



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CASE NO 515 OF 2019

KASSAN KANJI NHIRANI.....1ST APPLICANT

SEYANI BROTHERS CO LTD.....2ND APPLICANT

VERSUS

JANE NJERI KIMANI &

KEVIN KIMANI KARANJA

(Suing on behalf of the estate of

JOHN KARANJA GITAU).....RESPONDENTS

RULING

1. In their Notice of Motion application amended on 29th October 2019 and filed on 2nd November 2019, the Applicants sought an order for stay of execution of the judgment issued in **CMCC No 1385 of 2015 Nairobi Milimani** pending the hearing and determination of the appeal herein, release of Motor Vehicle Registration Number KBZ 820V (hereinafter referred to as “the subject motor vehicle”), an order that the Respondents pay the auctioneers’ fees, leave to file suit out of time and that the attached Memorandum of Appeal be deemed as having been duly filed. Their said application was supported by the Affidavit of their advocate, Agnes Wangari Gichohi. The same was sworn on 18th July 2019. Her Further Affidavit sworn on 26th August 2019 was filed on 28th August 2019.
2. The Applicants said that their insurer, M/S APA Insurance Company Ltd, was handing the matter on their behalf and that upon perusal of the court file, they noted that judgment was entered against them on 16th January 2019 and decree issued on 24th June 2019.
3. They enclosed a copy of the Cause list of 24th April 2019 showing that the matter was not listed on the said date and were emphatic that they were never served with the Judgment Notice as a result of which the judgment was delivered in their absence.
4. It was their averment that the amount stated in the decree and the judgment did not agree (**sic**). They added that they were not served with a draft decree within seven (7) days and/or served with a proclamation before the attachment took place. They were emphatic that the subject Motor Vehicle ought to be released immediately to avoid further suffering and incurring of losses.
5. They asserted that in the event the Respondents executed against them and they paid them the decretal sum of Kshs 2,262,635/=-, they were unlikely to recover the same from them as they may not have been financially able to refund the said amount of money if their Appeal succeeded. They added that they stood to suffer substantial loss as their goods were likely to be sold by public auction. They stated they were willing to give security for the decretal sum pending the hearing and determination of the appeal herein.
6. In the aforesaid Further Affidavit, they averred that they had already paid the Respondents a sum of Kshs 750,000/=- and deposited a further sum of Kshs 520,000/=- in court and consequently, the Respondents would not be prejudiced if their application was allowed as prayed.
7. In opposition to the said application, on 2nd December 2019, the Respondents’ advocate, Migui Mungai swore a Replying Affidavit on behalf of the Respondents herein. The same was filed on 17th December 2019.
8. The Respondents termed the present application as full of *mala fides*, lacking in merit and an abuse of process (**sic**). They stated that the Applicants were seeking to appeal against a decision that was delivered seven (7) months ago and that the application, which had been filed after an inordinate delay, was a mere afterthought meant to delay and frustrate the execution process. They asserted that they had not shown good cause or sufficient material to explain the inordinate delay in filing the present application.

9. They further averred that despite having been served with two (2) Mention Notices with a view to taking directions on the Judgment that was delivered on 16th January 2019, the Applicants' advocates failed to attend court. It was their further contention that the typographical error in the judgment was rectified by the Trial Court. They were categorical that the objection to execution ought to have been made in the lower court and not in this court. They thus asked this court to dismiss the present application.

10. It was apparent to this court that the Applicants had sought the following three (3) substantive orders:-

1. **An order for mandatory injunction;**
2. **An order for stay of execution pending appeal; and**
3. **An order seeking leave to file suit out of time.**

11. In their Written Submissions, the Applicants disclosed that the said subject Motor Vehicle was released upon payment of the storage charges, which they were said ought to have been met by the Respondents herein. The court did not therefore see any value in interrogating the question of whether the Applicants had established a good case for being granted a mandatory injunction or not as the issue was now moot.

12. It, however, deemed it prudent to first address the question of whether or not the Applicants ought to be granted leave to file their appeal out of time. The Applicants relied on the case of **Abraham Mwangi vs Ahmed Ibrahim [2014] eKLR** to support their argument that the length of delay in not filing the appeal herein was not inordinate, that the reason for the delay was excusable and that their appeal had high chances of success.

13. On their part, the Respondents submitted that the execution proceedings that they commenced against the Applicants jolted them into action. In this regard, they placed reliance on the cases of **Daphne Perry vs Murray Alexander Carson [1963] EA 546** where it was held that an appeal should be dismissed if it was time barred, even at the risk of injustice and hardship to the appellant and the case of **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others [2014] eKLR** where factors to be considered when deciding whether or not to grant an application seeking leave to appeal out of time were outlined.

14. They further referred this court to the case of **Ngiyanga Kavole vs Mailu Gideon [2019] eKLR** where a delay of five (5) months was found to have been inordinate.

15. Whereas 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, 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.

16. 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**.

17. 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...”

18. 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**. These were the same factors that were considered in the case of **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others** (Supra).

