



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HC MISC CIVIL APPL. NO. 82 OF 2018**

**WILSON NDOLO MUTWIWA.....APPLICANT**

**-VERSUS-**

**NICHOLAS MUSINGA NDETI.....RESPONDENT**

**RULING**

1. By way of Notice of Motion, the court is moved for orders:

1) Spent.

2) *That this Honourable court be pleased to extend time and grant leave to the applicants to lodge an appeal and file a memorandum of appeal out of time against the judgment and decree of the Honourable E.M. Muiru entered against the Applicant on 20<sup>th</sup> April 2018 in Kilungu SRM No. 65 of 2017.*

3) Spent

4) *That this Honourable court be pleased to stay the execution of the said judgment and decree pending the hearing and determination of the intended appeal.*

5) Spent.

6) *That the costs of this Application be in the cause.*

2. The same is anchored on the cited provisions of CPA cap 21 and CPR 2010.

3. The same is based on grounds on the face of the application and it is supported by Affidavit of Pauline Waruhiu sworn on 14/06/2018.

4. The Respondent opposes the same via grounds of Objection dated 24/09/2018.

5. Parties agreed to canvass the application via written submissions.

**APPLICANT'S SUBMISSIONS**

6. The applicant submits that, section 95 of the Civil Procedure Act (CPA) lays down the substantive law that grants the court power to enlarge time.

7. Further to the inherent powers conferred under section 3A of the CPA which enable the court to do justice, this Honourable Court also has the discretion which is provided by law, to admit an Appeal filed out of time.

8. Indeed, it is well settled that an Appellant should not be denied an opportunity to prosecute his Appeal or driven from the judgment seat unless the Appeal is unarguable.

9. The draft memorandum of appeal annexed to the present application sets out precisely grounds upon which the Applicants intend to appeal the decision of the lower court. The main ground which the applicants intend to reply upon is the finding on quantum.

10. In applications for stay pending Appeal, the Applicant submits that it only needs to show he has an arguable appeal and relies on the case

of Bake 'N' Bite (Nrb) Limited –Vs- Daniel Mutisya Mwalonzi [2015] eKLR., Kenya Revenue Authority –Vs- Sidney Keitany Changole & 3 Others [2015] eKLR

11. The applicant submits that, in exercise of court's discretion has been the subject of numerous court decisions. The principles governing the exercise of the judicial discretion are:-

**i. Firstly, there are no limits or restrictions on the judge's discretion. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.**

**ii. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.**

12. Applicant relies on the case of Esther Wamaitha Njihia & 2 Others –Vs- Safaricom Limited [2014] eKLR.

13. The applicant submits that, the conditions upon which the Applicant must satisfy in order to be granted the orders of stay of execution pending appeal are stated under Order 42 Rule 6 (2) of the CPR. The relevant section for purposes of the present of this application reads as follows:-

*“(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 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.”*

14. Applicant relies on the case of Tabro Transporters Ltd –Vs- Absalom Dova Lumbasi [2012] eKLR.

15. Applicant submits that the Respondent's means are unknown and it is highly unlikely that the Respondent may not be capable to refund the decretal amount in the event that the Applicants' Appeal succeeds. The Respondent's financial status is still unknown and has not been proven.

#### **RESPONDENT SUBMISSIONS**

16. The applicable submits that, the law on whether the court should grant extension of time for filing of an appeal is provided under Section 79G of the Civil Procedure Act.

17. The said proviso was explained by Justice M.J. Anyar Emukule in Gerald M'Limbine –Vs- Joseph Kangangi [2009] eKLR stated as follows:-

*“Understanding of the proviso to section 79G is that an applicant seeking an appeal to be admitted out of time must in effect file such an appeal and at the same time seek the court's leave to have such appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually amount to an abuse of the court's process.....*

*It seems to me therefore, it is not open to the court's to exercise its discretion under the proviso to section 79G of the Civil Procedure Act except upon the existence and perusal of the appeal to be 'admitted' not to be 'filed out of time'....”*

18. It is submitted that, in the matter herein the applicant filed its memorandum of appeal dated 14<sup>th</sup> June 2018 on the 20<sup>th</sup> of June 2018. This was out of time and instead of seeking for its admission out of time, the applicant seeks leave to lodge appeal out of time. Thus it is submitted that the said prayer has been overtaken by events.

19. On merit, the Respondent relies on the case of Stanley Kahoro Mwangi & 2 Others –Vs- Kanyamwi Trading Company Limited [2015] eKLR. Which held that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the court that he is entitled to the discretion being exercised in his favour.

20. It is submitted that judgment was delivered on the 20<sup>th</sup> of April 2018. The application herein was lodged on the 20<sup>th</sup> of June 2018 together with the appeal against the said judgment.

21. Thus it is submitted that the explanation that the delay to lodge the appeal was occasioned by receiving late instructions to appeal the said judgment is an afterthought.

22. On the prayer for the stay pending appeal, the respondent cites Civil Procedure Rules, 2010 provides conditions that need to be met before granting stay pending appeal under Order 42 Rule 6 (1) and also relies on the case of John Mwangi Nderitu –Vs- Joseph Ndiritu Wamathai [2016] eKLR . Also cites John Gachanja Mundia –Vs- Francis Muriira alias Francis Muthika & Anor [2016] eKLR.

