



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 231 OF 2020

EQUITY BANK LIMITED.....APPLICANT

-VERSUS-

RICHARD KEROCHI AYIERA.....RESPONDENT

RULING

1. The Notice of Motion dated 26th June, 2020 brought by the appellant/applicant who sought for the substantive orders for leave to file an appeal out of time against the judgment and decree of Honourable D.O. Mbeja (Mr.) (Senior Resident Magistrate) delivered on 24th April, 2020 in Milimani Chief Magistrate's Civil Case No. 7245 of 2015, and for a stay of execution of the aforesaid judgment pending hearing and determination of the intended appeal.
2. In support of the Motion are the grounds set out on its face and the facts stated in the affidavit of *Kariuki Kingori*, Manager-Legal Services in the applicant company.
3. In his affidavit, the deponent stated that the applicant is dissatisfied with the decision of the lower court and wishes to challenge the same on appeal but that the appeal was not filed in good time since the impugned judgment was delivered in the absence of a judgment notice and without the knowledge of the applicant's advocate. That the applicant's advocate only came to learn of the judgment on 10th June, 2020 upon perusing the lower court file.
4. The deponent further stated that the appeal raises arguable issues which ought to be determined on merit and that the instant application has been brought without unreasonable delay.
5. It was the averment of the deponent that unless an order for a stay of execution is granted, the applicant which is a financial and money lending institution stands to suffer substantial loss and that there is no guarantee that the respondent will refund the decretal amount once the same is paid to him and the appeal succeeds.
6. The respondent resisted the Motion by putting in a replying affidavit and stated that upon delivery of the impugned judgment, a copy of the same was soon thereafter forwarded to the applicant's advocate and hence he was at all material times aware of the existence of the judgment, and that the applicant has not shown the prejudice it stands to suffer if leave is not granted for it to file an appeal out of time.
7. It was the assertion of the respondent that the instant application has not been brought in good faith and should this court deem it fit to grant the orders sought, then the respondent urges this court to order the applicant to deposit the entire decretal sum together with costs, amounting to Kshs.581,882.73.
8. The Motion was disposed of by way of written submissions, with the applicant arguing that part of the delay in filing the instant appeal was occasioned by the prevailing Covid-19 pandemic challenges which led to the closing of many offices as well as the courts. The applicant also reiterated that no notice of judgment was served upon its advocate and that the judgment was delivered in the absence of the parties herein. The applicant therefore urged this court to consider the holding in the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR** where the court upon considering that no communication was given to the applicant regarding the judgment among other prevailing circumstances, granted an extension of time for the applicant to lodge an appeal.
9. The applicant further argued that it has an arguable appeal as seen in the grounds of appeal raised in its draft memorandum of appeal. Reliance was placed *inter alia*, on the reasoning by the Court of Appeal in the case of **Kenya Railways Corporation v Erdemann Property Limited [2012] eKLR** that the existence of an arguable appeal is a ground for granting stay orders.
10. It was the submission of the applicant that unless an order for a stay of execution is granted upon filing of the intended appeal, the appeal

will be rendered nugatory since the decree is partly monetary in nature and contains a colossal amount. To support its submission, the applicant made reference to the case of **Kenya Hotel Properties Limited v Willesden Investments Limited [2007] eKLR** in which the Court of Appeal rendered itself thus:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.”

11. The applicant indicated its willingness to provide security for the due performance of the decree and urged this court to direct that the sum of Kshs.581,882.73 be deposited in a joint account.
12. In reply, the respondent submitted that the applicant has not demonstrated the substantial loss it stands to suffer and that in any event, he is able to repay the decretal sum in the event that the appeal succeeds, while citing the case of **Butt v Rent Restriction Tribunal [1979] eKLR** in which the Court of Appeal held that there was no basis for holding that the respondent in that instance would not repay the decretal sum if the appeal was successful.
13. The respondent further submitted that in the event that an order for a stay of execution is granted, then this court should order that half the decretal sum be released to him and the remaining half be deposited in court or in a joint account.
14. I have considered the grounds as presented in the Motion, the facts deponed in the affidavits supporting and opposing the Motion, and the rival written submissions and authorities cited.
15. The Motion sought for twin prayers. I will first determine the prayer on extension of time and leave to file an appeal out of time.
16. Under the provisions of **Order 50, Rule 6** of the **Civil Procedure Rules**, the courts have power to enlarge the time required for the performance of any acts stipulated in the Rules notwithstanding the fact that such time has expired. It therefore follows that whether to extend time is a matter of judicial discretion. The discretionary power of the courts was reaffirmed by the Court of Appeal in the case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997 (unreported)** cited by the applicant, when it held that:

