILEE (Suing as the Administrators of the Estate of

WINFRED MBATHA MWALULA-Deceased..... RESPONDENTS

RULING

1. This is an application by the Applicant seeking two main prayers, firstly leave to file an appeal out of time from a judgement and decree entered against him and delivered on 29.10.2019 in **Kangundo PMCC No. 149 of 2018** and secondly stay of execution of judgement and decree in **Kangundo PMCC No. 149 of 2018** pending the hearing and determination of the intended appeal.
2. The Application is supported by an affidavit by Erastus Mbaka, from the applicant's insurer. The applicant apparently did not lodge this application until 22.01.2020. This was more than thirty-one days after the lapse of the time allowed to lodge appeals.
3. The Applicant deponed that the delay was due the fact that there was an administrative error following the resignation of a legal clerk and as a result there was miscommunication of instructions to file the appeal despite the fact that the respondent was keen in commencing execution. The applicant annexed a Draft Memorandum of Appeal exhibiting their grounds of dissatisfaction with the learned trial magistrate's judgement. The applicant avers in the supporting affidavit that execution is imminent and has included annexures of the notice of proclamation and warrants of sale and attachment to support this averment. The applicant indicated willingness to provide security for the performance of the decree pending determination of the appeal.
4. The Application is opposed. The Respondent contends that the application is unfounded and intended to frustrate the fruits of his judgement. He pointed out that there was a consent on liability and hence the appeal would be out of place and unmerited. Secondly, that the delay was deliberate and that the administrative glitches ought not to be visited on the respondents.
5. The Application was canvassed by way of oral submissions.
6. The applicant's counsel placed reliance on section 79G as read with section 80 of the Civil Procedure Act as well as Order 42 of the Civil Procedure Rules and submitted that the mistakes on the part of the insurer ought not to impede access to justice. Learned counsel pointed out that the respondent would have an opportunity to be heard on appeal. On the issue of stay of execution, counsel submitted that the applicant has provided sufficient reason to warrant grant of the order sought and in rejoinder reiterated a willingness to offer security as the courts may direct.
7. The Respondent in opposing the application through learned counsel Mr. Muthama submitted that the applicant intended to settle the decretal amount. Learned counsel lamented that the applicant had not explained the delay and the allegations of administrative glitches ought to have been explained vide affidavits from the respective relevant staff members; that had not been done. Learned counsel submitted that the applicant had taken the court for a ride and has not demonstrated that they fit within the conditions set under Order 42 Rule 6 of the Civil Procedure Rules. Counsel sought that the application dated 22.1.2020 be dismissed.
8. The issue for determination is whether the Applicant is entitled to an extension of time to lodge appeal and orders for stay of execution.
9. Section 79G of the Civil Procedure Act is the law applicable in deciding whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

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 any time 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:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

10. The Respondent opposed the application and I am unable to see why the respondent is so opposed. His prime concern is that of realizing the fruits of his judgement.

11. The power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis and while not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the court sufficient material to persuade it that the discretion should be exercised on its behalf and in their favour. This was stated in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC and 7 Others (2015) eKLR**.

12. The Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR** listed the factors which aid our courts in exercising the discretion whether to extend time to file an appeal out of time. They include the following:

- a. The period of 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.

I will now consider the Applicants' application for extension of time against these factors.

13. The Application was brought almost 2 ½ months after time had run out. I find the applicant has in my view explained satisfactorily the reason for the delay. I find the delay is not inordinate.

14. Looking at the Draft Memorandum of Appeal filed, I am satisfied that the appeal is arguable. The applicant is not averse to the furnishing of requisite security for performance of the decree. I am alive to the apprehensions that the respondent has. However, in light of the fact that the applicant has indicated willingness to furnish security to satisfy the decretal sum and the fact that he is not satisfied with the judgement of the trial court there is likelihood of the adverse effects to be suffered if the request is not granted. The appellant ought to be given an opportunity to ventilate his appeal. Consequently, I will grant prayer 3 in the Applicant's Notice of Motion.

15. Next I will address the issue of stay of execution. Order 42 Rule 6 of the Civil Procedure Rules is the law applicable in deciding whether the prayer is merited.

16. The case of **Antoine Ndiaye v African Virtual University [2015] eKLR** the court gave the guiding principles for stay orders, in semblance with Order 42 Rule 6 of the Civil Procedure Rules; to wit,

- a. The Application was brought without undue delay*
- b. Substantial loss occasioned to the applicant if the order is not granted.*
- c. Security for performance of the decree.*

17. I have looked at the application herein, and with regard to the condition of undue delay, as analyzed above, the delay is not inordinate. With regard to the issue of substantial loss, I am unable to find the substantial loss that the applicant shall suffer save that his right to be heard on appeal will be extinguished if the order is not granted. On the issue of security for performance, the applicant has indicated willingness to deposit security as court directs. Therefore, I am satisfied that the applicant has partially met the basic requirements for grant of this order.

18. A perusal of the pleadings reveals that liability had been agreed by consent at 15% to 85% in favour of the respondents. The intended appeal is only on quantum of damages. The appellant seems to attack the quantum on the loss on dependency. It is thus obvious that the respondents are not likely to come out empty handed at the end of the appeal. Consequently, an order that a sum of Kshs 500,000/ be paid to the respondents while the balance be deposited into an interest earning account in the joint names of the advocates for the parties will be appropriate in the circumstances as it takes care of the parties' concerns.

19. Consequently, I find merit in the applicant's application dated 22.1.2020. The same is allowed in the following terms:

a) The Applicant do file and serve a memorandum of appeal within the next fourteen (14) days from the date hereof.

b) Pending the hearing and determination of the appeal herein an order of stay of execution of the judgement and decree in Kangundo SPMCC No. 149 of 2018 is hereby granted upon the Applicant paying the respondents a sum of Kshs 500,000/ and deposit the balance of the decretal sums into an interest earning account in the joint names of the advocates for the parties within thirty (30) days from the date of this ruling failing which the stay shall lapse.

c) The costs hereof shall abide in the appeal.

It is so ordered.

Dated and delivered at Machakos this 26th day of May, 2020.

D. K. Kemei

Judge