23. Also relies on the case of **John Mwangi Nderitu –Vs- Joseph Ndiritu Wamathai (supra)** which held that the corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. He proceeds to submit that the Appeal is unarguable as it only challenges quantum, therefore applicant will not be occasioned any substantial loss by the respondent's lawful execution of the said judgment.

24. Further it is submitted that, the judgment in contention was delivered on 20<sup>th</sup> April 2018 and application herein was filed on the 20<sup>th</sup> of June 2018. An explanation of what constitutes unreasonable delay was discussed in the case of **Jaber Mohsen Ali & Anor –Vs- Priscillah Boit & Anor [2014] eKLR** where it was stated that:-

**“.....what is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”**

25. In the present case the Applicant took 62 days to move his court which is inordinate and Unreasonable.

26. The Applicant further attempts to explain that the delay was occasioned by receiving late instructions.

27. The Civil Procedure Rules stipulate that an applicant should offer security when seeking for stay orders. The proposed Appellants have made no such offer.

28. It is submitted that, Legal procedure envisages that all the conditions for stay need to be satisfied before such orders are granted. The Applicant has failed to satisfy any of the laid down conditions.

### **ISSUES, ANALYSIS AND DETERMINATION**

29. After going through material before the court, I find the issues are; **whether the application for extension of time to lodge appeal is incompetent? If above in negative, whether the application for leave to lodge appeal out of time is merited? Has the applicant met the conditions for stay of execution pending appeal?**

30. The respondent submits that, the applicant filed its memorandum of appeal dated 14th June 2018 on the 20th of June 2018, before seeking leave to file its appeal out of time thus it ought to seek court's leave to have the already filed appeal to be deemed as dully filed under sect 79G CPA.

31. In the application applicant only prayed for leave to file appeal out of time and however failed to pray for the already deemed appeal to be deemed as dully filed. Thus the respondent submits that the application is fatally defective.

32. The proviso to section 79G stipulates; **Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”**

33. This court and others have held that in view of the provisions of **article 159(2) (b) constitution of Kenya**, such technicalities will not bar this court from entertaining such an application on merit. Thus the court overrules that objection and proceeds to consider the application on merit.

34. On merit the respondent submits that, the principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the court that he is entitled to the discretion being exercised in his favour.

35. The trial magistrate delivered judgment in the matter herein on the 20th of April 2018. The applicant was soon thereafter informed of the said judgment. The applicant filed instant application on the 20th of June 2018.

36. The applicant explanation is that the delay to lodge the appeal was occasioned by receiving of late instructions to appeal to impugn the said judgment from the client to the advocate. The applicant was late by 62 or so days in lodging the appeal.

37. An explanation of what constitutes unreasonable delay was discussed in the case of **Jaber Mohsen Ali & Anor –Vs- Priscillah Boit & Anor [2014] eKLR** where it was stated that:-

**“.....what is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”**

38. The court is prepared to give the applicant a benefit of doubt and extend time of lodging appeal. Same shall be filed and served within 7 days provided the respondent will be paid costs Ksh.20,000/= within 30 days and in default leave granted to be deemed denied.

39. On stay pending appeal application, the Civil Procedure Rules, 2010 provides conditions that need to be met before granting stay pending appeal under **Order 42 Rule 6 (1)**. In **John Mwangi Nderitu –Vs- Joseph Ndiritu Wamathai [2016] eKLR** it was held that;

**“It is clear from the wording of Order 42 rule 6(1), for an applicant to succeed in an application of this nature, he must satisfy the following conditions; namely, (a) substantial loss may result to the applicant unless the order is made; (b) the application has been made without undue delay; (c) such security as to costs has been given by the applicant.”**

40. Having allowed leave to lodge appeal out of time, am prepared to hold that the application for stay was lodged without inordinate delay once instructions to appeal was given.

41. On substantial loss ,the court seeks guidance in the case of **Tabro Transporters Ltd –Vs- Absalom Dova Lumbasi [2012] eKLR**, where Gikonyo J. ruled as follows;

**“Sufficient cause is established when the Applicant proves the following conditions on a balance of probabilities that:**

**Substantial loss may result to the applicant unless the order is made,.....”**

42. The respondent has not shown how he would pay decretal amount if paid and eventually appeal succeeds. If the money cannot be recovered in event appeal succeeds, substantial loss may result to the applicant.

43. However the court observes that the appeal is essentially on quantum and the applicant does not say that the respondent shall get nothing in event appeal succeeds. Thus the court has to balance the interest of the parties.

44. Therefore the court will order half of the amount to be paid to the respondent as a condition for stay pending appeal within 30 days.

45. In sum the court orders;

**i. -Appeal shall be filed and served within 7 days provided that Ksh.20,000/= will be paid to the respondent within 30 days from dates herein and in default the leave to be deemed denied.**

**ii. -The stay of execution of lower court decree is granted on condition that half decretal amount is paid to the respondent within 30 days from dates herein and in default execution to proceed.**

**SIGNED, DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF JANUARY, 2019 IN OPEN COURT.**

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**HON. C. KARIUKI**

**JUDGE**