



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL APPEAL NO. 35 OF 2020

WANJAU CHARLES WILSON.....1ST APPELLANT

SILVER BILL.....2ND APPELLANT

VERSUS

CHRISTINE ANYANGO AUMA

(suing as the legal representative and administrator of the estate of

PETER OUMA NGADA)..... RESPONDENT

RULING

1. The application for determination is the Motion, dated 20th July 2020. It is brought at the instance of the appellants, who I shall refer hereto as the applicants, as there is no proper appeal on record as at now. The Motion seeks, in the main, stay of execution and stay of any declaratory suit arising from the *ex parte* judgment dated 31st August 2017 and the ruling dated 20th February 2020, in Kakamega CMCCC No. 42 of 2016, and extension of time to appeal against the said ruling and the deeming of the memorandum of appeal filed herein as having been properly filed.

2. The reasons given by the applicant are on the face of the application. It is averred that the applicants were never served with the summons to enter appearance and the plaint, and that the affidavit of service sworn on 2nd December 2016, by a process server, was false. The applicants further aver that they filed an application dated 30th November 2018, seeking to set aside the *ex parte* judgment of 31st August 2017, and the same was delayed for a whole year before it was eventually delivered on 20th February 2020, without notice to the applicants. It is averred that the trial court erred in that ruling in holding that there was proper service on the 1st applicant, yet no summons to enter appearance had been issued against him, that could possibly be served. Secondly, it is averred that no affidavit of service was filed with respect to the 2nd applicant, as the one on record referred to service on the 1st applicant, and did not mention the 2nd applicant at all. It is also averred that the applicants did not know the Peter Nduru, who allegedly pointed out the 1st applicant within Kakamega township, for the purpose of service, and that they, the applicants, did not have any business premises at Canon Awuor Street or anywhere in Kakamega. They argue that they stand to suffer irreparable loss and damage, should they be denied their constitutional right to appeal, and that their appeal would be rendered nugatory. The application is supported by an affidavit, sworn on 20th July 2020, by Anthony Thuo Kanai, the advocate, for the applicants, whose contents are largely a replica of the contents of the grounds set out on the face of the Motion.

3. The response to the Motion is vide an affidavit that Vivian Shibanda, who is the advocate for the respondent, swore on 28th July 2020. She asserts that there was proper service, and points at the affidavit of service on record in the primary suit. It is further averred that the applicants' insurer, Fidelity Insurance Company, had been served with notice of intention to sue, before the primary suit was filed, but the insurer did not come on record for the applicants in the primary suit, but only placed itself on record when the declaratory suit was filed. She further asserts that the applicants and their insurer were well aware of all the matters relating to the accident claim, but chose to sleep on their rights. She further avers that the application for stay of execution and setting aside the proceedings was filed after the applicants had participated in the declaratory suit for over a year, and after the court had recorded a last adjournment after the applicants failed to provide witnesses. It is stated that the applicants rushed to apply for stay and setting aside in the primary suit, instead of prosecuting the declaratory suit as their response to the last adjournment order, which application was dismissed on 20th February 2020. It is further averred that the applicants' advocates were served with a notice of entry of interlocutory judgment in the primary suit, via courier service, on 11th December 2018, but they chose to take no steps in the matter. The same advocates were also served with a notice of delivery of the ruling of 20th February 2020, on 3rd March 2020, through registered post, but they still took no action in the matter. It is argued that the applicants have not explained why they did not file appeal on time, and is late by six months. It is also argued that the applicants have not demonstrated the irreparable loss that they would suffer.

4. Attached to the replying affidavit are several documents. There is the affidavit of service, sworn on 2nd December 2016.

5. The advocate for the applicants swore and filed a supplementary affidavit on 5th August 2020, where he largely reiterates that there was no service on the applicants, and gives reasons to support that contention: that no summons to enter appearance were ever issued for service upon the 1st applicant, that the process service alleged to have had served the 1st applicant despite the court not having any summons for service upon him, that the affidavit of service makes no mention of the 2nd applicant, and the relationship between the said 2nd applicant and the 1st applicant, that no affidavit of service was ever filed with respect to the 2nd applicant, that there is no reference to service being effected at Silver Bill, and that none of the applicants had any business premises at the address at which it is alleged the service was effected. It is averred that the applicants' insurers were not party to the primary suit, and that an insurer is not required to appear in primary suits, and it can only appoint advocates to act for its insureds. In any case, it is submitted, the insurer and the applicants were two separate entities. The rest of the affidavits comprises of arguments rather than averments on factual matters.

