



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. CIVIL APPLN. NO. 479 OF 2019**

**SUBRU MOTORS LIMITED.....APPLICANT**

**VERSUS**

**LINET NEHEMA ONYONI [suing as the administratrix & legal representative**

**of the estate of Gibon Gisore Ogechi [deceased].....1<sup>ST</sup> RESPONDENT**

**KELVIN MUCHANGI MBERIA.....2<sup>ND</sup> RESPONDENT**

**GICHUKI WINFRED.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Notice of Motion dated 5<sup>th</sup> July 2019 filed by *Subru Motors Limited* (the applicant) principally seeks leave to file an appeal out of time against the judgment and decree of the lower court in CMCC No. 5836 of 2013. The applicant also seeks orders of stay of execution pending disposal of its appeal and that upon grant of leave, the memorandum of appeal lodged together with the application be deemed as duly filed.

2. The application is supported by grounds stated on its face and the depositions in the supporting and further affidavits sworn on 5<sup>th</sup> July 2019 and 2<sup>nd</sup> March 2020 respectively by *John Mbogo*, a Director of the applicant. The applicant contends that it is aggrieved by the judgment of the learned trial magistrate delivered on 6<sup>th</sup> March 2019 but it was unable to file an appeal within time since it was not aware of the judgment until it was served with a proclamation and warrants of attachment and sale of property in execution of the decree; that the judgment was delivered without notice and the 1<sup>st</sup> respondent prior to commencing execution did not serve it with the decree or notice of entry of judgment.

3. In addition, the applicant avers that its intended appeal is arguable as demonstrated by the draft memorandum of appeal annexed to the supporting affidavit. It further urges the court to note that execution was imminent as demonstrated by the proclamation and warrants of attachment and sale of property already served on it in execution of the decree issued by the lower court.

4. It is the applicant's case that if leave and stay are not granted, it will suffer great prejudice as the decretal amount is substantial and its payment will not only adversely and severely affect its operations but will also render its intended appeal nugatory. The applicant also invited the court to note that the application was filed timeously. It also pledged to offer any security that may be imposed by the court.

5. The application is opposed by the 1<sup>st</sup> and 3<sup>rd</sup> respondents. The 2<sup>nd</sup> respondent did not file any response and the court was informed by *Mr. Kerongo*, learned counsel for the 1<sup>st</sup> respondent that the 2<sup>nd</sup> respondent did not participate in the proceedings in the lower court.

6. The 1<sup>st</sup> respondent who was the plaintiff in the trial court opposed the motion through her learned counsel, *Mr. Kerongo*. *Mr. Kerongo* through a replying affidavit sworn on 16<sup>th</sup> July 2019 deposed that there was inordinate delay of five months in filing the application after delivery of the impugned judgment; that the delay is not explained since the application was prompted by the execution process; that the intended appeal has no chances of success; that the 1<sup>st</sup> respondent being the successful litigant should be allowed to enjoy the fruits of her judgment. Counsel urged the court to dismiss the application with costs for lack of merit.

7. On his part, the 3<sup>rd</sup> respondent opposed the motion vide a replying affidavit sworn on 30<sup>th</sup> September 2019. He deposed that the application lacked merit as the applicant had failed to establish sufficient basis for the exercise of the court's discretion in its favour; that the intended appeal does not have any chances of success and that the application had been filed with the sole aim of further prejudicing his

interests. He implored the court to find that the delay in filing the application was inordinate and inexcusable and dismiss the application with costs.

8. By consent of the parties, the application was canvassed by way of written submissions. The applicant filed its submissions on 5<sup>th</sup> March 2020 while those of the 1<sup>st</sup> and 3<sup>rd</sup> respondents were filed on 22<sup>nd</sup> May 2020 and 22<sup>nd</sup> June respectively.

