



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC.APPLICATION NO. 361 OF 2018

PETER NGUGI KIMANI.....1ST APPLICANT

KAMAU PATRICK NDIRANGU.....2ND APPLICANT

VERSUS

STEPHEN MUTURI MWANGI.....RESPONDENT

RULING

1. The Notice of Motion dated 22nd June, 2018 is brought by the applicants herein under Sections 3A, 63 and 95 of the Civil Procedure Act; Order 50, Rule 6, Order 42, Rule 6 (1) and (6) and Order 51, Rule 1 of the Civil Procedure Rules. The Motion is supported by the grounds set out on the body thereof and the facts deponed to in the sworn affidavits of *Kamau Patrick Ndirangu* and *Ishmael Muchiri*. The prayers sought are as follows:

i) Spent.

ii) THAT this Honourable Court be pleased to enlarge the time for lodging the intended appeal by the applicants against the judgment delivered on 7th March, 2018 in CMCC NO. 6106 OF 2013.

iii) That this Honourable Court be pleased to order a stay of execution of the decree and/or the judgment in Nairobi CMCC 6106 of 2013, Stephen Muturi Mwangi Vs. Ali Abdulahi Mahd & 2 others.

iv) That this court be pleased to issue an order staying further execution of the decree herein and specifically stop the advertisement for sale, selling and/or auctioning of the 2nd Applicant's motor vehicle registration number KAP 974K which was carried away by Mbusera Auctioneers on 18th June 2018 in execution of the decree.

v) That the Honourable Court be pleased to issue orders directing the auctioneers Mbusera Auctioneers to immediately return the motor vehicle registration number KAP 974K carried away from the 2nd Applicant in Karen on 18th June 2018 and restitute the 2nd Applicant to the position before the carrying away of the motor vehicle registration number KAP 974K pending the hearing and disposal of this application.

vi) THAT in the alternative to prayer number 3, the honourable court be pleased to grant a temporary injunction in such terms as the Honourable court may deem fit restraining the respondent, his agents and or representatives from further taking away, advertise for sale, selling and/or auctioning the applicants property in execution of the decree and/or in Nairobi CMCC 6106 of 2013, Stephen Muturi Mwangi Vs. Ali Abdulahi Mahd & 2 others pending the hearing and determination of this application.

vii) THAT the orders sought under prayers iii) and iv) above be confirmed upon hearing of the application till the hearing of the intending appeal.

viii) THAT the costs of the application be provided for.

2. The first deponent, Kamau Patrick Ndirangu essentially stated that Kenya Orient Insurance Limited was mandated to sue/be sued on behalf of the applicants and that once judgment was entered against the aforesaid applicants, the decision on whether to pay the decretal sum or appeal lay solely with the insurer. That the insurer neither paid the decretal sum nor lodged an appeal in time, prompting the respondent to apply for execution of the decree.

3. The second deponent, Ishmael Muchiri, is the legal officer of the insurer, Kenya Orient Insurance Limited. He averred that the delay in lodging the appeal within the statutory timelines resulted from the fact that the former legal officer of the insurer (Kevin Kitavi) who was

previously handling the matter left employment without advising the insurer to instruct its advocates on the appeal. The deponent reiterated that there are no orders for a stay of execution in place and that the respondent has commenced the execution process.

4. In his replying affidavit, **Steven Muturi Mwangi** contended inter alia, that the Motion has been made with unreasonable delay and that no valid explanation has been given for the same and hence the applicants are not entitled to the prayers sought.

5. The parties filed their respective submissions, which this court has duly considered together with the authorities cited; the grounds set out in the Motion and the affidavits in support thereof; and the reply in opposition thereto.

6. This court deems it appropriate to begin by addressing the issue of whether or not the applicants are entitled to an enlargement of time for lodging of their intended appeal. The relevant statutory provisions in this regard are Section 95 of the Civil Procedure Act and Order 50, Rule 6 of the Civil Procedure Rules duly cited by the applicants. Similarly, Section 79G of the Civil Procedure Act expressly gives the timelines for filing an appeal from the subordinate courts to the High Court, adding that an appeal may be admitted out of time where sufficient cause has been shown.

7. The case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** illuminates the guiding principles on enlargement of time for filing an appeal. It is well noted that the parties herein have made reference to this case in their respective submissions.

8. The first principle on the subject is whether or not the application is made without undue delay. The judgment on which the intended appeal is premised was delivered by Hon. Orange (Mr.) (Senior Resident Magistrate) on 7th March, 2018 whereas the Motion currently before this court was filed on 22nd June, 2018. Drawing from the timelines set out under Section 79G cited hereinabove, it is without a doubt that there has been a delay in lodging the intended appeal. This leaves the question of whether such delay is reasonable.