6. The deponent of the supplementary affidavit has attached several documents to it. There are mention notices that were served on him by the advocate for the respondent with respect to the declaratory suit, on divers dates in 2018 and 2020. There is a copy of the ruling of 20th February 2020. There is also a copy of the applicants' draft defence to the primary suit. There is also a copy of the final judgment in the primary suit. There is also copy of the summons to enter appearance dated 9th January 2016. Copies of receipts issued by the courier and post office are also attached.

7. Directions were given on 29th July 2020, for disposal of the Motion by way of written submissions. Both sides complied, by filing their respective submissions. The said submissions were highlighted on 30th September 2020, on the limited point as to whether the applicants needed to apply for leave to appeal.

8. In his written submissions, the applicant argues, for extension of time to file appeal and stay of proceedings. He cites section 79G of the Civil Procedure Act, Cap 21, Laws of Kenya, and Order 50 Rule 6 of the Civil Procedure Rules, to argue that that law empowers the High Court to enlarge time fixed for the doing of any act or proceedings. He says that the default to file appeal within the specified time was not his fault, but rather it was because the trial court delivered judgment without notice to him. He submits that he had a good reason for not filing appeal on time.

9. On the question of stay of execution and proceedings, he relies on Section 3A of the Civil Procedure Act and Order 42 Rule 6(1) of the Civil Procedure Rules. He cites *Ezekiel Mule Musembi vs. H Young & Company (EA) Limited* [2019] eKLR, where it was said that the power to stay proceedings emanates from Order 42 Rule 6, as well as the inherent jurisdiction reserved in Section 3A. He also cites *Butt vs. Rent Restriction Tribunal* [1982] KLR 417, to argue that the trial court should exercise discretion in a manner that does not prevent the appeal, and if successful to prevent it from being nugatory. On substantial loss, he submits that the respondent had not demonstrated that she would be in a position to refund the decretal sum should the appeal be successful. He cites *GN Muema p/a Mt. View Maternity & Nursing Home vs. Miriam Maalim Bishar & another* [2018] eKLR, where the court observed that substantial loss need not have anything to do with money, it could also include the hardship of going through legal proceedings to recover the decretal amount.

10. In her written submissions, the respondent did not submit on matters of law around the questions relating to enlargement of time to appeal, stay of execution and stay of proceedings.

11. I will start by looking at whether leave to file the appeal was required in this case, the applicants seek to appeal against a ruling that was delivered on 20th February 2020, in which the trial court dismissed their application to set aside default Judgment under Order 10 Rule 11 of the Civil Procedure Rules.

12. The law on civil appeals is section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules. Section 75 provides as follows:

"1. An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the Act-

- a) Order 1 (parties to suits);*
- b) Order 2 (pleadings generally);*
- c) Order 3 (frame and institution of suit)*
- d) Order 4, rule 9 (return of plaint);*
- e) Order 7, rule 12 (exclusion of counterclaim);*
- f) Order 8 (amendment of pleadings)*
- g) Order 10, rule 11 (setting aside judgments in default of appearance).*
- h) Order 12, rule 7 (setting aside judgments or dismissal for non-attendance);*
- i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);*

- j) *Order 19 (affidavits);*
- Order 22, rules 25, 57, 61 (3) and 73 (orders in execution);*
- l) *Order 23, rule 7 (trial of claim of third person in attachment of debts);*
- m) *Order 24, rules 5, 6, and 7 (legal representative);*
- n) *Order 25, rule 5 (compromise of a suit);*
- o) *Order 26, rules 1 and 5(2) security for costs);*
- p) *Order 27, rules 3 and 10 (payment into court and tender)*
- q) *Order 28, rule 4 (orders in proceedings against the Government);*
- r) *Order 34 (interpleader);*
- s) *Order 36, rules 5, 7 and 10 (summary procedure)*
- t) *Order 39, rule 2, 4 and 6(furnishing security);*
- u) *Order 40, rules 1, 2, 3 7 and 11 (temporary injunctions);*
- v) *Order 41, rules 1 and 4 (receivers);*
- w) *Order 42, rules 3, 14, 21, 23 and 35 (appeals)*
- x) *Order 45, rule 3 (application for review)*
- y) *Order 50, rule 6 (enlargement of time);*
- z) *Order 52rules 4, 5, 6 and 7 (advocate);*
- (aa) Order 53 (judicial review orders).*

