



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NUMBER 22 OF 2020**

**CAPTAIN MOTORCYCLES MANUFACTURING**

**COMPANY LIMITED.....APPLICANT**

**VERSUS**

**JANE MUTHONI MBERERE.....1<sup>st</sup> APPELLANT**

**DAVID OYETU KAMAU.....2<sup>nd</sup> RESPONDENT**

**RULING**

The Applicant herein has moved the court by way of an application dated the 23<sup>rd</sup> January, 2020 under Sections 3A and 79 (G) of the Civil Procedure Act, Order 42 Rules 6 and 7, order 50 Rule 5 of the Civil Procedure Rules seeking leave to file an Appeal out of time from the judgment and Decree in Thika CMCC 358 Of 2016 and the annexed Memorandum of Appeal be admitted out of time. He has also sought for an order for stay of execution of the same Decree pending the hearing and determination of the intended Appeal and the costs of the application.

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit sworn by **Peter Wanjohi Gichuki**, on the 23<sup>rd</sup> January, 2020.

The grounds in support of the application are that; despite having an advocate on record, the applicant had not been made aware of the judgment until he was served with the Proclamation by Mutrix Auctioneers, on the 21<sup>st</sup> December, 2019, by which time, time within which to file an appeal had run out, that the respondent has already proclaimed the applicant's property and the said property is in imminent danger of being attached and sold whereby the applicant will suffer substantial and/or grave loss and damage and his appeal will be rendered nugatory; the applicant avers that its appeal has overwhelming chances of success; that the application has been made timeously and that the respondents will not suffer any prejudice if the order sought are granted.

In his supporting affidavit, the deponent states that the applicant was served with a proclamation, on the 21<sup>st</sup> December, 2019, which had been issued by the court in CMCC 358 of 2016 following which, he instructed their advocate to peruse the court file and establish the background of the matter. That he was advised that the same had been issued pursuant to the above lower court matter and since the applicant was dissatisfied with the same, it intends to appeal against the whole of the judgment as per the annexed draft Memorandum of Appeal.

He avers that sometimes in the month of November 2019, the applicant changed its advocate which also contributed to the delay in filing the Appeal. He has urged the court not to visit the mistake of Counsel, on the applicant.

The 1<sup>st</sup> respondent filed his grounds of opposition to the application, on the 19<sup>th</sup> February 2020. He avers that the application is frivolous, incompetent and vexatious; bad in law; incurably defective; an abuse of the court process and that the same has been brought after inordinate delay.

The 2<sup>nd</sup> respondent did not participate in the hearing of the suit before the trial court.

The application was canvassed by way of written submissions which this court has duly considered.

On the issue of enlargement of time to file Appeal, Section 79(G) is clear that an 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, provided that an appeal may be admitted out of time if the appellant satisfies the court that he has a good and sufficient cause for not filing the appeal on time.

The guiding principles in determining whether to grant leave to appeal out of time were aptly discussed in the case of ***APA Insurance***

Limited Vs Michael Kinyanjui Muturi (2016) Eklr with reference to the Court of Appeal case of Thuita Mwangi Vs Kenya Airways Limited (2010) Eklr which are; the reason and the length of the delay; whether the applicant has an arguable appeal and lastly, the prejudice that the respondent will suffer if the orders are granted.

The requirement of an applicant to give a satisfactory explanation for the delay in filing of the appeal in time cannot be over emphasized. The Court of Appeal in the case of Stanley Kahoro Mwangi & 2 others Vs Kanyamwi Trading Company Limited (2015) Eklr held that;

**“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the Court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour. (emphasis mine)”.**

The reasons given by the applicant for the delay is that it changed advocates sometime early December, 2019 and the transition period from the previous advocate to the new one took some time and that the applicant was not aware of the judgment until it was served with the proclamation. The applicant has blamed its previous advocate for his failure to keep it informed of the progress in the matter. In his submissions, counsel for the respondent submitted that he served a breakdown of costs upon the advocate of the applicant on the 18<sup>th</sup> October, 2019 with a warning that execution was to be levied but the applicant chose to ignore the said warning and did nothing to either satisfy the Decree or Appeal against the same at that point.

