



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO 17 OF 2020

PETER KARIUKI BORO.....1ST APPLICANT

NELLY WAIRIMU WANJIKU.....2ND APPLICANT

VERSUS

CHARLES NYANDORO.....RESPONDENT

RULING

1. In their Notice of Motion application dated 20th January 2019 and filed on 21st January 2019, the Applicants sought an order for stay of execution of the judgment of Hon A.M. Obura, Senior Principal Magistrate that was entered on 26th November 2019 in respect of **CMCC No 9751 of 2018 Charles Nyandaro vs Peter Kariuki Boro & Another** pending hearing and determination of the appeal herein and leave to file their appeal out of time. Their said application was supported by the Affidavit of their advocate, Hope Wambugu that was sworn on 20th January 2020.
2. The Applicants' advocate contended that the Applicants were aggrieved by the aforesaid judgment and although they intended to appeal against the same time, time to do so had already run out. She explained that they were instructed to appeal on 10th January 2020 during which their offices were closed for the Christmas break from 20th December 2019 to 13th January 2020.
3. The Applicants averred that the delay in filing the present application was not inordinate and that the Respondent would not suffer any prejudice if their application was allowed. They pointed out that it was they who would suffer untold loss if the decretal sum was released to the Respondent herein as he had no known stable means of income. They added that they were ready to deposit the decretal sum and to abide by any conditions issued by the court.
4. They asserted that their appeal was arguable and had high chances of appeal and thus urged this court to grant their application because their appeal might be rendered nugatory if the same was not granted.
5. In opposition to the said application, the Respondent swore a Replying Affidavit on 13th February 2020. The same was filed on even date.
6. He stated that there was no appeal to warrant an order for stay of execution being granted. He further averred that the Applicants were aware of the date of entry of judgment but that they deliberately failed to attend court.
7. They termed the present application as an abuse of the court process that was aimed at denying him his fruits of judgment and urged this court to dismiss the same with costs to them.
8. The Applicants placed reliance on the cases of **Joseph Gitonga Kuria vs Elizabeth Wambui Gitonga & Another [2016] eKLR**, **Focin Motorcycle Co Ltd vs Ann Wambui Wangui & Another [2018] eKLR**, **Housing Finance Company of Kenya vs Sharok Kher Mohamed Ali Hirji & Another [2015]eKLR** amongst other cases to support their case.
9. On the other hand, the Respondent relied on the cases of **Rosalindi Wanjiku Macharia vs James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased) [2017] eKLR** and **Bajaber Salim Ali & 2 Others vs Phillip Mbatha [2019] eKLR** to buttress their case.
10. All the parties were agreed upon on the conditions that must be met before an order for extension seeking leave to file suit out of time could be granted. 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 (2013) KLR and Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another [2018] eKLR that was relied upon by the Applicant herein.

15. The Applicants did not deny having known that the judgment the decision they intended to appeal against was delivered on 26th November 2019. What was in contention was the reason for the delay in filing the Appeal herein, Notably, this period of filing an appeal expired on 20th January 2020. This is because time stopped running from 21st December 2019 to 13th January 2020.

16. The Applicants' advocates explained that they received instructions to file an appeal on 10th January 2020 when their offices were still closed for the Christmas break. Notably, they ought to have pursued instructions from the Applicants as they knew the consequences of not filing an appeal out of time. It was immaterial that they were proceeding on the Christmas break. It was nonetheless the view of this court that they could still have filed their Appeal on 20th January 2020 as they had been at their offices at least six (6) days before. It appears that they never factored in the fact that time stopped running as aforesaid.

17. Having said so, it would be punitive to punish the Applicants for the mistakes of their advocates. Indeed, it is trite law that no party should be penalised just because there was a blunder particularly by his or her advocate. Indeed, in the case of Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR, it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

18. Further, it was the considered opinion of this court that the period of about a day between the time the appeal was to be filed and the time the present application was filed was not inordinate. Accordingly, as duty of the court is to do substantive justice to parties, this demanded that the Applicants be granted leave to file an appeal out of time.

19. Turning to the issue of an order for stay of execution pending appeal, this court took the view that it could grant the said order notwithstanding that there was no appeal that had been filed. This is because the order for stay of execution could either be granted by the court from which an appeal was being preferred from or by the court to which an appeal was preferred.

20. Indeed, Order 42 Rule 6 of the Civil Procedure Rules provides as follows:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just (emphasis court), and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

21. Having settled the said issue, this court determined that before a court could grant an order for stay of execution, it had to be satisfied that the applicant had demonstrated the conditions that have been set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. The said conditions are as follows:-

- 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.

22. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **“and”**. It connotes that all three (3) conditions must be met simultaneously.

23. The decretal sum herein was a sum of Kshs 200,000/=. It was not a colossal amount of money. However, the Respondent did not file an Affidavit of Means to demonstrate his ability to refund the Applicants the money in the event they were successful in the intended appeal.

24. 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.”

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

26. Turning to the issue of filing the application without undue delay, this court had already determined hereinabove that the present application was filed without undue delay. The Applicants had thus satisfied the second condition for the granting of an order for stay of execution pending appeal.

27. The Applicants had indicated that they were willing and ready to comply with the terms of the court regarding the security. This court was thus satisfied that they had demonstrated that they had complied with the third condition of being granted an order for stay of execution pending appeal.

28. Weighing the Applicants’ right to have their 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 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 Applicants if they were denied an opportunity to ventilate their Appeal on merit in the event an order for stay of execution was not granted.

DISPOSITION

29. For the foregoing reasons, the upshot of this court’s decision was that the Applicants’ Notice of Motion application dated 20th January 2020 and filed on 21st January 2020 was merited and the same is hereby allowed in terms of Prayer No (3) and (4) therein in the following terms:-

1. The Applicants are hereby directed to file and serve their Memorandum of Appeal within fourteen (14) days from the date of this Ruling.

2. The Applicants are hereby directed to file and serve their Record of Appeal within one hundred and eighty (180) days from the date of this Ruling.

3. The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the expeditious typing of the proceedings in the lower court to enable the Applicants comply with the timelines within which to file their Record of Appeal as aforesaid.

4. In the event the certified copies of the proceedings and Ruling to be appealed from will have been ready and the Appellant will have failed to file and serve its record of Appeal within one hundred and eighty (180) days from the date of the Ruling herein, the Appeal herein will stand as automatically dismissed.

5. There shall be a stay of execution of the judgment of Hon A.M. Obura, Senior Principal Magistrate that was entered on 26th November 2019 in respect of CMCC No 9751 of 2018 Charles Nyandaro vs Peter Kariuki Boro & Another pending hearing and determination of the appeal herein on condition that the Applicants shall deposit into an interest earning account in the joint names of their counsel and counsel for the Respondent the decretal sum of Kshs 200,000/= within forty five (45) days from the date of this Ruling.

6. For the avoidance of doubt, in the event, the Applicants shall default on Paragraph 29(4) hereinabove, the conditional stay of execution shall automatically lapse.

7. Either party is at liberty to apply.

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

30. It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd day of November 2020

J. KAMAU

JUDGE