9. I have carefully considered the application, the affidavits on record both in support and in opposition to the motion. I have also given due consideration to the rival written submissions filed on behalf of the parties and all the authorities cited. Having done so, I find that only two main issues crystalize for my determination. These are whether the applicant is entitled to grant of leave to file an appeal out of time and if it is, whether it is entitled to orders of stay of execution pending disposal of its intended appeal.

10. Starting with the first issue, *Section 79G* of the *Civil Procedure Act* provides that appeals to the High Court should be filed within 30 days of the challenged judgment or order but the proviso thereof gives this court unfettered discretion to admit an appeal filed out of time or to grant leave to a deserving applicant to file an appeal out of time. As held by the Supreme Court in **Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others, [2015] eKLR**, extension of time to file an appeal is not an automatic right of a party. It is an equitable remedy which can only be granted to a deserving party at the discretion of the court. A party seeking the exercise of the court's discretion under the proviso to *Section 79G* of the *Rules* must lay before the court sufficient material demonstrating that he had good cause or reason for failing to file the appeal within the prescribed time.

11. However, like all other judicial discretions, the courts discretion must be exercised judiciously in accordance with established legal principles and the facts of each case. It should not be exercised arbitrarily or capriciously.

12. The Court of Appeal in **Thuita Mwangi V Kenya Airways Limited, [2003] eKLR** and **Edith Gichugu Koine V Stephen Njagi Thoithi, [2014] eKLR** gave guidance on the factors a court should take into account when exercising its discretion in applications such as the present one. The court should consider the following factors, among others:

- i. The period of the delay;
- ii. The reasons for the delay;
- iii. Whether the intended appeal is arguable;
- iv. The degree of prejudice to the respondent if the extension sought was granted; and
- v. The nature of the dispute and whether it raises issues of public importance or public interest.

Guided by the above factors, I will now proceed to consider the application.

13. Having considered the affidavits on record and the parties' rival submissions, I find that it is not disputed that the impugned judgment was delivered on 6<sup>th</sup> March 2019. The intended appeal therefore ought to have been filed on or before 7<sup>th</sup> April 2019. The instant motion was filed on 5<sup>th</sup> July 2019 about three months later. In my view, a delay of three months is not inordinate if a reasonable explanation is given to explain the delay.

14. In this case, the applicant contends that it was unable to file its intended appeal on time because it was not aware of the date that judgment was delivered; that it only became aware of existence of the judgment when the 1<sup>st</sup> respondent commenced the execution process and served it with a notice of proclamation and warrants of attachment and sale of its property; that being dissatisfied with the judgment, it then took swift remedial action by filing the instant application.

15. Whereas I agree with the position taken by the respondents that the applicant ought to have followed up with the trial court to ascertain when judgment was scheduled to be delivered, I find that this omission does not negate the fact that the judgment was not delivered on the date it was initially reserved and that it was eventually delivered without notice to the applicant. Mr. Kerongo has admitted in his replying affidavit that the applicant was not represented in court on 30<sup>th</sup> November 2018 when the judgment date was fixed. The judgment of the trial court annexed as "JM2" confirms also confirms that the applicant who was a third party in the suit was not present or represented when the judgment was delivered on 6<sup>th</sup> March 2019.

16. Flowing from the foregoing, I am satisfied that the applicant has proved to the satisfaction of this court that it was not aware of the existence of the judgment till the 1<sup>st</sup> respondent commenced the execution process against it. Considering that the proclamation, warrants of attachment and sale of property exhibited by the applicant are dated 28<sup>th</sup> June 2019, it is obvious that by that time, the 30 day period prescribed for filing of appeals to this court had already expired.

17. Regarding whether or not the intended appeal is arguable, I have perused the grounds advanced in the draft memorandum of appeal and having also read the judgment of the trial court, I am convinced that the applicant has demonstrated that it has an arguable appeal. It must be remembered that an arguable appeal is not one which must succeed but one which cannot be said to be frivolous. *See: Stanley Kangethe Kinyanjui V Tony Keter & 5 Others, [2013] eKLR.*

18. Turning to the respondent's claim that they are going to suffer prejudice if the application was allowed, I agree with the 1<sup>st</sup> respondent that allowing the application will not doubt occasion her some inconvenience and further delay in enjoying the fruits of her successful

litigation. It is however my view that the right of a successful litigant to enjoy fruits of judgment must be weighed against the right of the other party to access appellate courts if aggrieved by the trial court's decision provided that where an appeal is not filed within time like in this case, sufficient cause is shown why the appeal was not filed within the stipulated time.