2. An appeal shall lie with the leave of the court from any other order made under these Rules.”

13. Order 43 Rules 1, 2, 3 and 4 of the Civil Procedure Rules provide that:

“An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the Act-

- a) *Order 1 (parties to suits);*
- b) *Order 2 (pleadings generally);*
- c) *Order 3 (frame and institution of suit);*
- d) *Order 4, rule 9 (return of plaint);*
- e) *Order 7, rule 12 (exclusion of counterclaim);*
- f) *Order 8 (amendment of pleadings);*
- g) *Order 10, rule 11 (setting aside judgments in default of appearance);*
- h) *Order 12, rule 7 (setting aside judgments or dismissal for non-attendance);*
- i) *Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);*
- j) *Order 19 (affidavits);*
- k) *Order 22, rules 25, 57, 61 (3) and 73 (orders in execution);*

- l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
- m) Order 24, rules 5, 6, and 7 (legal representative);
- n) Order 25, rule 5 (compromise of a suit);
- o) Order 26, rules 1 and 5(2) security for costs);
- p) Order 27, rules 3 and 10 (payment into court and tender);
- q) Order 28, rule 4 (orders in proceedings against the Government);
- r) Order 34 (interpleader);
- s) Order 36, rules 5, 7 and 10 (summary procedure);
- t) Order 39, rule 2, 4 and 6(furnishing security);
- u) Order 40, rules 1, 2, 3 7 and 11 (temporary injunctions);
- v) Order 41, rules 1 and 4 (receivers);
- w) Order 42, rule 3, 14, 21, 23 and 35 (appeals);
- x) Order 45, rule 3 (application for review);
- y) Order 50, rule 6 (enlargement of time);
- z) Order 52rules 4, 5, 6 and 7 (advocate);
- (aa) Order 53 (judicial review orders)

2. An appeal shall lie with the leave of the court from any other order made under these Rules.

3. An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

4. Save where otherwise expressly provided in this rule, "order" includes both an order granting the relief applied for and an order refreshing such relief."

14. The application, dated 3rd December 2018, whose dismissal led to the filing of the instant application, was brought under the provisions of Order 10 Rule 11 of the Civil Procedure Rules, Section 1A, 3 and 3A of the Civil Procedure Act. An order, made in respect of an application brought under Order 10 Rule 11 of the Civil Procedure Rules, is appealable as of right under Order 43 (1) (g) of the Civil Procedure Rules. The applicants did not, therefore, require such leave as argued by the respondent. See *Maurice Antony Wanjala Muse vs. Anna Wanyama Wanjala & 11 Others* [2019] eKLR.

15. With regard to extension of time to file appeal, the Supreme Court, in *Fahim Yasin Twaha vs. Timamy Issa Abdalla & 2 Others* [2015] eKLR, laid down some general principles in matters relating to extension of time. The court said:

"As regards extension of time, this Court has already laid down certain guiding principles ... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

- 1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
- 2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
- 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
- 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
- 5. whether there will be any prejudice suffered by the respondents, if extension is granted;

6. whether the application has been brought without undue delay; and

7. whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

16. In *Imperial Bank Ltd (In Receivership) & Another vs. Alnashir Popat & 18 Others* [2018] eKLR, the Court of Appeal observed:

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

17. The applicants submit that the delay in filing appeal was because they were not aware that the ruling had been delivered, and that they were not served with the notice of delivery of the ruling. They also fault the trial court for delaying the delivery of the ruling for a year only to have the same delivered without notice. The respondent, on her part, submits that she served notice on the applicants, and she has produced a certificate of postage as proof of the same.

18. The delay in filing the appeal was that of six months. In *Rufus Murithi Nyaga vs. Juliet Wanja Ileri* [2018] eKLR, the court observed:

“When a court is considering delay, the length of delay is a relevant factor.”

