



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO 519 OF 2019

ROSES GALORE LIMITED.....1ST APPLICANT

GEOFFREY MWATHI KAGIRI.....2ND APPLICANT

VERSUS

GILBERT ANGONDE AGOLA.....RESPONDENT

RULING

1. In their Notice of Motion application dated and filed on 22nd July 2019, the Applicants sought an order for stay of execution of the judgment, decree and any consequential orders 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, Getrude Chepng'etich that was also sworn on 22nd July 2019.
2. The said advocate stated that judgment in **Milimani CMCC No 7806 of 2014** was to be delivered on notice. However, on 28th June 2019, her firm received a letter from the Respondent's advocates informing them that judgment was entered in the Respondent's favour on 14th June 2019. The Applicants instructed them to appeal against the decision five (5) days after the period stipulated for the filing of appeal had expired. It was her contention that the delay was inadvertent and the Applicants were desirous of filing an appeal against the said judgment.
3. The Applicants further contended that their intended appeal was meritorious and had a high chance of success. It was their contention that if an order for stay of execution was not granted, they stood to suffer irreparable loss and damage and that their appeal would be rendered nugatory. They also averred that the Respondent had no source of income to refund them in the event their appeal was successful. They added that they filed their application without undue delay and that they were ready and willing to comply with any terms of security as may be ordered by the court. They therefore urged this court to allow their application as prayed.
4. In opposition to the said application, the Respondent swore a Replying Affidavit on 23rd September 2019. The same was filed on even date.
5. He stated that judgment was delivered on notice to all parties and hence the Applicants' advocates could not purport that they were not aware of the date of delivery of the said decision. He further said that his advocates informed the Applicants' advocates of the delivery of the said decision and hence there was a three (3) week delay in filing the present application.
6. It was his contention that the lack of diligence on the part of the Applicant could not form a basis for the granting of an application of this nature and since there was no appeal, no stay could be granted.
7. He pointed out that there was a consent on liability at 80:20 and consequently, half of the decretal sum ought to be released to him to enable him seek further medical attention.
8. He termed the present application an abuse of the court process and thus urged this court to dismiss the same.
9. On his part, the Respondent submitted that the Applicant ought not to be granted leave to file an appeal out of time for the reason that the explanation for the delay in filing an appeal was not plausible and that he was a successful litigant who should not be denied the fruits of his judgment.
10. The Applicants relied on the cases of **Nicholas Kiptoo Arap Salat vs IEBC & 7 Others SC Application No 16 of 2014**, **Timwood Products Limited vs Karachiwalla (Nairobi) Limited [2016] eKLR** and **David Omwenga vs John Teleiyo [2010] eKLR** while the Respondent placed reliance on the case of **Rosalindi Wanjiku Macharia vs James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased) [2017] eKLR** in support of their respective cases.

11. Section 79G of the Civil Procedure Act Cap 21 (Laws of Kenya) provides that an appeal has to be lodged within thirty (30) days from the date of delivery of the decision to be appealed.

12. 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.

13. It is for that reason that Section 79 G of the Civil Procedure Act provides 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.**

14. 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...”

15. Having said so, the extension to file an appeal out of time is not a matter of course. The court has to consider certain factors before allowing an application for extension to file an appeal out of time. These are 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 as was held in the case of **Mwangi vs Kenya Airways Limited (2013) KLR.**

16. Notably, the decision the Applicants intended to appeal against was delivered on 14th June 2019. The period of filing an appeal expired on 14th July 2019. Their advocates received instructions to file an appeal on 19th July 2019. They stated that they only became aware of the delivery of the decision on 28th June 2019 when the Respondent’s advocates wrote to them on 28th June 2019.

17. Notably, the Applicants’ advocates ought to have pursued instructions from the Applicants as they knew the consequences of not filing an appeal within the stipulated time. It would, however, be punitive to punish the Applicants for the mistakes of their advocates. Indeed, it is trite law that no party should be penalised just because there was a blunder particularly by his or her advocate. 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. Going further, this court noted that both the Applicants and the Respondent were in agreement that the Judgment was to be delivered on notice. The Applicants’ advocates denied ever having received the notice notifying them of delivery of the said judgment. The Respondent did not provide proof to show that the said advocates had received the said Notice and failed to attend court for the delivery of the said judgment.

