



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO 120 OF 2018**

**PETER NJAU KIMEMIA**

**REUBEN KINYANJUI.....APPELLANTS**

**VERSUS**

**EVANSON MWANIKI WANJIRU.....RESPONDENT**

**RULING**

1. The undisputed background to the motions filed on 29<sup>th</sup> May 2020 by the Appellants **Peter Njau Kimemia** and **Reuben Kinyanjui** and that filed by the Respondent **Evanson Mwaniki Wanjiru**, on 11<sup>th</sup> June 2020 is as follows.

2. The Appellants were aggrieved by the judgment of the lower court in **Kikuyu CMCC No. 240 of 2015**, delivered on 31<sup>st</sup> August 2018 in which damages were awarded to the Respondent. On 26<sup>th</sup> September 2018 they filed a memorandum of appeal in this Court. In the ten or so months that followed, no further step was taken in the appeal. On 15<sup>th</sup> July 2019, the Appellants approached this Court under certificate of urgency seeking an order to stay execution pending appeal.

3. On the same date, this Court granted conditional stay pending appeal. Unknown to the court at the time, a previous application for stay dated 8<sup>th</sup> October 2018 had been filed in the lower court, *ex parte* orders of stay issued but it was dismissed for non-attendance by the Appellants' counsel on the hearing date. A subsequent application to reinstate the dismissed motion suffered a similar fate on 26<sup>th</sup> November 2018 for non-attendance by the applicant's counsel. Ditto for the subsequent application to set aside the dismissal orders of 26<sup>th</sup> November 2018. These matters were not disclosed in the affidavit supporting the motion filed herein on 15<sup>th</sup> July 2019 and which was apparently prompted by the Respondent's renewed execution.

4. Although this Court had on 15<sup>th</sup> July 2019 directed that a sum of KShs.1,000,000/= be deposited into court within a limited period as a condition for the stay order, the Applicants did not comply, instead filing, on 3<sup>rd</sup> September 2019 an application, allowed by Ogembo J, for extension of time. Eventually on 29<sup>th</sup> August 2019 the sum of KShs.1,000,000/= was deposited into court. The Respondent seemingly aggrieved by the extension of time filed his own motion on 16<sup>th</sup> September 2019 seeking to set aside the order for extension of time for deposit and the release of the sum held in court.

6. Nevertheless, when the parties appeared before the court for the *inter partes* hearing of the motions filed on 15<sup>th</sup> July 2019 and 16<sup>th</sup> September 2019, a consent order was recorded in terms that there be stay of execution pending appeal, conditional upon the Appellants filing their record of appeal in 90 days, failing which the appeal would stand dismissed. Secondly, for the security sums held by the court to be deposited into an interest earning bank account in the joint names of the parties' advocates.

7. It has now emerged that by the said date, the Appellants had not even applied for certified copies of the proceedings in the lower court, the first and only request having been filed in the lower court on 14<sup>th</sup> October 2019, over one year and a month since judgment. Unsurprisingly therefore the Appellants could not file their record of appeal on time. Pursuant to the consent order of 23<sup>rd</sup> September 2019, the appeal herein therefore stood dismissed as at 25<sup>th</sup> January 2020.

8. On 29<sup>th</sup> May the Appellants filed the motion subject to this ruling seeking two key prayers;

(a) that the court extends the time for the filing of the record of appeal;

(b) that there be stay of execution pending the determination of the appeal.

On grounds that there had been delay in obtaining the lower court proceedings and that the Appellants stood to suffer substantial loss, a warrant of arrest having been issued in the lower court. It was asserted by the deponents to the two supporting affidavits that the lower court proceedings had been obtained on 28<sup>th</sup> May 2020 and the record of appeal compiled. The court on 29<sup>th</sup> May 2020 granted the prayer for interim stay and the applications set for hearing on 16<sup>th</sup> June 2020.

9. However, on 3rd June 2020 the court received a copy of a complaint of even date addressed to the Chief Justice and the Judiciary Ombudsman among others, alleged professional misconduct by the trial Judge. The unsigned complaint apparently raised on behalf of the Respondent by an outfit describing itself as Kituo cha Haki Ngong lamented the conduct of the Appellants in this matter and levelled allegations of improper conduct against the Judge. For her part, the Respondent's counsel filed a motion on 11th June 2020 seeking to set aside the *ex parte* orders of 29th May 2020 and the release of the deposited security to the Respondent. The court directed that the said motion be heard on 16th June 2020 alongside and adverted in its order to the complaint filed on 3rd June 2020.

10. On 16<sup>th</sup> June 2020 the court inquired into this latter matter and sought to know whether the Respondent desired that the Judge recuses herself. Counsel explained the circumstances in which the complaint came to be lodged, allegedly without the Respondent's instructions and stated that the matter ought to proceed before this Court. The court declined to deal with the matter and directed counsel to obtain full instructions from her client. The matter was stood over to 15<sup>th</sup> July 2020.

11. In the interim period, by a letter dated 10<sup>th</sup> July 2020, the Respondent's counsel disowned the complaint, asserting that although the Respondent had visited the offices of **Kituo cha Haki Ngong** to plead for financial assistance, at no time did he authorize the said body to lodge a complaint on his behalf. He therefore sought that the complaint be expunged from the records. The latter letter was addressed to the Judge and also copied to the recipients of the complaint letter of 3<sup>rd</sup> June 2020 and Kituo Cha Haki Ngong.

12. In these circumstances, the motions filed on 29<sup>th</sup> May 2020 and 11<sup>th</sup> June 2020 proceeded to hearing. Ms. Ondieki for the Appellants sought to rely on the affidavits supporting their motion and the Replying Affidavit filed on 16<sup>th</sup> June 2020 in opposition to the Respondent's motion. For her part, Ms. Kihika for the Respondent pointed out that the motion by the Appellants did not contain a prayer for reinstatement of the appeal hence the Appellants' motion is hanging in the air. Pointing to the Appellant's delay in seeking proceedings in the lower court, she asserted that even after receiving the proceedings, the Appellants had not filed the record of appeal. She relied on the case of **Nicholas Kiptoo Arap Salat v IEBC & Others [2014] eKLR** on the principles of extension of time and stated that the Appellants do not deserve the orders sought and their application ought to be dismissed. She sought release of the deposited sum to the Respondent.

13. In a rejoinder Ms. Ondieki conceded that there was no appeal subsisting hence the prayer to enlarge time; that the Appellants had explained the delay in filing the record of appeal; and that if their application is disallowed there will be a miscarriage of justice as the Appellants or one of them, stands to lose his liberty *via* execution.

14. The court has considered all the matters canvassed in respect of the motions as well as the background thereto. The Appellants' motion is expressed to be brought under Order 42 rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. In the circumstances of this case, Order 50 rule 6 of the Civil Procedure Rules which has not been invoked, is the provision applicable in an application for enlargement of time. Similarly, the provisions of Order 42 Rules 7 and 9 of the Civil Procedure Rules invoked by the Respondent appear to have no application to his motion. Order 50 Rule 6 of the Civil Procedure Rules provides that:

**“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:**

**Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”**

15. What then are the applicable principles? In the case of **Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission and 7 Others [2014] e KLR**, the Supreme Court stated that:

**“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:**

**Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;**

**A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court**

**Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**

**Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**

**Whether there will be any prejudice suffered by the respondents if the extension is granted;**

**Whether the application has been brought without undue delay; and**

**Whether in certain cases, like election petitions, public interest should be a consideration for extending time”.**

16. The case of **John Tomno Cheserem vs Sammy Kipketer Cheruiyot [2018] e KLR** in which a motion was brought under Rule 4 of the Court of Appeal Rules appears to have specific relevance to the matter at hand as Rule 4 of the Court of Appeal Rules is in *pari materia* with the provisions of Order 50 Rule 6 of the Civil Procedure Rules. The application in that case was for enlargement of time or leave to file a record of appeal out of time. The court (**Mohammed J**) observed that:

**“7. 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. In exercising my discretion I ought to be guided by consideration of the factors started in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and any interested parties if the application is granted, and whether the matter raises issues of public importance. In the case of Fakir Mohammed V Joseph Mugambi & 2 Others, Civil Appln No. Nai 332/04 (unreported) this Court rendered itself thus:-**

