



**REPUBLIC OF KENYA**

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

**CIVIL MISC. APPLICATION NO. 20 OF 2020**

**NJAGI PETER.....APPLICANT**

**VERSUS**

**JOSEPH MUSYIMI MUSYOKA.....RESPONDENT**

**RULING**

1. The applicant took out a motion on notice dated 26<sup>th</sup> May 2020, seeking this court's leave to lodge an appeal out of time against the judgment delivered on 4<sup>th</sup> June 2019 in CMCC No. 372 of 2016. He also applied for stay of execution pending the hearing and determination of the intended appeal.
2. The motion is predicated on sections 3A, 79G, and 95 of the Civil Procedure Act and orders 22 rule 22, 42 rule 6, 50 rule 6 and 51 rules 2 and 3 of the Civil Procedure Rules 2010, and all enabling provisions of the law. The motion is supported by the grounds on its face and the applicant's affidavit sworn on 26<sup>th</sup> May 2020.
3. According to the applicant, although the judgment he intends to appeal against was delivered on 4<sup>th</sup> June 2019, the trial magistrate was thereafter transferred and his effort to trace the file was not successful. He states that although there were instructions to appeal, such an appeal could not be filed without the trial court's file being traced.
4. The applicant states that he is aggrieved with the trial court's judgment and would like to appeal against that decision but his efforts have been frustrated. He further states that he is willing to furnish reasonable security and that unless leave is granted, he will suffer irreparable loss and may be unable to recover decretal sum if execution was to proceed.
5. The respondent filed a replying affidavit sworn and filed on 11<sup>th</sup> June 2020. He deposes that the application has not been made in good faith; the application is aimed at delaying payment of the decretal sum and the application is an abuse of the process of the court.
6. According to the respondent, there has been an inordinate and inexcusable delay in filing the appeal for about one year. He states that although the applicant was aware of the judgment, he did not file the appeal in time. He also states that the applicant has not provided evidence to support his allegation that he was not able to trace the court file. He urges the court to dismiss the application.
7. Parties agreed to dispose of the motion by way of written submissions. The applicant filed his submissions dated 24<sup>th</sup> June 2020 while the respondent's submissions are dated 29<sup>th</sup> June 2020.
8. The applicant submits that the court has inherent power to make orders that may be necessary for the ends of justice. He argues that he wishes to appeal against the trial court's decision and the ends of justice demand that leave be granted. He relies on Wachira Karani v Bildadi Wachira [2016] eKLR, for the submission that section 3A is clear that nothing in the Civil Procedure Act should inhibit the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.
9. According to the applicant, the fundamental duty of the court is to do justice between the parties, and that duty calls on the court to afford parties an opportunity to have their cases determined on merit.
10. The applicant urges the court to exercise its powers under section 3A and grant leave to appeal. He relies on Patel v East Africa Cargo Handling Services Limited [1974] EA 75, for the submission that the main concern of the court is to do justice to the parties, and that the court will not impose conditions on itself to fetter its wide discretion under the rules.
11. The applicant further relies on section 95 of the Civil Procedure Act which grants the court power to enlarge time. According to the applicant, he has an arguable appeal as can be seen from the draft of Memorandum of Appeal annexed to his affidavit in support of the motion. He relies on Kenya Revenue Authority V Sidney Keitany Changle & 3 Others [2015] eKLR and Samuel Mwaura Muthambi v

Josephine Wanjiru Nguji & Another [2018] eKLR, for the argument that all an appellant needs to show is the arguability of his appeal.

12. Relying on section 79G, the applicant submits that the court has power to admit an appeal out of time if good reason or substantial cause is shown. He relies on several other decisions and urges the court to grant leave.

13. On stay, the applicant relies on Order 42 Rule 6 of the Civil Procedure Rules which outlines the circumstances under which the court may grant stay of execution pending appeal. He relies on Tabro Transporters Limited v Absalom Dora Lumbasi [2012] eKLR on when substantial loss is shown among other decisions.