“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 in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted.”
17. When it comes to appeals from the subordinate court to the High Court, the applicable provision is **Section 79G** of the **Civil Procedure Act** which expresses that appeals of such nature must be filed within a period of 30 days from the date of the decree or order from which the appeal lies.
18. The above proviso is also clear that leave to file an appeal out of time can only be granted to a party where sufficient cause has been shown. From the record, it is not in doubt that in the present instance, the applicants did not comply with the timelines of **Section 79G** (supra).
19. That being said, for purposes of determining the guiding principles to be met in an application seeking leave of the court to file an appeal out of time/extension of time, I turn to the case of **Thuita Mwangi v Kenya Airways Limited [2003] eKLR** and which principles were echoed in the case of **Growth Africa (K) Limited & another v Charles Muange Milu [2019] eKLR**.
20. The first and second principles concern the length and reason for the delay respectively. I have already established that the impugned judgment was delivered on 24th April, 2020, while the instant Motion was filed within a period of close to three (3) months on 2nd July, 2020. Upon considering the length of the delay, I do not find it to be inordinate or unreasonable.
21. On the reasons behind the delay, I considered the material availed to show that the impugned judgment was originally listed for delivery on 16th March, 2020 and yet it was delivered one (1) month later, and the explanation by the applicant that no judgment notice was served upon its advocate. I also considered the averment by the respondent that his advocate had served upon the applicant’s advocate a copy of the judgment soon thereafter and I looked at a copy of the correspondence dated 28th April, 2020 to that effect; however, I note that the said correspondence does not bear any indication that service was effected upon the applicant’s advocate. In the premises and upon further considering the prevailing circumstances resulting from the Covid-19 pandemic, I find the explanation of the applicant to be reasonable.
22. On the third principle to do with whether an arguable appeal exists, the Court of Appeal in the case of **Kenya Railways Corporation v Erdemann Property Limited [2012] eKLR** quoted in the applicant’s submissions, succinctly stated that an arguable appeal is not one which will necessarily succeed but is one that raises arguable grounds.
23. On looking at the draft memorandum of appeal annexed to the Motion as “KK3” I note that the appeal essentially seeks to challenge *inter alia*, the decision of the trial court to issue a permanent injunction against the applicant; the award of Kshs.300,000/ made in favour of the respondent; and that the trial court overlooked some relevant factors in delivering its judgment. Without going into the merits of the appeal, I am satisfied the intended appeal raises arguable grounds which the applicant ought to be given an opportunity to address on merit.

24. The fourth principle concerns itself with the prejudice which will befall the respondent should leave be granted for the applicant to file an appeal out of time. From my study of the respondent's replying affidavit, I did not come across any credible evidence to indicate the prejudice that would befall him, that cannot be compensated by way of costs.

25. For all the foregoing reasons, I am satisfied that it would be a proper exercise of my discretion to enlarge the time required for the applicant to file an appeal against the judgment and decree of the trial court.

26. Having arrived at the above determination, I will now proceed to address the second limb of the Motion to do with the granting of an order stay of execution with reference to **Order 42, Rule 6 (2)** of the **Civil Procedure Rules** which specifies the principles for consideration in such applications.

27. As concerns the first principle on whether the application has been brought without unreasonable delay, I am satisfied that I have sufficiently analyzed it hereinabove.

28. This brings me to the second principle concerning substantial loss that will be suffered by the applicant. From my study of the averments made in the application and supporting affidavit, it is apparent that the applicant is anxious that its operations will be negatively impacted if an order for a stay of execution is denied, and more importantly, that the respondent will not be able to refund the decretal sum if the same is paid to him and the appeal succeeds. On his part, the respondent stated that he is financially capable of repaying the decretal sum.

29. I am alive to the fact that the courts have time and time again addressed the subject on who has the burden of proof on the issue of refund of the decretal sum. I am both guided and bound by the Court of Appeal's analysis in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** where it held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

30. It is clear from the foregoing that the respondent in the present instance bore the evidential burden of proving his financial ability to refund the decretal sum and yet he did not place any evidence or material before this court to demonstrate such ability.

31. In the absence of anything to ascertain the respondent's financial capacity, I am satisfied that the applicant has reasonably demonstrated that it stand to suffer substantial loss.

32. On the third and final condition relating to the provision of security for the due performance of the decree, the applicant expressed its willingness to deposit the sum of Kshs.581,882.73/ being the decretal sum plus costs. From my perusal of the judgment and decree, I established that the decretal sum is in the sum of Kshs.300,000/ and hence I am of the view that this would constitute the applicable sum to be deposited.

33. I also considered the proposal of the respondent that he be paid half the decretal sum but note that no reasonable explanation was given to support this proposal.

34. Consequently, the Motion dated 26th June, 2020 is allowed in respect to prayers (ii) and (iv) and the following orders are hereby made:

a) The applicant shall file and serve its memorandum of appeal within 14 days from today and shall compile, file and serve its record of appeal within 60 days from today.

b) There shall be a stay of execution of the judgment delivered on 24th April, 2020 on the condition that the applicant deposit the entire decretal sum of Kshs.300,000/ in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within 30 days from today, failing which the order for stay shall automatically lapse.

c) Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 29th day of October, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

.....**for the Appellant/Applicant**

.....**for the Respondent**