In this regard, the court has noted the applicant’s averment that it changed its advocate sometime in the month of November, 2019 after miscommunication from its previous advocates causing injustices to it not only in this matter, but to others too, that he was handling for it. Courts have held times without number that a mistake of a counsel should not be visited upon his client. Going by that principle, this court will give the applicant the benefit of doubt and allow prayer 2 of the application.

On whether the intended appeal is arguable or not, I have perused the draft Memorandum of Appeal and the grounds set out therein. I have also looked at the judgement that was delivered by the trial court. The Appellant has challenged the same mainly on the ground that the subject motorcycle had already been sold as at the date of the accident. Though I appreciate that it is not the duty of this court to deal with the main Appeal at this point, it is my considered view that the applicant has an arguable Appeal and it’s only fair that it be granted a chance to ventilate the same.

On the prayer seeking a stay of execution pending Appeal, Order 42 Rule 6 of the Civil Procedure Rules provides the conditions for granting an order of stay of execution which are that;

- (a) The application must have been made without undue delay;
- (b) Security for the Decree or order has been given;
- (c) Substantial loss may result to the applicant unless the order for stay is made.

It should be noted that what constitutes unreasonable delay varies from the circumstances of each case. In this case, the application was filed on the 23<sup>rd</sup> January, 2020 whereas the judgment sought to be stayed was delivered on the 3<sup>rd</sup> October, 2019. There was a delay of close to four months but going by the finding of the court hereinabove, the delay has been explained and the court is satisfied with the explanation given by the applicant.

On the issue of security for the Decree, the applicant has offered to abide by any orders that this court may give on security of the Decretal sum. The court is prepared to take that as sufficient offer on security.

For an order of stay of execution to issue, the applicant has to establish what substantial loss he is likely to suffer if the order is not granted. Substantial loss is the cornerstone in an application for stay of execution as was discussed in the case of Jason Ngumba Kagu & 2 others Vs Intra Africa Assurance Company Limited (2014) Eklr where the court held that;

why I stated in Bungoma HC Misc. 42 Of 2011 James Wangalwa & Another Vs Agnes Naliaka “The possibility that substantial loss will occur if an order of stay of execution is not made is the corner stone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the respondent to the fruits of his judgment and the right of the applicant on the prospects of his appeal. Even though many say that the test in the High court is not that “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the applicant to do what the judgment requires, he will become a pious explorer in the judicial process. That is why I stated in Bungoma HC MISC APPLICATION NO 42 OF 2011 JAMES WANGALWA & ANOTHER Vs AGNES NALIKA CHSETO that;

**“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very core of the applicant as the successful party in the appeal. This is what substantial loss would entail.....”.**

The court has perused the supporting affidavit sworn by the Peter Wanjohi Gichuki, he has alluded that the applicant will suffer substantial loss if the orders for stay are not granted. However, the applicant did not establish what loss he will suffer if the orders are not granted. It has

not been shown how the Appeal will be rendered nugatory if the orders are not granted bearing in mind that this is a money Decree. The applicant has not shown that the respondent is not in a position to refund the decretal sum in the event that the Appeal is successful. This was not even deponed to, in the supporting affidavit. It is not enough to merely state that the applicant will suffer substantial loss, the same has to be explained. In my view, the applicant has failed to satisfy the court that it is deserving of an order of stay of execution and that prayer therefore fails.

In the end, the application partially succeeds and I make the following orders;

- (1) The applicant is granted leave to file Appeal out of time. The same to be filed within 21 days from the date of this ruling.
- (2) However, the prayer for stay of execution is denied.
- (3) Costs of the application shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 30<sup>th</sup> day of July, 2020.

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**L. NJUGUNA**

**JUDGE**

In the presence of

..... for the applicant

.....for the respondent