19. Notably, the decision the Applicants intended to appeal against was delivered on 16th January 2019. The period of filing an appeal expired on 15th January 2019. It was true as the Respondents had averred that they were jolted into action once execution proceedings commenced against them.

20. In their Further Affidavit, the Applicants' advocates stated that the matter was not listed on 24th April 2019. They did not, however, explain what why they did not attend court even after being served with the Mention Notices of 28th February 2019 and 5th April 2019, which they duly acknowledged. They thus did not appear to have been very diligent in following up the matter then.

21. Be that as it may, 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.

22. The above notwithstanding, save for stating that the Applicants were seeking to appeal against a judgment that was delivered over seven

(7) months prior to the filing of the present application, the Respondents did not indicate when the Judgment date was given. They merely addressed themselves to Mention Notices post 16th January 2019 when the Judgment was delivered. In the absence of any proof to the contrary, this court gave the Applicants herein the benefit of doubt that they were not aware of the date of delivery of the Judgment and hence the failure to file the appeal on time was well explained.

23. This court noted that the Applicant had already made part payment of the decretal sum to the Respondents and deposited some monies into court. It was only fair and just that they be granted leave to file their appeal out of time as in the circumstances, it would be prejudicial for them not to be denied their right of appeal.

24. Turning to the question of whether or not the Applicants ought to be granted an order for stay of execution pending appeal, this court noted that in the Judgment, the Respondents were awarded a sum of Kshs 1,270,000/=. The decretal sum in the Decree was shown as Kshs 1,720,000/= made up as follows:-

Pain and suffering	Kshs 50,000/=
Loss of expectation of life	Kshs 100,000/=
Loss of dependency	Kshs 1,120,000/=
Special damages	<u>Kshs 450,000/=</u>

Kshs 1,720,000/=

25. It also noted the opposing submissions by the Applicants that the rectification of the decretal sum was not made and those of the Respondents that the said rectification was made. It did not want to delve into the merits or otherwise of the said argument as that was not an issue that had been placed before it for determination. Suffice it to state that having paid a sum of Kshs 1,270,000/= as was indicated in the Judgment, it was evident from the sum that was indicated in the decree that there was a balance of Kshs 450,000/= that had remained unpaid. In view of this outstanding balance, this court found it necessary to consider if it could grant the Applicants an order for stay of execution pending appeal.

26. Notably, under Order 42 Rule 6 (1) of the Civil Procedure Rules, the appellate court has power to grant an order of stay of execution even if such order had not been granted by the court from which the appeal had been preferred. It was therefore not correct as the Respondents had argued that the present application ought to have been made in the lower court.

27. For an applicant to succeed in being granted an order for stay of execution, he has to demonstrate the following conditions as has been set out on Order 42 Rule 6(2) of the Civil Procedure Rules, 2010:-

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.

28. 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.

29. The Respondents did not file any Affidavit of Means to demonstrate that they would be able to refund the Applicants the decretal sum if the same was made to them and the Applicants succeeded in their intended Appeal. In the absence of proof to demonstrate their ability to refund the Applicants the decretal sum that had already been deposited in court and the remaining unpaid part of the decretal sum in the event the Applicants were successful in their Appeal, this court was satisfied that the Applicants would suffer substantial loss. They had thus satisfied the first condition of being granted a stay of execution pending appeal.

30. As can be seen hereinabove, this court accepted the Applicants position that they were not aware of the delivery of the Judgment. Bearing in mind that the Respondents proclaimed their goods on 8th July 2019 and they initially filed their Notice of Motion application on 18th July 2019 within the month, their application was made without undue delay. The Applicants only amended their application on 29th October 2019 to correct the order of how the parties appeared in the proceedings. In this regard, this court took the view that they had satisfied the second condition for the granting of an order for stay of execution pending appeal.

31. The Applicants had paid the Respondents part of the decretal sum and further deposited part of the decretal sum into court. They had therefore demonstrated that they had complied with the third condition of being granted an order for stay of execution pending appeal. However, there was need for them to pay the balance of Kshs 450,000/= which would be sufficient security as was binding upon them for the due performance of the decree herein.

32. Accordingly, as duty of the court is to do substantive justice to parties, this demanded that the Applicants be given an opportunity to ventilate their intended Appeal on merit while enjoying some conservatory orders.

DISPOSITION

33. For the foregoing reasons, the upshot of this court's decision was that the Applicants' Notice of Motion application that was amended on 29th October 2019 and filed on 2nd November 2019 was merited and the same is hereby allowed in terms of Prayer No (6) and (7) therein in the following terms:-

1. The Applicants be and are hereby directed to file and serve their Memorandum of Appeal within fourteen (14) days from the date of this Ruling.

2. The Applicants be and 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. THAT there shall be a stay of execution of the decree in Nairobi CMCC No 1385 of 2015 pending the hearing and determination of the Appeal on condition the Applicants shall deposit into court the sum of Kshs 450,000/= 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 33(1) 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 30th day of July 2020

J. KAMAU

JUDGE