9. The applicants submitted that the delay resulted from the failure on the part of the erstwhile legal officer of the insurer to give appropriate instructions to the advocates regarding the appeal. In his rival submissions, the respondent argued that the applicants had not supported their averments with proof and as such, no explanation for the delay has been given. The respondent further argued that the applicants' advocates were well aware of the delivery of the judgment, having been informed of the same by the respondent's advocates vide a letter dated 12th March, 2018 and the proclamation that followed. Consequently, the delay in filing the application has not been reasonably explained.

10. This court has perused the documents annexed to the Motion and the replying affidavit respectively, thereby confirming that indeed the applicants' advocates were notified of the delivery of the judgment. This position has not been challenged by the applicants. In fact, the applicants admitted that the fault was on the part of the insurer's former employee who did not inform the insurer of the judgment or give instructions to its advocate to appeal. This court has taken into consideration the relevant authorities cited by the parties and appreciates that enlargement of time is purely discretionary in nature and is in no way a matter of right. That notwithstanding, this court is satisfied that the explanation given by the applicants is reasonable.

11. On the second principle of the degree of prejudice that will befall the respondent, the applicants' submission was that a balance ought to be struck between the parties as concerns the prejudice that each stands to suffer. The applicants further submitted that they will suffer prejudice in the sense that they will be condemned unheard and hence driven out of the seat of justice. The respondent on his part contended that he should not be put through the litigation process afresh since the applicants slept on their rights and the execution process has since begun. The respondent cited Ajir **Singh Viridi v J.F. McCloy [2014] eKLR** and **Article 159 (2) (b)** of the Constitution in support thereof.

12. Having addressed its mind to the above, this court does not refute that there exists a need to balance the rights of the parties. On the one hand, the respondent has the right to enjoy the fruits of his judgment and it would appear the execution process is underway. On the other hand, the applicants are aggrieved by the decision of the lower court and should not be hindered from seeking some form of reprieve by way of an appeal, which they so desire. In this court's view, to deny the applicants the chance to appeal would result in a greater degree of prejudice. Any prejudice that the respondent stands to suffer as a result can well be compensated by way of costs.

13. This brings us to the issue of a stay of execution pending appeal. The governing principles/conditions are stipulated under **Order 42, Rule 6 (2)** of the Civil Procedure Rules.

14. The first condition relating to whether the application is brought without unreasonable delay has already been addressed. This court sees no need to restate its view and will therefore move to the second condition.

15. On the issue of substantial loss, the applicants submitted that unless an order for stay is granted, they will be compelled to pay the decretal amount before the issues are addressed on appeal. In rebutting the aforementioned arguments, the respondent maintained that the issue of substantial loss was merely alleged but not demonstrated.

16. Having considered the arguments by the applicants and rival arguments by the respondent, this court is in agreement with the analysis given in **Mary Muthoni v Kenya Nut Company Ltd [2016] eKLR** as well as **APA Insurance Limited v Michael Kinyanjui Muturi [2016] eKLR** cited by the respondent and applicants respectively that indeed, substantial loss ought to be elucidated.

17. In fact, in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, Honourable Justice F. Gikonyo while dealing with the issue of substantial loss took the following view:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because

execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma v Abuoga (1988) KLR 645 emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

18. In this court’s assessment, the applicants have made no effort to demonstrate that they stand to suffer substantial loss. The mere fact that they will be required to pay the decretal sum does not in itself give rise to substantial loss. If anything, the respondent is lawfully entitled to execute his judgment. Might I add that the granting of a stay of execution is not a matter of right but of the court’s discretion and which discretion ought to be exercised judiciously and on valid grounds. No material was placed before the court to show that the applicants will suffer substantial loss.

19. The third and final condition is that of the provision of security for the performance of the decree. Whereas the applicants indicated in the grounds of their application and submissions that they are ready to abide by the terms set out by the court, this court has noted that the subject was not at all discussed in the affidavits supporting the said application, thereby denying the respondent the opportunity of responding to the same. In any event, this court has already determined that the threshold for substantial loss has not been met by the applicants.

20. In the end, the Motion is allowed in terms of prayer ii) and the following orders are made:-

- a) The applicants shall file and serve the memorandum of appeal within 14 days from the date hereof.
- b) Costs of the Motion shall abide the outcome of the appeal.

Dated, signed and delivered at **NAIROBI** this **28th** day of **January, 2019**

L. NJUGUNA

JUDGE

In the presence of:

..... for the Applicants

..... for the Respondent