19. The respondent, in her submissions, agrees that the ruling was delivered in the absence of the applicants. In a bid to demonstrate service, the respondent has attached a certificate of postage dated 11th December 2019. The same does not show the contents of the letter that was being posted, neither can one tell what was being delivered to the applicants’ advocates. It is, therefore, my finding that the applicants have provided sufficient cause for the delay, and that, owing to the current circumstances and the situation that the courts were in during the period of March 2020 to July 2020, due to the Covid-19 pandemic, the six months’ delay was not inordinate in the circumstance. See *Urbanus K Wambua vs. Brigitta Ndila Musau* [2016] eKLR.

20. In *Kenya Power & Lighting Company Ltd vs. Rose Anyango & Another* [2020] eKLR, the court was faced with a similar matter, and it said:

“18. Without belabouring too much into the merits and demerits of this prayer, it is not disputed that the judgment in the lower court was delivered on 19th February 2020 and that this application was filed on 20th April 2020 which was beyond the 30 days stipulated in section 79G of the Civil Procedure Act. The applicant’s counsel has given an explanation that the instructions to appeal were given after the last date of filing an appeal. Albeit the 1st Respondent claims that there is no evidence of instructions to the advocate, there is no legal requirement that instructions to an advocate must be in writing. There is delay which is admitted. However, this court does not find that the delay is inordinate as to deny the applicant an opportunity to ventilate its grievances by way of an appeal to this Court. This court takes judicial Notice that between 16th March 2020 to the date of filing of this application, there has been downscaling of court services owing to Covid 19 pandemic and which threw all persons in a spin of uncertainty as to how services were to be rendered.

19. No doubt, the 30 days fell in the Covid 19 pandemic situation and therefore the delay in filing the intended appeal was not inordinate.”

21. On stay of execution of judgment or decree of the trial court, pending the hearing and determination of the intended appeal, Order 42 Rule 6(2) of the Civil Procedure Rules provides:

“No order for stay of execution shall 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. Order 42 Rule 6 of the Civil Procedure Rules grants the court a wide discretion to order stay of execution of decrees pending appeal. In the present case, from a perusal of the draft memorandum of appeal, it would appear to me that the applicants would have an arguable appeal. It raises a triable issue, as to whether the trial court fell into error in dismissing the applicants’ application for setting aside of the default judgment. The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment. At the same time, the court endeavours to balance the rights of the parties. In the present application, I have found that the delay in filing the application was not inordinate. On the fulfilment of the second condition, the applicants argue that they are likely to suffer substantial loss as the respondent has not shown his ability to refund the decretal sum should the appeal succeed. Lastly, on the third condition, the applicants state that that they are willing to furnish security for satisfaction of the decree. They submit that they are willing to furnish an insurance bond as security in lieu of depositing money in court.

23. With respect to the furnishing security, the court, in *Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, observed:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. “

24. The issue of receiving insurance bonds as security was addressed by the court in *Samuel Kabuthia Ndana vs. Jennifer Wawira Njeru & another* [2018] eKLR, the court held that the offer of security by way of a bank guarantee without naming the relevant bank is as good as no security. The defendants did not name the bank whose guarantee they proposed to give. In *Xplico Insurance Co. Ltd vs. Impreza Construzioni Giuseppe Maltauro Spa* [2019] eKLR, the court while allowing a bank guarantee as security, said:

“I agree with the submissions of the respondent that the lifespan of the bank guarantee is too short therefore it cannot secure the respondent’s interest. However, since the appellant has stated that the period can be extended, then the appellant will be required to do so within a given time line ...”

25. I am persuaded by the approach in *Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd* (supra), and find that that deposit of the decretal sums in an interest earning account, in the names of the advocates for both sides, is the best way forward in the matter, pending determination of the appeal. None of the parties herein would be prejudiced since the monies will be earning interest as the parties canvass the appeal.

26. In the end the final orders that I shall make on the application, dated 20th July 2020, are as follows:

(a) That the applicants are hereby granted extension of time to file appeal, and that the applicants’ Memorandum of appeal lodged herein on 22nd July 2020 is hereby deemed to have been duly filed;

(b) That there be a stay of execution of the decree in Kakamega CMCCC No. 42 of 2016, pending the hearing and determination of the appeal herein, on condition that the applicants do deposit a sum of Kshs. 2,455,643.00, in an interest earning account in the joint names of the parties’ respective advocates within 45 days, in default of which the stay shall lapse; and

(c) That costs shall be in the appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20th DAY OF November 2020

W MUSYOKA

JUDGE