



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO 653 OF 2019

SARAH K MAUNDU.....1ST APPLICANT

JOHN MAUNDU.....2ND APPLICANT

VERSUS

AGNES MULOKO JACKSON..... RESPONDENT

RULING

1. In their Notice of Motion application dated 9th October 2019 and filed on 14th October 2019, the Applicants sought an order for stay of execution of the judgment that was delivered on 19th July 2019 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, Joyce Chichi that was sworn on 9th October 2019.
2. They stated that judgment was entered in favour of the Respondents herein for the sum of Kshs 444,450/=, which they disputed in its entirety. They further contended that the Trial Magistrate who was handling the matter left with the court file when she was transferred to another court and hence they had been unable to obtain a copy of the Judgment that was delivered to enable them file the present application.
3. They added that their intended appeal raised pertinent issues 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 added that they filed their application without undue delay and that they were ready and willing to furnish such reasonable security within the time the court may direct. 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 4th November 2019. The same was filed on 6th November 2019.
5. She stated that judgment was entered in her favour for the sum of Kshs 393,000/= plus costs and interest and not Kshs 444,450/= as the Applicants had contended. She pointed out that the Applicants' advocates promised to settle the decretal amount upon receipt of the decree but they failed to do so and instead, filed the present application.
6. She added that the Applicants had been lax in this matter because despite having prepared the application on 9th October 2019, it was filed on 14th October 2019 and served on 29th October 2019. She was emphatic that the judgment was delivered in Nairobi and not in Nakuru and hence the file was

available at the Registry.

7. It was her further contention that one did not need a copy of the judgment to file an application such as this one and that the failure by the Applicants to file an appeal within the stipulated time was intentional. She further averred that they had not demonstrated that they had met the conditions for being granted an order for stay of execution.

8. She pointed out that this was an old matter for the year 2008 that had to come to an end and hence urged this court to dismiss the application.

9. Both parties were agreed that an appeal had 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).

10. 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.

11. In this regard, the Applicants relied on the cases of Mwangi vs Kenya Airways Limited (2013) KLR and Anal Hauliers Limited vs Abdulnasir Abukar Hassan [2017] eKLR while the Respondent placed reliance on the cases of Diplack(sic) Kenya Limited vs William Muthama Kitonyi [2018] eKLR and Julius Mathia Ndamaiyu vs Peter Njoroge Mwaniki [2019] eKLR to buttress their respective arguments.

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. 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 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 (Supra).

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. 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 appeal out of time could be granted in line with the aforesaid cases which it fully associated itself with.

16. Notably, the decision the Applicants intended to appeal against was delivered on 19th July 2019. They did not state when their advocates managed to get the file from Nakuru to enable them file the present application on 14th October 2019. This court could not ascertain whether this was true was because it was not clear why, if at all, the Trial Magistrate carried the file to Nakuru where she had been transferred as they had alleged. As the Respondent correctly pointed out, it was not necessary for the Applicants to have obtained a copy of the judgment to enable them file the present application. Indeed, they did not disclose to this court whether or not they were present at the time the judgment was delivered. They had not

therefore advanced a plausible reason to explain why they did not file the Appeal herein within the stipulated period.

17. However, despite not having found a good reason to explain the delay in filing the present application, it was the considered opinion of this court that the period of about three (3) months between the time the judgment was delivered and the time the present application was filed was not inordinate. It was punitive to punish the Applicants for the mistakes of their advocates.

18. 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.

19. 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.

20. Turning to the issue of an order for stay of execution pending appeal, the Applicants submitted that they were ready and willing to deposit the entire decretal sum in court as a condition or stay of execution in the matter herein.

21. On their part, the Respondent submitted that it was twelve (12) years since she filed suit and that the delay in conclusion of the case was attributable to the Applicants whose conduct had dragged the matter in court over the years. It was her averment that they had not demonstrated what prejudice they would suffer if the orders were not granted but that any further delays would only continue to cause her prejudice as she was still attending follow up clinics for injuries that she sustained in the material accident.

22. Before a court can grant an order for stay of execution, it 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. 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.

23. 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.

24. The decretal sum herein was a sum of Kshs 393,000/=. 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.

25. 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.”

26. 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.

27. 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.

28. 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.

29. 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.

30. This court was not able to order release of part of the decretal sum to the Respondent herein pending the hearing and determination of the Appeal herein for the reason that there was nothing before it to ascertain the nature of her injuries. Indeed, this court noted that the Applicants had raised the issue of whether or not the Respondent was involved in the material accident and the apportionment of liability as grounds of appeal.

DISPOSITION

31. For the foregoing reasons, the upshot of this court's decision was that the Applicants' Notice of Motion application dated 9th October 2019 and filed on 14th October 2019 was merited and the same is hereby allowed in terms of Prayer No (2) and (4) 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 to 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 1378 of 2008 Agnes Muloko Jackson vs Sarah K Maundu & Another that was delivered on 19th July 2019 on condition that the Applicants shall deposit into an interest-earning account in the joint names of their counsel and counsel for the Respondent, the sum of Kshs 393,000/= 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 31(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.

32. It is so ordered.

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

J. KAMAU

JUDGE