



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

MISC CIVIL APPLICATION NO. 107 OF 2020

BETWEEN

GULF FABRICATORS LIMITED.....1ST APPLICANT

GORDON ORURE KAOKO.....2ND APPLICANT

VERSUS

KENYA COMMERCIAL BANK (K) LIMITED.....RESPONDENT

RULING

1. By a judgment dated 17.06.2019, the trial court entered judgment for the Respondent against the Applicants for Kshs. 447,815.58.

2. By notice of motion dated 19.06.2020 filed on even date, brought under Sections 1A, 1B, 3A, 75 (1), 78, 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya and Order 42, 43 rule (1), (2) and (3) and 51 of the Civil Procedure Rules, the Applicants pray for orders that:

- 1) **The Honourable Court be pleased to grant leave to the Applicants to appeal out of time**
- 2) **There be a stay of execution pending the hearing and determination of the intended appeal**
- 3) **That the costs of this application be provided for**

3. The application is based on the grounds among others that the delay in filing the appeal was purely inadvertent and is excusable.

4. The application is supported by the affidavit sworn by the 2nd Applicant on 19.06.2020 in which he reiterates the grounds on the face of the application and more particularly that the delay in filing the appeal was occasioned by delay in obtaining the court judgment and proceedings. Annexed to a second affidavit sworn by **COSMAS OYOO LAJA** sworn on 19.06.2020 is the court judgment, letter dated 19.12.19 by the firm of Amondi & Co Advocates for the Applicants requesting for copies of proceedings and judgment and receipt dated 23.12.19 for the same marked AOB 1, 2 &* 3 respectively.

5. The application is opposed by way of a replying affidavit sworn by **KEZIAH AUMA**, advocate for the Respondent, sworn on 01.07.2020.

She avers that a party does not require copies of proceedings and judgment and that the Applicants who moved the court a year after the judgment was delivered are underserving of the orders sought.

Analysis and Determination

6. I have considered the submission filed for the Applicants and for the Respondent and annexures thereto. The main issue for determination is whether the Applicants ought to be granted leave to appeal out of time.

7. The law on extension of time is to be found in Section 95 of the Act which states as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may,

in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

8. Order 50 of the Civil Procedure Rules on the other hand states 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”.

9 Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya states that:

“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 anytime 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”.

10. The powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered. In the case of Eliud Buku Thuku v Beatrice Wambui Mwangi [2013] eKLR, the Court of Appeal reiterated the parameters for exercise of court’s discretion as set out in Mutiso v Mwangi [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

11. As much as the discretion of the court is unfettered, an Applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the invocation of the court’s discretion in his favor.

12. I have considered the holding in Edward Kamau & Another v Hannah Mukui Gichuki & Another [2015] eKLR cited by the Applicants. The case is distinguishable from this case for the reason that the Applicant in that case filed an application to appeal out of time just 7 days after discovery of the judgment which the court found was not inordinate unlike in this case where the Applicants knew about the judgment from the date of its delivery on 17.06.2019 but filed the present application a year later on 19.06.2020.

13. The Applicants’ assertion that the delay in filing the appeal was occasioned by delay in obtaining the court judgment and proceedings is not factual for the reason that they did not require them to file a notice of appeal (See Murata Sacco Society Ltd V Banking, Insurance Finance Union (Kenya) [2019] eKLR).

14. This court appreciates that it has the inherent discretion under Section 3A to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. The court is also enjoined under Article 159(2) b of the Constitution to do justice without any delay.

15. The Court of Appeal in the case of Simon Thuo Mwangi v Unga Feeds Limited [2015] eKLR cited Esther Waimaitha Njihia & Others Vs. Safaricom Ltd (2014) eKLR with approval and reiterated that:

“The exercise of judicial discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice”. (Emphasis added).

16. From the material presented before the court, it is clear that the Applicants were well aware of the judgment delivered on 17.06.2019 but only moved the court a year later after they were served with the notice to show cause dated 11.06.2020.

17. The conduct of the Applicants demonstrates that they are seeking to deliberately obstruct the cause of justice and to deny the Respondent the fruits of its judgment.

18. From the foregoing, I am persuaded that the Applicants are guilty of inordinate delay that has not been sufficiently explained and I therefore decline to exercise my discretion in favour of granting leave to file the notice of appeal out of time.

19. Having said that, I correspondingly decline to grant a stay of execution of the decree in the impugned judgment.

20. Consequently and for the reasons stated hereinabove, I have come to the conclusion that the notice of motion dated 19.06.2020 is devoid of merit and it is hereby dismissed with costs to the Respondent.

DATED AT KISUMU ON THIS 23rd DAY OF September 2020

T.W. CHERERE

JUDGE

Court Assistant

- Ms. Amondi

For Applicants

- Ms. Mathairo for Amondi & Co. Advocates

For Respondent

- Ms. Auma for Watako Kirui & Co. Advocates

Order

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID -19