



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 779 OF 2019

PREMIER TRADING COMPANY LIMITED.....APPLICANT

VERSUS

PETER ONYANGO OGONDA.....1ST RESPONDENT

SAMUEL OBWIRI.....2ND RESPONDENT

RULING

1. In its Notice of Motion application dated 13th February 2020 and filed on 14th February 2020, the Applicant herein sought leave to file an appeal out of time and an order of stay of execution of the judgment and decree in **CMCC No 5365 of 2017** and all consequential orders pending the hearing and determination of the Appeal herein. On 13th February 2020, George Okune Indeche, the Applicant's Salesman and Supervisor swore an Affidavit on its behalf.

2. The Applicant stated that it was aggrieved by the decision of the lower court in which it was found to have been the owner of Motor Vehicle Registration Number KMDP 470L (hereinafter referred to as "the subject Motor Vehicle"). It averred that it delayed in instructing its advocates to file an appeal within time as it Director was out of the country.

3. It further contended that the delay was not inordinate and that its appeal had high chances of success and thus urged this court to allow its application as prayed.

4. In opposition to the said application, on 17th February 2020, Lourine L. Ochogo, the 1st Respondent's advocate swore a Replying Affidavit on its behalf. It was filed on 19th February 2020.

5. The 1st Respondent termed the present application as an abuse of the court process, an afterthought, premised on bad faith and a delaying tactic to deny him from enjoying the fruits of his judgment. He contended that the Applicant had not proffered any explanation for the delay in filing the said application. He was emphatic that its assertion that its Director was out of the country was a falsehood as it had not attached any proof that he was out of the country. He therefore urged this court to dismiss the present application.

6. The Applicant relied on the cases of **Samuel Munyi Njagi & Another vs Harrison Munyi Njagi [2014] eKLR** to argue that the 1st Respondent failed to enjoin the correct party and hence their omission ought not to be visited upon them.

7. It placed reliance on the case of **Mwangi vs Kenya Airways Ltd (2003) KLR** where it stated the Court of Appeal gave scenarios where an order for stay of execution pending appeal could be granted.

8. On the other hand, the 1st Respondent argued that the Applicant ought to have filed its Appeal as provided for in Section 79 G of the Civil Procedure Act Cap 21 (Laws of Kenya) and that the reason of the delay of five (5) months five (5) days was not well explained. He submitted that he was going to be greatly prejudiced if the application was allowed as he was left with permanent scars after the accident.

9. He added that the application had not met the threshold of being granted an order for stay of execution and in this regard, relied on the case of **Machira t/a Machira & Co Advocates vs East African Standard (No 2) (2002) KLR**.

10. As the 1st Respondent correctly argued, Section 79G of the Civil Procedure Act Cap 21 (Laws of Kenya) provides that an appeal has to

be lodged within thirty (30) days from the date of delivery of the decision to be appealed.

11. This court took cognisance of the fact that every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.

12. It is for that reason that Section 79 G of the Civil Procedure Act provides that an appeal can be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not having filed his appeal within the prescribed time. A similar conclusion was arrived at by Odunga J in **Dilpack Kenya Limited vs William Muthama Kitonyi [2018] eKLR**.

13. Further, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It stipulates as follows:-

“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...”

14. Having said so, the extension to file an appeal out of time is not a matter of course. The court has to consider certain factors before allowing an application for extension to file an appeal out of time. These are the period of delay, the reason for the delay, the chances of the appeal succeeding and/or the arguability of the appeal and the prejudice that would be suffered by a respondent if the said application for leave to file an appeal out of time was granted as was held in the case of **Mwangi vs Kenya Airways Limited** (Supra).

15. Notably, the decision the Applicant intended to appeal against the decision that was delivered on 19th September 2019. The period of filing an appeal expired on 18th October 2019. The initial Originating Summons was filed on 11th December 2019. This was about two (2) months after the period of filing an appeal had expired. The said Originating Summons was subsequently amended on 13th February 2020.

16. It was evident from the Applicant’s Supporting Affidavit that no reason was proffered to explain the delay in filing the appeal as no proof was attached to show that its Director was out of the country, a fact that was correctly pointed out by the 1st Respondent. Having said so, even in the absence of a plausible explanation, if it can be shown that no prejudice has been suffered by the opposing party, courts must always strive to do substantive justice to both parties.