19. As far as the 3<sup>rd</sup> respondent is concerned, I am unable to see what prejudice he is likely to suffer if the application was allowed considering that it is clear from the trial court's judgment that the suit against him was dismissed with costs.

20. In applications such as the present one, the court is called upon to perform a delicate balancing act between the competing interests of the parties and to arrive at a decision which is fair to all and which meets the ends of justice.

Considering that the applicant is aggrieved by the trial court's judgment, I find that if I dismissed the application, the applicant will be thrown out of the seat of justice before ventilating its grievances on appeal and this may violate its constitutional right of access to justice.

If on the other hand the application was allowed, the 1<sup>st</sup> respondent is not likely to suffer any prejudice which cannot be ameliorated by an award of costs.

In view of the foregoing, I am satisfied that prayer 1 of the motion is merited and it is hereby allowed. The applicant is granted leave to file and serve its intended appeal within 14 days of today's date.

21. I now turn to address the applicant's prayer for stay of execution pending appeal. The law governing grant of stay of execution pending appeal is set out in *Order 42 Rule 6* of the *Civil Procedure Rules (the Rules)*. *Rule 6 (1)* states as follows:

**“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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, 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.”**

22. In my view, the above rule is clear that a court can only grant stay of execution of a judgment or order if an appeal has already been filed and is pending hearing. My take is that the existence of an appeal is a condition precedent to the exercise of the courts discretion under *Order 42 Rule 6(1)* of the *Rules*. Needless to state, there is no appeal pending before this court and that is why the applicant sought in prayer 1 leave to file its appeal out of time.

23. The applicant has pleaded in the motion that a memorandum of appeal it had allegedly filed out of time be admitted and be deemed to have been duly filed. I have carefully perused the court record and I have not across such a memorandum of appeal. What I have seen is a draft memorandum of appeal which is annexed to the supporting affidavit. The same is neither dated nor signed and as its title suggests, it is just a draft showing the grounds the applicant intends to advance on appeal. Since it is just an annexure to the supporting affidavit, it is not a pleading meant to institute the applicant's appeal and it is thus not filed.

24. Had the applicant filed a memorandum of appeal out of time, I would have regularized the appeal and admitted it out of time having found that the applicant had good reason for not filing it on time. This would have given me a basis for considering the applicant's prayer for stay of execution pending disposal of the appeal.

25. Having found as I have above, as matters now stand, there is no appeal on record on the basis of which this court can exercise its discretion to grant stay pending appeal. In the premises, I do not find any merit in prayer 3. In my view, applications for stay of execution pending appeal should be made within existing appeals and not in applications seeking enlargement of time to file an appeal.

26. That said, I hold the view that under *Section 3A* of the *Civil Procedure Act* which give courts inherent power to make such orders as may be necessary to meet the ends of justice as read with the overriding objective of the *Civil Procedure Act*, this court has power to order stay of execution pending the filing of the applicant's intended appeal in order to preserve the substratum of the intended appeal. Since the applicant has been given leave to file its intended appeal within the next 14 days, it is hereby granted stay of the trial court's judgment to last for 14 days from today.

27. The 1<sup>st</sup> respondent is awarded thrown away costs of KShs.20,000 to be paid by the applicant within the next 14 days.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>th</sup> day of July 2020.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms Wanjala holding brief for Mr. Kirimi for the 3<sup>rd</sup> respondent

No appearance for the 1<sup>st</sup> & 2<sup>nd</sup> respondents

No appearance for the applicant

Ms. Mwinzi Court Assistant