19. In the absence of such proof, this court gave the Applicants the benefit of doubt that their advocates were actually not aware of when the Judgment was to be delivered and thus found that the Applicants had advanced a plausible reason to explain why they did not file the appeal within the stipulated period.

20. Further, it was the considered opinion of this court that the period of about a week between the time the appeal was to be filed and the time the present application was filed was not inordinate. Accordingly, as 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.

21. Turning to the issue of an order for stay of execution pending appeal, the Applicants submitted that they had met the conditions set out in Order 42 Rule 6(1) of the Civil Procedure Rules, 2010. On his part, the Respondent submitted that the money decree would not be rendered nugatory and further, that the Applicants had not provided any proof that he was he was a man of straw. He added that the order for stay of execution could not be granted as there was no appeal herein.

22. Before considering whether or not there was merit in the Applicants’ application for an order of stay of execution pending appeal, this court took the view that it could grant the said order notwithstanding that there was no appeal that had been filed. This is because the order for stay of execution could either be granted by the court from which an appeal was being preferred from or by the court to which an appeal was preferred.

23. Indeed, Order 42 Rule 6 of the Civil Procedure Rules provides as follows:-

“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 (emphasis court), 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.”

24. Having settled the said issue, this court determined that before a court could grant an order for stay of execution, it had to be satisfied that the applicant had demonstrated the conditions that have been set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. 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.

25. 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.

26. The decretal sum herein was a sum of Kshs 600,500/=. It was not a colossal amount of money. However, the Respondent did not file an Affidavit of Service to demonstrate his ability to refund the Applicants the money in the event they were successful in the intended appeal.

27. 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.”

28. 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.

29. Having said so, this court noted from the judgment that the Respondent had sustained a fracture of the right ankle joint. It was evident that he had submitted that a sum of Kshs 1,500,000/= general damages would be adequate compensation for the injuries that he sustained. It was not stated, however, how much the Applicants had submitted was a reasonable figure. The Respondent did not also allude to this fact in his Replying Affidavit. As liability was not contested, the Applicants would not suffer any prejudice if a part of the decretal sum was released to the Respondent herein pending the hearing and determination of the Appeal herein.

30. Turning to the issue of filing the application without undue delay, this court had determined that the present application was filed without undue delay. The Applicants had thus satisfied the second condition for the granting of an order for stay of execution pending appeal.

31. The Applicants had indicated that they were willing and ready to comply with the terms of the court regarding the security. This court was thus satisfied that they had demonstrated that they had complied with the third condition of being granted an order for stay of execution pending appeal.

32. Weighing the Applicants’ right to have their 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

33. For the foregoing reasons, the upshot of this court’s decision was that the Applicants’ Notice of Motion application dated and filed on 22nd July 2019 was merited and the same is hereby allowed in terms of Prayer No (2) and (5) therein in the following terms:-

- 1. The Applicants are hereby directed to file and serve their Memorandum of Appeal within fourteen (14) days from the date of this Ruling.**
- 2. The Applicants are hereby directed to file and serve their 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 Applicants comply with the timelines within which to file their Record of Appeal as aforesaid.**
- 4. There shall be a stay of execution of the decree in CMCC No 7806 of 2014 Gilbert Angode Agola vs Rose Galore Limited & Another that was delivered on 14th June 2019 on condition that the Applicants shall pay to the Respondent a sum of Kshs 100,000/= and deposit into an interest earning account in the joint names of their counsel and counsel for the Respondent, the balance of the decretal sum of Kshs 500,500/= within forty five (45) days from the date of this Ruling.**
- 5. For the avoidance of doubt, in the event, the Applicants shall default on Paragraph 33(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.

34. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of May 2020

J. KAMAU

JUDGE