14. The respondent has filed written submissions dated 29<sup>th</sup> June 2020 and filed on 16<sup>th</sup> July 2020. On stay, the respondent argues, relying on Antoine Ndiaye v African Virtual University [2015] eKLR, that whether or not to grant stay is the court's discretion to be exercised judicially and on principles established under Order 42 Rule 6. The respondent submits that to succeed, an applicant must satisfy the principles in Order 42 Rule 6. He relies on Machira v/a Machira & Company Advocates v East African standard (No. 2) [2002] KLR 63 for the submission that a court should not be obsessed with the protection of the intended appellant in total disregard of the party who has a judgment in his favour.

15. The respondent also argues that the application has not been brought timeously. According to him, although judgment was delivered on 4<sup>th</sup> June 2019, the application was not filed until 29<sup>th</sup> May 2020. He submits that the applicant's advocates were served with letter dated 26<sup>th</sup> July 2019 on 29<sup>th</sup> July 2019 informing them of the contents of the judgment, but they took no steps to file the appeal. In his view, the application is an afterthought.

16. On whether the applicant will suffer substantial loss, the respondent argues that he will not. He again relies on the Machira Case (supra) for the argument that in an application for stay, it is not enough for an applicant to merely state that he will suffer substantial loss. He must prove specific details and particulars of the loss to be suffered.

17. He also relies on James Wangalwa & Another v Agnes Naliaka Cheseto (Bungoma Misc. Appl. No. 42 of 2011), for the submission that an applicant should show that execution will create a state of affairs that will irreparably affect or negate the very essence of the application if it is the successful party on appeal.

18. Regarding security, the respondent argues that although the applicant had shown willingness to provide security, he, respondent, is also entitled to equal protection and treatment before the law.

19. On leave to appeal, he argues that the court is being called upon to exercise discretion on whether or not to extend time to appeal. Relying on Mwangi v Kenya Airways Limited [2003] eKLR, the respondent contends that the court should consider the period of delay, reason for delay; arguability of the appeal; the degree of prejudice to be suffered by the respondent if extension is granted; importance of compliance with time limits and effect on the administration of justice.

20. The respondent submits that the applicant has failed to demonstrate or give any substantive reason why there was delay. He argues that there is no evidence in terms of letters or correspondence to show that he made effort to obtain proceedings for purposes of an appeal and what challenges he faced.

21. He also argues that although judgment was delivered on 4<sup>th</sup> June 2019, no application was made until about one year later. He relies on Port Reiz Maternity v James Karanga Kabia CA No. 63/1997, for the argument that the right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of a judgment delivered in his favour, and that there must be just cause for depriving the plaintiff of that right. He urges the court to dismiss the application.

22. I have considered the motion, the response and submissions by parties. I have also considered the authorities relied on. The application seeks two principal orders. Leave to appeal and stay of execution. The judgment sought to be appealed against was delivered on 4<sup>th</sup> June 2019, while the application for leave to appeal and stay of execution was made on 29<sup>th</sup> May 2020.

23. The applicant has urged the court to exercise its discretion and grant both orders. The respondent on his part has opposed grant of the orders, arguing that the applicant has not shown good reason why the application should be allowed. Both parties have relied on a number of decisions to support their respective positions.

### **Leave to Appeal**

24. The law grants every person who is aggrieved with a judgment, the right to appeal. Section 65 of the Act allows appeals from subordinate courts to this court. on the other hand, section 79G sets the time within which an appeal should be filed. It states:

***“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.”***

25. As it is, section 79G gives this court discretion to extend time within which an appeal should be filed where good reason or sufficient cause is shown. Court decisions are also clear that the court's discretion to extend time to appeal may be granted on certain parameters. Just

like the proviso to section 79G, the decisions lay down the principle that an applicant must satisfy the court that he had good and sufficient cause for not filing the appeal on time and that the court should always exercise its discretion judicially.

26. The judgment sought to be appealed against was delivered on 4<sup>th</sup> June 2019. The applicant argued that after the judgment was delivered, they tried to pursue an appeal but could not do so since the trial court proceeded on transfer and they could not trace the file. The applicant has not attached evidence to show that he tried to trace the court file and actually sought the court's assistance without success. The applicant did not even state when, if at all, he finally got the file. What he did was to make depositions without evidence that he genuinely made effort to appeal but was frustrated by circumstances not of his making.

