



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 71 OF 2019**

**MOHAMMED HASSAN IBRAHIM.....APPLICANT**

**VERSUS**

**TABITHA NJOKI KANYIRU & CYPRIAN KAIBUNG'A**

**(Suing as the legal representative of the Estate of**

**PANCRAS KANYIRI INEBU.....RESPONDENT**

**RULING**

The applicant filed the present application dated 8<sup>th</sup> April 2019 seeking the following orders;

- a) Stay of execution of judgment and decree in Eldoret CMCC no. 180 of 2016 pending the hearing and determination of the appeal filed in the High Court
- b) Leave to file an appeal out of time from the judgment and decree in Eldoret CMCC No. 180 of 2016.

**APPLICANT'S CASE**

The applicant filed submissions on 4<sup>th</sup> March 2020. He submits that he was in Sudan at the time of the judgment and only heard of the result when he returned one month later.

The applicant submitted that as per the supporting affidavit of the deponent, he knew when the judgment was entered against his client but he was not in a position to act further without the instructions of the client who was based in Sudan. The delay was not deliberate.

When the applicant got the information he acted on the same by filing the present application. He submitted that the court consider the principles of natural justice and be guided by *Order 50 rule 6* and *Section 79G* of the *Civil Procedure Act*.

The applicant further cited *Section 79G* and *Section 95* of the *Civil Procedure Act* and submitted that he had a valid reason for the delay.

The respondent will not suffer any prejudice and it is the applicant who is suffering prejudice as the judgment was already entered against him. Should the judgment be delivered in favour of the respondent after the appeal has been heard, the appellant is in a position to compensate the respondent in monetary terms.

**RESPONDENT'S CASE**

There are no submissions on record for the respondent.

The respondent filed a replying affidavit on 14<sup>th</sup> May 2019.

She deponed that the application is bad in law as the supporting affidavit has been deponed to by a stranger to the suit, Hassan Mutembei. The applicant is forum shopping as he has filed a similar application in the lower court seeking the same orders. The application in the lower court is dated 23<sup>rd</sup> April 2019. The same was attached and annexed as A.

The application is an attempt to deny the respondent from enjoying the fruits of judgment by filing numerous applications for stay since the 2<sup>nd</sup> defendant in the primary suit is enjoying interim orders and his application is also pending determination and the same is coming up on

22<sup>nd</sup> may 2019. The order was attached to the affidavit.

From paragraph 5 of the supporting affidavit, the defendant was duly informed of the judgment through counsel holding his brief M/s Wanjiku Karuga & Company Advocates.

An appeal ought to be filed within 30 days and it can only be filed out of time if the appellant satisfies the court that he/she had sufficient cause for the delay in appealing. The applicant has not shown sufficient cause for the reasons that despite not being present in court at the time the judgment was delivered, they were served with the notice of entry of judgment and 30 days stay of execution granted to them. Further, they have not demonstrated the reason for delay in informing their clients on time.

The applicant has not proven that the respondent is impecunious hence undeserving to be paid the decretal dues. The application does not meet the requirements for grant of stay of execution pending appeal as it has not put the facts in the affidavit to show the respondent will be unable to pay the decretal sum on the conclusion of the appeal if successful. No credible evidence to enable the court reach the conclusion that the applicant will suffer substantial loss if the decretal sum is paid. The refusal of stay will not render the appeal nugatory as it involves a money decree capable of being repaid.

The condition precedent of granting stay is the deposit of security which the respondent prays he be paid half of the decretal amount and the other half be deposited in a joint interest earning account within 14 days.

The applicant has not demonstrated his seriousness in pursuing the appeal and has not attached a memorandum of appeal to enable the court determine whether there is an appeal with high chances of success. The respondent will be greatly prejudiced if the application is allowed as the applicant has come to the court with unclean hands and further, he has not demonstrated what substantial loss is likely to be suffered if the application is disallowed.

The application should be disallowed with costs.

#### **ISSUES FOR DETERMINATION**

- a) Whether the application for stay of execution of orders pending appeal should be granted.
- b) Whether the applicant should be granted leave to file the appeal out of time.

#### **WHETHER THE APPLICATION FOR STAY OF EXECUTION OF ORDERS PENDING APPEAL SHOULD BE GRANTED**

The conditions to be met before stay is granted are provided by *Order 42 Rule 6(2)* of the *Civil Procedure Rules, 2010* as follows:

**“No order for stay of execution shall be made under subrule (1) unless—**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

The applicant contends that the delay in filing the appeal was occasioned by his presence in Sudan at the time judgment was delivered. The applicant's advocates have not demonstrated the reason they failed to inform their clients on time. The delay has not been adequately explained. In this day and age of advanced communication technology, I find it highly improbable that the applicant's advocates were completely unable to reach him.

The applicant has not demonstrated that he will suffer substantial loss that cannot be compensated by way of damages. There is no evidence that the respondent is a man of straw who is unable to refund the decretal sum.

It is evident that the applicant has filed a similar application in the trial court. The same is annexed as A in the respondent's replying affidavit. It was filed on 23<sup>rd</sup> April 2019. It was filed two weeks after the present application had been filed. I find this as an abuse of the court process. I am inclined to agree with the respondent that the applicant is forum shopping.

In the premises, the application for stay of execution is unmerited and fails in its entirety.

#### **WHETHER THE APPLICANT SHOULD BE GRANTED AN ENLARGMENT OF TIME TO FILE THE APPEAL**

*Section 79G* of the *Civil Procedure Act* provides as follows:

***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, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***

***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.*

In *First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65* the Court set out the factors to be considered in deciding whether or not to grant such an application and these are:-

**(i) The explanation if any for the delay;**

**(ii) The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;**

**(iii) Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.**

The applicant's explanation for the delay is not sufficient. The applicant's advocates claim he was indisposed. They have not provided any evidence to ascertain so.

The draft memorandum of appeal has not been presented to the court to enable it determine the merits of the contemplated action.

The applicant has not shown that the respondent is impecunious and will be unable to pay the decretal sum if the intended appeal succeeds.

I find that the application does not meet the legal threshold for the enlargement of time. In the premises the application fails in its entirety and is dismissed with costs to the Respondent.

**S.M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 24<sup>th</sup> day of September, 2020.**

In the absence of:-

Mr. Mutembei for the applicant

Mr. Oduor for the respondent

Ms Gladys - Court assistant

Parties be notified of the ruling delivery.

**SIGNED**

**S.M GITHINJI**

**JUDGE**