



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISCELLANEOUS CIVIL APPLICATION NO. 157 OF 2018**

**COUNTY GOVERNMENT OF UASIN GISHU.....APPELLANT/APPLICANT**

**VERSUS**

**ABBEY RESORT LIMITED.....JUDGMENT CREDITOR**

**AND**

**KENYA COMMERCIAL BANK.....1<sup>ST</sup> GARNISHEE**

**NATIONAL BANK OF KENYA.....2<sup>ND</sup> GARNISHEE**

**CO-OPERATIVE BANK.....3<sup>RD</sup> GARNISHEE**

**RULING ON THE APPLICATION DATED 13/6/2018**

1. By an application dated 13/6/2018, the County Government of Uasin Gishu/Applicant seeks ORDERS that

**a. Spent**

**b. This Honourable Court be pleased to issue an order of stay of execution of the ruling delivered by Hon. B. Morara (P.M) and any consequential orders thereof on the 15/11/2017 pending the hearing and determination of this application interparties.**

**c. That this Honourable court be pleased to enlarge time and grant leave to the Applicant to file an appeal out of time against the Order of this Court given on the 15/11/2017**

**d. Upon grant of Prayer (c) above, this Honourable Court be pleased to issue an order of stay of execution of the ruling dated 15/11/2017 and any other consequential orders thereof pending hearing and determination of the Appeal.**

2. The application is premised on **Sections 1A, 3A and 79 (a) of the Civil Procedure Act, and Orders 42 rule 6 of the Civil Procedure Rules**; and grounds stated on the face of the application; and a supporting affidavit sworn by the applicant's Advocate Omollo H. Aseso on the 13/6/2018. In opposing the application, the Respondent filed a Replying Affidavit, sworn on the 27/6/2018 and filed on the 28/6/2018.

3. On the 28/6/2018, an ex parte Interim Order of Stay of execution of the Decree in **Nakuru CMCC No. 737 of 2011** was granted to the applicant pending hearing and determination of this application interparties.

To urge the application, parties have filed written submissions. The applicant's submissions are dated 9/11/2018. While those by the Judgment Creditor, Abbey Resort Limited are dated 18/10/2018.

**4. APPLICANT'S SUBMISSION** are that the trial court allowed the judgment Creditor, by an application dated 18/3/2016 to take out garnishee proceedings against the applicant's bank accounts in several banks to levy execution against it, a County Government.

It submits that it was not aware when the ruling was delivered as no notice was served, and only came to discover it was delivered upon perusing the court file, during which time the time for filing an appeal had expired, thus the application. It is further submitted that the delay was occasioned by want of service of notice for delivery of the Ruling on the 27/9/2017, and further that a request for proceedings several times has not been honoured. It is a further submission that this application was brought soon, (three months) upon learning of the delivered

ruling and thus no inordinate delay on its part, citing the case

**Gahir Engineering Works Ltd Vs. Rapid kate Services & another (2015) e KLR.**

5. On arguability of the appeal it is submitted that the said ruling violates **Provisions of Section 21 (4) of the Government Proceedings Act and Order 29 Rule 2 (2) (c) of the Civil Procedure Rules, as well as Article 189 (1) of the Constitution** that recognizes existence of the two levels of Government the National and County Governments.

6. It is a further submission that the applicant would suffer prejudice if the orders sought are not granted, and cited the case **Charles Muchemi Ikinya Vs. Florence Wambui Kungu (2015) e KLR** to buttress its arguments that a party should not be denied a determination of its claim on merits because of procedural default unless the default causes prejudice to the opponent party for which an award of costs cannot compensate.

7. By its submissions, I am urged to order a stay of execution and grant leave for filing the intended appeal out of time. A draft Memorandum of Appeal is annexed to the supporting affidavit.

**8. JUDGMENT CREDITOR'S SUBMISSIONS** are that the application is incompetent as the application ought to have filed the Memorandum of Appeal first, then seek leave under **Section 79 G of the Civil Procedure Act, and cites the case Asma Ali Mohamed Vs. Fatime Mwinyi Juma CA 75/2014 and Gerald M'Kimbine Vs. Joseph Kangangi (2009) e KLR.**

It is urged that the applicant has not satisfied the conditions for an order for extension of time as stated in the case **Nicholas Kiptoo Arap Korir Vs. IEBC & 7 Others, SC Application No. 16/2014.**

**9. On stay of execution**, the respondent submits that the applicant has not met the threshold for such order of stay, as stated under **Order 42 Rule 6 CPR.**

**10. ANALYSIS AND DETERMINATION.**

It is trite and a Statutory imperative under **Section 21(4) of the Government Proceedings Act** that no execution or attachment process may be issued for enforcement of payments by the Government of any money, or costs save by leave of the Court, and upon obtaining a certificate of order against such government, including a County Government as recognized **under Article 189 of the Constitution.**

11. The manner of execution is well stated. It is only after compliance with **Section 23 and 29** that execution proceedings may ensue against any of the two levels of Government. The elaborate procedure is stated under **Order 29 and 53 of the CPR.**

12. **Order 29 Rule 2(2) CPR** provides that no execution of decrees and orders **under Order 22** shall be granted against the Government, unless a certificate against the said government is issued by the Registrar. **Rule 4** provides that no order for attachment of debts under **Order 23** shall be made in respect of any money due or accruing from the Government. This includes attachments of Bank Accounts of the Government by way of Garnishee proceedings.

