



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
(CORAM: CHERERE-J)

MISC CIVIL APPL NO. 123 OF 2019

BETWEEN

SAMUEL KIUNGA.....APPLICANT

AND

ALI GOSAR SAMATAR.....RESPONDENT

RULING

1. By a notice of motion dated 24th October, 2019 and filed on 14th November, 2019, the Applicant seeks 11 orders but only 3 are relevant at this stage. **That:**

- 1) **This court be pleased to grant leave to the Applicant to file an appeal out of time**
- 2) **The leave granted do operate be a stay of execution of the judgment and/or decree of the trial court and any other consequential orders**
- 3) **Costs of this application be paid by the Applicant**

2. The application is based on the grounds among others. That:

- a) **The Applicant intends to file an appeal against the judgement in MAUA CMCC NO. 86 OF 2016**
- b) **The appeal has overwhelming chances of success**
- c) **The Applicant stands to suffer prejudice and loss if the orders sought are not granted**

3. The application is supported by the affidavit sworn by the Applicant on 24th October, 2019 in which he reiterates the grounds on the face of the application. Annexed to the affidavit are exhibits among them a copy of the memorandum of appeal, copy of decree and copy of application for execution. By his further affidavit sworn on 29th November, 2019, the Applicant avers that he has a good defence to the Respondent's claim.

4. The application is opposed by way of a replying affidavit sworn by the Respondent on 22nd November, 2019. Respondent avers that the Applicant has not filed an appeal since the judgment of the trial court was delivered on 17th March, 2019 and that his appeal has no chance of success.

5. The court directed that this application be disposed off by way of written submissions which the parties' advocates dutifully filed.

Analysis and Determination

6. I have considered the application in the light of the affidavits on record and annexures thereto and I have deduced the following issues for determination.

- 1) **Whether the Applicant ought to be granted leave to appeal out of time.**
- 2) **Whether the order of stay of execution of the impugned decree ought to be granted**

Whether the Applicant ought to be granted leave to appeal out of time.

7. The powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered. The law on extension of time is to be found in Section 95 of the Act which states as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

8. Order 50 of the Civil Procedure Rules on the other hand states that:

“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”.

9. The parameters for exercise of court’s discretion were concisely laid out in the case of *Mwangi v Kenya Airways Ltd* [2003] KLR where the Court of Appeal expressed itself thus: -

“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”.

10. In determining this application; I will endeavor to address each of the principles laid down in the above cited case.

i. Length of delay

11. Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which 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 anytime which the lower court may certify as having been requisite for the preparation and delivery to the appellants of a copy of the decree or order”.

12. The judgment from which the Applicant proposes to appeal against was delivered on 27th March, 2019 and a decree was issued on 07th May, 2019. The Applicant had 30 days from 27th May, 2019 to file the intended appeal. The present application was filed on 14th November, 2019 which is about 5 months outside the time limited for filing an appeal.

ii. Reason for delay

13. I have considered both the Applicant’s supporting affidavit and the further affidavit and he makes no attempt to explain why the filing of the appeal was delayed.

iii. The chances of appeal succeeding if the application is granted

14. Determining at this juncture that the appeal does or does not raise triable issues will amount to deciding on a matter not before this court. All that this court needs to determine at this juncture is whether the applicant has a prima facie case that is triable. (See **Nicholas Kiptoo Arap Korir Salat v. The Independence Election & Boundaries Commission & 7 Others, [2014] eKLR**).

15. I have considered the issues raised in the memorandum of appeal which mainly faults the trial court for allegedly not considering the defence which issue is triable.

iv. The degree of prejudice to the respondent if the application is granted.

16. The issue between the parties herein is a money issue. The Applicant has offered to comply with any order that the court is likely to give as security for due performance of the judgment.

17. Although the five months’ delay has not been explained to the satisfaction of the court, this court has power under Section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice.

Whether the order of stay of execution of the impugned decree ought to be granted

18. The substantive law of access for the relief sought is Order 42 (6) of the Civil Procedure Rules which provides that:

(2) No order for stay of execution shall be made under sub rule

(1) Unless—

a. The court is satisfied that substantial loss may result to the applicant unless the order is made

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

c. 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.

19. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting an order of stay of execution and the party

seeking stay bears a specific burden regarding proof of substantial loss. (See **Rhoda Mukuma v John Abuoga[1988] eKLR**).

20. The Applicant has not alleged or demonstrated that the Respondent would be unable to adequately refund the decretal sum should the intended appeal ultimately succeed

21. From the foregoing analysis, the notice of motion dated 24th October, 2019 and filed on 14th November, 2019 partially succeeds in the following terms:

1. The applicant is granted leave to appeal out of time

2. The intended appeal shall be filed within 30 days from today's date

3. Stay of execution of the decree in MAUA CMCC NO. 86 OF 2016 is granted upon the Applicant depositing half (½) the decretal sum in an interest earning account in the names of both advocates

4. Costs shall be costs in the Appeal

DATED IN MERU THIS 16th DAY OF December 2020

T.W. CHERERE

JUDGE

Court Assistant- Morris Kinoti

For the Applicant - Mr. Kobia for Kobia Michubu & Co. Advocates

For the Respondent -Mbogo for Mbogo & Muriuki Advocates