**“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”**

**[8] The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In Mwangi V. Kenya Airways Ltd, [2003] KLR 48, the Court having set out matters which a single Judge should take into account when exercising the discretion under Rule 4, went on to hold:-**

**“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”**

17. The Appellants having filed their appeal on 26<sup>th</sup> September 2018 did not seek to obtain the proceedings in the lower court for a period of over a year. Their first and only written request exhibited as annexure “SWM” to the supporting affidavit of **Susan Murage**, though dated 26<sup>th</sup> September 2019 was not lodged in the registry of the lower court until 14<sup>th</sup> October 2019. No explanation has been attempted for this period of delay, during which the Appellants filed but did not prosecute several applications for stay before the lower court. The delay of one year is inordinate, and in this case compounded by the demonstrated tardiness on the part of the Appellants in the handling of their applications filed before the lower court.

18. It is asserted in the affidavit of one **Jonathan Mutisya**, a court clerk in the firm of **Wagaki Murage and Co. Advocates** representing the Appellants that:

**“8. THAT since we made our application, I have visited Kikuyu Law Courts registry severally to check on the position of the typed proceedings.**

**9. THAT another letter was written on 23<sup>rd</sup> January 2020 and each time I visited the registry, I was informed by the registry staff that the typing was not yet completed....**

**11. THAT I managed to get the proceedings on the 28<sup>th</sup> May 2020 and have now compiled the record of appeal.”**

19. The above depositions appear to be contradicted by the depositions of Susan Murage who in her replying affidavit filed on 16.06.2020 asserted at paragraph 5 that the proceedings of the lower court had been certified by 5<sup>th</sup> March 2020. Why it took a further 1½ month for the Appellants to collect the proceedings is not explained in either supporting affidavit. During the hearing counsel for the Appellants asserted from the bar that the proceedings were back dated! That aside, neither the alleged letter of 23<sup>rd</sup> January 2020 nor a copy of the alleged compiled record of appeal are annexed to his affidavit. Further no certificate of delay is attached to either supporting affidavit to give credence to the Appellant’s assertions. And while some delay is expected in the procurement of lower court proceedings, it is evident that the Appellants did not help the situation by their failure to promptly apply for proceedings upon filing this appeal. As earlier stated, no explanation has been tendered for the Appellants’ delay of a full year before seeking the proceedings and none for the late collection of the same.

20. The court is obligated to balance the competing interests of the Appellants with those of the Respondent. The Appellants are entitled to the right of appeal while the Respondent has a judgment in his favour. In **M/s Port Reitz Maternity v James Karanga Kabira Civil Appeal No.63 of 1997** the Court of Appeal stated that:

**“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”**

21. In other words, the extension of time ought not to cause undue prejudice to the Respondent who has a judgment in his favour. It is almost two years since the judgment was passed. Further delay, especially given the Appellants' indolent conduct will occasion the Respondent undue prejudice. There is a further reason why the Appellant's motion cannot be granted. As conceded by the Appellants, the appeal herein stood dismissed as of 25<sup>th</sup> January 2020. In yet another demonstration of their ineptitude, the Appellants have not included a prayer for the reinstatement of the appeal in the motion filed on 29/05/2020. When this was pointed out, they responded that that was the reason for seeking extension of time. Of what value will an order to allow filing the record of appeal out of time be if the appeal no longer exists?

22. It has been repeated often before courts by erring counsel that the mistakes of counsel ought not to be visited on the parties. But it is equally true that cases belong to parties and it is their duty to keep up with their advocates. And since parties are entitled to counsel of their choice, if their counsel repeatedly fails to attend court and to take proper necessary steps in good time, as appears to be the case herein, the party must bear the consequences. Such a party cannot be allowed to offload such consequences upon the innocent adverse party. I think I have said enough to demonstrate that the Appellants' motion filed on 29<sup>th</sup> May 2020 is both misconceived and without merit. The same is dismissed with costs. With that, there can be no further purpose for this court retaining the sum of KShs.1,000,000/= as security. The Court will therefore allow prayer (3) of the Respondent's motion filed on 11<sup>th</sup> June 2020. The costs occasioned by the two applications are awarded to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 7<sup>TH</sup> DAY OF AUGUST 2020.**

**C MEOLI**

**JUDGE**