13. Thus, the action of garnisheeing the County Government of Uasin Gishu Bank Accounts to settle the Civil debt is illegal and unlawful.

**In Republic Vs. County Secretary, Nairobi County & another & Ex parte Wachira Nderitu Ngugi & Co. Advocates (2016) e KLR**, the court held that

**“This court must therefore protect devolution and promote its principles. It must not condone actions which are likely to promote onslaught on the County Government and grind its operations to a halt and paralyse it from realizing and fulfilling its constitutional mandate.----- the immunity granted to the National Government under Section 21(4) of the Government proceedings Act must necessarily extend to the County Governments”.**

14. The court in **Kilimanjaro Safari Club Ltd Vs. Governor Kajiado County (2014) e KLR**, declared Garnishee proceedings against the County Government unsustainable, and against the law, for lack of conformity with the **Governments proceedings Act and Order 29 of the Civil Procedure Rules.**

15. To that extent, the action by the Judgment creditor, Abbey Resort Limited to garnishee the Applicant's Bank Accounts at Kenya Commercial Bank, National Bank and Co-operative Bank, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Garnishee respectfully were unlawful and must be lifted forthwith.

**Consequently the interim stay of execution order against the Applicant granted on the 28/6/2018 is hereby confirmed.** The judgment debtor may pursue execution of the decree against the judgment debtor only pursuant to the laid down, proper and legal process.

**16. Extension of time to file appeal out of time.**

I have considered the reasons for the delay in filing the appeal within the statutory period.

I note that the only objection by the Judgment Creditor on this issue is that the applicant has not filed the appeal before applying for leave.

17. Section 79 G of the Civil Procedure Act provides:

**“Every 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 had good and sufficient cause for not filing the appeal in time”**

18. Different courts have interpreted the above provision differently: whether the appeal ought to be filed before seeking leave or after obtaining leave. In **Asma Ali Mohammed (Supra)** the court was of the opinion that the appeal ought to have been filed prior to applying for leave. Same position was taken by the court in **Gerald M’limbiwe (Supra)**.

19. I have considered other superior court decisions, where the judges have used the two scenario interchangeable; and holding that what is material are the reasons for the delay – **Dilpack Kenya Ltd Vs. William Muthama Kitonyi (2018) e KLR**.

20. In **Charles Karanja Kiiru Vs. Charles Githinji Muigwa (2017) e KLR** the Court of Appeal sitting at Mombasa discussing the twin issues of stay of execution pending hearing and determination of Appeal and leave to file appeal out of time rendered, in respect to **Rule 4** of its Rules, that

**“The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the court, or of a Superior Court, for the doing of any act authorized or required by these Rules, Whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended”.**

21. Unlike in the **Gerald M’limbine Case, in Martha Wambui Vs. Irene Wanjiru Mwangi & another (2015) e KLR**, the court held

**“in my view, the use of the term “admitted” connotes both the act of allowing an appeal to be filed out of time and also the act allowing or permitting an appeal already filed to be admitted out of time.**

22. The Supreme Court pronounced itself in **Nicholas Kiptoo Arap Korir (Supra)** that

**“-----by filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such “an appeal”, is tantamount to moving the court to remedy an illegality. This, the court cannot do”.**

It went ahead to state that

**“-----No appeal can be filed out of time without leave of the court. Such filing renders the “document” so filed a nullity and of no legal consequence”.**

23. Guided by the Supreme Court holding above (**Nicholas Kiptoo Arap Korir Case**) that an appeal ought not be filed out of time then the party moves the court for leave to file the appeal out of time, or in other words, to admit the appeal out of time. An illegality ought not be sanitized by an order of the court.

24. In reference to the application before me, the applicant had not filed the intended appeal, but annexed a draft. That I find to be in order, there being no appeal filed without leave of court.

I am satisfied by the reasons for the delay as expounded in the supporting affidavit as well as the prejudice that would be caused to the applicant if leave is not granted.

25. I am further minded that a court of law should be very slow and hesitant at closing the door to justice to a litigant due to procedural flaws – **Article 159 (2) (d) of the constitution**.

Consequently, there being no serious opposition by the Respondent in granting leave to the applicant to file an appeal out of time, **I hereby allow Prayer No (c) of the application dated 13/6/2018.**

26. In respect of Prayer (d), I am being asked to give an order in anticipation that the applicant will comply with Order (c). That I will not do. There is no appeal filed, upon which I can order stay of execution pending hearing as envisaged under **Order 42 rule 6** of the none existent appeal. That is jumping the gun, or the cue. It is premature.

Once the appeal is filed in line with Prayer (C), the applicant may move the court for the appropriate Orders of stay.

27. Costs of the application shall be costs in the cause

**DELIVERED, SIGNED AND DATED ELECTRONICALLY AT NAIROBI THIS 27<sup>TH</sup> JULY, 2020.**

**J.N. MULWA**

**HIGH COURT JUDGE**