17. It was also the considered opinion of this court that the period of about two (2) months between the time the appeal was to be filed and the time the present application was filed, was not inordinate.

18. The question of whether or not the Learned Trial Magistrate erred in having found the Applicant to have been vicariously liable for the negligence of the driver of the subject Motor Vehicle was not a frivolous issue. It was an arguable point of law and fact as was contemplated in the case of **Mwangi vs Kenya Airways Limited** (Supra).

19. This court was thus persuaded that it was in the interests of justice that the Applicants herein be granted leave to file an appeal out of time.

20. Turning to the question of a stay of execution pending appeal, the court noted that before an applicant could be granted an order for stay of execution pending appeal, he had to demonstrate that he had met the following conditions that have been set out on Order 42 Rule 6(2) of the Civil Procedure Rules, 2010:-

a. That substantial loss may result unless the order is made.

b. That the application has been made without unreasonable delay.

c. Such security as the court orders for the due performance of the decree has been given by the applicant.

21. It is trite law that the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed as the Respondents pointed out in their submissions. The key word is **“and”**. It connotes that all three (3) conditions must be met simultaneously. Indeed, Order 42 Rule 6 (2) of the Civil Procedure Rules is couched in mandatory terms. It states that:-

“No order for stay of execution shall (emphasis court) 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.”

22. The decretal sum herein was a sum of Kshs 184, 750/= . It was not a colossal amount of money. However, the 1st Respondent did not file an Affidavit of Means to demonstrate his ability to refund the Applicant the money in the event it was successful in the intended appeal. The difficulties in recovering the decretal sum that had been paid before an appeal is heard, which appeal has been successful, would in the mind of this court amount to substantial loss.

23. In the case of G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR, this very court held as follows:-

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

24. In the absence of proof that the 1st Respondent would be able to refund the Applicant the decretal sum without any hardship, this court was satisfied that the Applicant would suffer substantial loss. The Applicant had thus satisfied the first condition of being granted a stay of execution pending appeal.

25. Turning to the issue of filing the application without undue delay, this court had already determined hereinabove that there was no inordinate delay in filing the same. The Applicant had thus satisfied the second condition for the granting of an order for stay of execution pending appeal.

26. Whereas the Appellant had not offered to provide security for the due performance of such decree or order as may ultimately be binding on it, this court nonetheless determined that it could order that it provides such security as would be binding on it.

27. Weighing the Applicant’s right to have its dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important 1st Respondent’s fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicant if it was denied an opportunity to ventilate its Appeal on merit in the event an order for stay of execution was not granted. It was in the interests of justice that it be accorded a conducive environment to canvass its Appeal by being granted preservative orders.

DISPOSITION

28. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Notice of Motion application dated 13th February 2020 and filed on 14th February 2020 was merited and the same is hereby allowed in the following terms:-

1. The Applicant be and is hereby directed to file and serve its Memorandum of Appeal within fourteen (14) days from the date of this Ruling.

2. The Applicant be and is hereby directed to file and serve its Record of Appeal within one hundred and eighty (180) days from the date of this Ruling. In the event the proceedings of the lower court and the lower court file will have been placed in the file herein and the Applicant shall have failed to file its Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed.

3. Since the Applicant does not have control of the court diary, the Registrar of High Court Civil Division Milimani Law Courts is hereby directed to facilitate the typing of proceedings and placing of the lower court file within ninety (90) days from date of this Ruling.

4. THAT there shall be an order for stay of execution of the judgment and decree in CMCC No 5365 of 2017 and all consequential orders therein pending the hearing and determination of the Appeal herein on condition that the Applicant shall deposit into an interest earning account in the joint names of its advocates and the advocates for the 1st Respondent, the decretal sum of Kshs 184,750/= within thirty (30) days from the date of this Ruling.

5. For the avoidance of doubt, in the event, the Applicant shall default on Paragraph 28(4) hereinabove, the conditional stay of execution shall automatically lapse.

6. Either party is at liberty to apply.

7. Costs of the application will be in the cause.

29. It is so ordered.

DATED and DELIVERED at NAIROBI this 25th day of November 2020

J. KAMAU

JUDGE