REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

MISC. CIVIL APPLICATION NO. E007 OF 2020

CALLISTUS IHAH THOYA (DCD SUING THROUGH PHOEBIAN REHEMA

KALENGA & SHEILA CHANA THOYA.....PLAINTIFF/RESPONDENT

VERSUS

RONALD WANJE JEMBE.....DEFENDANT/APPLICANT

Coram: Hon. Justice R. Nyakundi

Jengo advocates for the Plaintiff/respondent

Kimondo Gachoka advocates for the Defendant/applicant

RULING

The application expressed to be brought under Section 1A, 3, 3A, 79G and 95 of the Civil Procedure Rules, Order 42 Rule 6, 50 rule 6, Order 51 Rule 1 of the Civil Procedure Rules seeks the following substantive orders.

> ***(1) That this Honourable Court be pleased to grant leave to file an Appeal out of time against the Judgment delivered in CMCC NO. 48 OF 2019.***
>
> ***(2) That this Honourable Court be pleased to order a stay of execution of the Judgment pending the hearing and determination of the intended appeal.***

The applicant in support in his affidavit reiterates the events leading to the delivery of the impugned Judgment. The respondent in opposition of the application filed a replying affidavit dated 2.12.2020. Both counsels submitted on the specific issues that touched on the application and why the Court should decline or allow the relief prayed for by the applicant without reproducing the lengthy submissions and crafting them into the ruling; I do acknowledge their valuable contribution to the final decision.

Determination

There two issues to be considered and determined by this Court. First whether the applicant has satisfied the criteria for enlargement of time within which to lodge an appeal. Secondly, whether stay of execution of the whole of the impugned Judgment is justified pending the hearing and determination of the intended appeal.

I begin with the application for leave to file an appeal out of time. In essence in approaching the High Court for an appeal any such litigant has 30 days as provided in Section 79(G) of the Civil Procedure Act to lodge the appeal.

Further, it is established principle that the Court has unfettered discretion to enlarge time save that it ought to be exercised judiciously and not whimsically, the Court in the **Salat v Independent Electoral & Boundaries Commission & 7 others {2014} eKLR**.

Considered the nature of the principles to consider whether a party has qualified to be granted leave to file an appeal out of time. Some of the usual conditions precedent to be fulfilled by the movant are well captured in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi CA No. 255 of 1997** thus:

> ***"It is now 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 the Court takes into account in deciding whether to grant 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 comparatively on the same issue of enlargement of time the Court in **Mugo v Wanjiru {1970} EA 481 and Pinnacle Propects Ltd v Business in Motion Consultants Ltd H. C. Misc. Application No. 362 of 2010** held**:**

"that sufficient reason must relate to the inability or failure to take a particular step in time. It is also a vital precept of just exercise of discretion to be grounded by the principles in Bamanya v Shain Sherahi Zaver CA No. 70 of 2001: "That mistakes, faults, lapses and dilatory conduct of counsel should not visited on the litigant, and further that where there are serious issues to be tried, the Court ought to grant the application."

An analysis of the record and evidence shows that the delivery of Judgment was adjourned on various occasions. It is also clear from the record that the applicant counsel was not part of the persons in attendance during the pronouncement of the impugned decision. It is trite that the delay in obtaining a copy of the Judgment subject matter of an appeal may be sufficient cause that constitutes the reasons in which exercise of discretion may be granted in favour of the applicant.

The true significance of the authorities cited is to consider that the applicant is not an indolent party to a litigation. In that conclusion, the evidence shows that the applicant on context of the application acted timeously in filing a motion for extension of time. The legitimacy of the application was further expounded in the decision by the Court of Appeal of Uganda in **Tiberio Okeny v The Attorney General & 2 others CA No. 51 of 2001.** I have attuned my mind to the 7 tests formulated by the **Supreme Court in Salat v IEBC (supra)** and I find that in my analysis exercise of discretion to grant stay of execution against the Judgment of the trial Court in CMCC No. 48 of 2019 pending the hearing and determination of the appeal.

It follows therefore that the applicant notice of motion dated 7.11.2020 succeeds as prayed on both extension of time to file an appeal and stay of execution pending the hearing and determination of the intended appeal. The draft memorandum of appeal be deemed to be duly filed within time. The appeal against the Judgment of the trial Court be filed in the next 45 days from today's order.

In the circumstances of the case, the applicant is hereby ordered to deposit the entire decretal sum in a joint earning interest account of both advocates in the next 30 days also from today's date that in the event of noncompliance with the condition on deposit of security for due performance of the decree, right of appeal lapses and the Judgment shall be eligible for execution. Costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF DECEMBER 2020

.....

R. NYAKUNDI

JUDGE

<u>In the presence of:</u>

1. Mr. Nyabero advocate for the applicant

2.. Mr. Jengo advocate for the respondent