27. I have considered each party's arguments on this limb. As already stated, the law grants the applicant the right to appeal. He was to file the appeal within thirty days but he did not. He has blamed the court for not filing his appeal on time. I have already stated that there is no evidence that he made effort to get the file for purposes of lodging the appeal.

28. That notwithstanding, the law gives this court wide discretion when it comes to extension of time to appeal. However, when exercising its discretion, the court should try and render substantive justice to parties. This will be achieved if the court allows the applicant to challenge the impugned judgment.

29. I also note that the respondent has not stated what prejudice he will suffer if leave is granted to meet the ends of justice. For that reason, it is my view that the ends of justice would be better served if leave is granted to the applicant to lodge his appeal out of time.

### **Stay of execution**

30. The applicant has also sought stay of execution pending the filing and determination of the intended appeal. He argues that if stay is not granted, he will suffer substantial loss. The respondent has opposed grant of stay, arguing that there was not only inordinate delay but also that there is no evidence that the applicant will suffer substantial loss. The respondent further argues that he equally has a right in the judgment delivered in his favour and the court should also consider this right. Both parties rely on a number of decisions to support their respective positions.

31. Whether or not to grant stay calls for exercise of discretion. There are well settled principles upon which stay may be granted. The law is clear that an appeal alone does not act as stay of execution. In that regard, Order 42 Rule 6 provides for grounds upon which the court exercises its discretion to grant stay.

32. First, an applicant must show that he will suffer substantial loss if stay is not granted. The trial court delivered judgment in favour of the respondent for Kshs. 153,000/=. The applicant has argued that he will suffer substantial loss if stay of execution is not granted. He has however not shown how that will be the case.

33. In James Wangalwa & another v Agnes Naliaka Cheseto [2012]eKLR, the Court observed;

***“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”***

34. In Equity Bank Ltd v Taiga Adams Company Ltd [2006] eKLR, the Court again stated that *the only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent, that is; execution is carried out, in the event the appeal succeeds, the respondent would not be in a position to pay back or reimburse the decretal sum because he is a person of no means.*

35. In Butt v Rent Restriction Tribunal Civil App No. NAI 6 of 1979, the court of Appeal stated as follows:

***i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.***

***ii. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.***

***iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.***

***iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.***

36. And in Machira v Machira & Company Advocates v East African standard (N0. 2) (supra), the court cautioned thus:

***“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the***

***exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court". (emphasis)***

37. The applicant has not, apart from stating that he will suffer substantial loss, shown how that will likely to be the case. It was not enough to just depose and state that he will suffer substantial loss to persuade the court to exercise its discretion in his favour. He was required to go further and satisfy the court that indeed he would suffer something special that would amount substantial if stay was not granted. This, he has failed to do.

38. The applicant is also required to show that the application has been made without delay. Judgment was delivered on 4<sup>th</sup> June 2019. The application was not made until 29<sup>th</sup> May 2020. There cannot be argument that the application was made timeously. He not attempted to satisfy this court that there was good reason for not filing the application for stay timeously.

39. A party who seeks the court's exercise discretion in his favour must satisfy the court that he deserved that discretion. In the present circumstances, the applicant has not shown that he acted diligently. He has not shown that he is not to blame for the delay and how his plea for stay should be balanced with the respondent's right conferred by the judgment delivered in his favour. He has not shown that the respondent is an impecunious man who cannot refund the decretal sum if it was paid and that he will therefore suffer substantial loss.

40. Flowing from what I have stated above, the application partially succeeds and I make the following orders.

***a. Leave is hereby granted to the applicant to file an appeal out of time.***

***b. Appeal be filed within fourteen (14) days from the date of this order.***

***c. The prayer for stay of execution is declined.***

***d. Each party do bear their own costs of the application.***

Orders accordingly

**Dated, Signed and Delivered at Kajiado this 18<sup>th</sup> day of September 2020.**

**E. C. MWITA**

**JUDGE**