



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISC. CIVIL APPL. NO. 49 OF 2018

KCB BANK KENYA LTD.....APPLICANT

VERSUS

THOMAS K. SAMBU

t/a SOLAI AGENCIES.....1ST RESPONDENT

KIPKEMEI ARAP KORIR.....2ND RESPONDENT

RULING

1. The applicant was the defendant in Kericho Chief Magistrate's Court Civil Case No. 323 of 2014 in which the respondents, the plaintiffs in the suit, sought to recover Kshs 105,000, interest and costs from the defendant. The amount was the purchase price that the 2nd respondent had paid to the 1st respondent who had conducted a sale by public auction of a property charged to the applicant.

2. Following the auction carried out in exercise of the chargee's power of sale, the 2nd respondent emerged as the highest bidder. However, the applicant did not furnish the respondents with the discharge of charge in respect of the property in question, and the 2nd respondent demanded refund of his money from the 1st respondent.

3. These facts emerge from the case presented by the respondents/plaintiffs before the trial court. It appears that the defendant failed to attend court at the hearing and present its evidence, and so the court, in its decision dated 6th June 2018, entered judgment in favour of the respondents /plaintiffs. Hence the present application seeking stay of the orders of the lower court, and leave to file an appeal out of time.

4. In the application dated 18th September 2018, the applicant seeks the following substantive orders:

(a)...

(b)...

(c) This Honourable Court be pleased to grant leave to the applicant to lodge an appeal from judgment and decree of the Honourable Magistrate in Kericho CMCC NO. 323 of 2014 out of time the same having been delivered by the trial court on 6th June 2018.

(d) That there be stay of execution of the decree in Kericho CMCC No. 323 of 2014 pending the hearing and determination of this application and of the intended appeal.

(e) that this Honourable Court be pleased to grant temporary stay orders pending the hearing and determination of this application inter parties in terms of prayer (d) above and/or further orders of the court.

(f) Such other orders be made as are just and expedient.

(g) Costs be in the cause.

5. The application was based on the grounds set out on its face. Briefly stated, these were that the applicant was aggrieved by the judgment of the Honourable Magistrate in Eldoret (sic) CMCC No. 323 of 2014 delivered on 6th June 2018. However, the period within which the applicant ought to have filed an appeal lapsed in the pendency of an application which the applicant had filed seeking to re-open the case for hearing.

6. The applicant argued in its third ground that the judgment it sought leave to appeal against, the respondent stood to be compensated twice, first through possession of the subject property and secondly through payment of the refund of purchase price plus interests as ordered by court. Conversely, the applicant would stand to lose twice, without being able to recoup the loan money and/or secure property hence losing twice. It contended that it had a good appeal from the said decision, and its failure to appeal the decision in time was not deliberate as it was hopeful of a favourable ruling by the trial court. It had brought the application expeditiously and in good faith and it was fair, just and expedient that the application be allowed.

7. The application is supported by two affidavits, both sworn on 18th September 2018. The first is sworn by Kipkemoi Kelong, the Credit Administrator at the applicant. He avers that their advocates are seeking leave to file an appeal out of time on a judgment delivered on 6th June 2018. There had, in the intervening period, been an application ruling on which was delivered on 12th September 2018. He contends that their appeal has reasonable chances of success, and that the applicant is willing to comply with any orders issued by the court.

8. The second affidavit is sworn by the applicant's advocate, E. C. Sitienei, on 18th September 2018. The Advocate avers that judgment in the matter was delivered on 6th June 2018 in favour of the respondents. The period for filing the appeal lapsed during the pendency of an application filed by the applicants seeking to re-open the case.

9. It is her averment that the judgment of the trial court is erroneous. She reiterates the contention in the grounds in support of the application that the respondents would be compensated twice while the applicant will suffer a double loss as a result of the judgment. It is her contention, further, that the appeal that the applicant intends to lodge against the decision of the lower court has overwhelming chances of success and annexes in evidence a draft Memorandum of Appeal.

10. Further, that the application has been filed expeditiously, and the applicant will suffer substantial loss if the orders sought are not granted. If stay of execution is not granted, she contends that the applicant's appeal would be rendered nugatory.

11. In response, the respondents filed a Notice of Preliminary Objection on the basis that a similar application was pending before the trial court. They also filed a replying affidavit sworn by the 1st respondent, Thomas Kimagut Sambu, on 8th October 2018. Pursuant to a consent between the parties on 8th October 2018, the applicant abandoned the application before the trial court and the respondents abandoned their preliminary objection, and the parties agreed to proceed with the application now before me.

12. In his affidavit, Mr. Sambu makes various depositions with regard to the application that was then pending before the trial court. In view of the fact that the application was subsequently abandoned by the agreement of the parties, the matter need not detain us further.

13. With regard to the averment that the applicant will suffer substantial loss if the orders of stay are not granted, he avers that the applicant has not shown that he is not a man of means. It is his case that he is a licensed auctioneer who has worked as such for 36 years and will be able to refund the decretal amount within two weeks should he be ordered to do so.

14. It is also his contention that the averment by the applicant's Counsel that he is in possession of the subject property is untrue. His role as auctioneer was limited to sale of the charged property to the highest bidder. He further challenges the affidavit of E. C. Sitienei on the basis that she has sworn to contentious matters contrary to the provisions of order 19 rule 3 (1) of the Civil Procedure Code.

15. As regards the factual situation giving rise to the dispute between the parties, Mr. Sambu deposes that he auctioned the subject land, Kericho/Kunyak S.S./366 on 20th March 2002. The 2nd respondent emerged the highest bidder and paid Kshs. 26,250 being 25% of the purchase price. He paid the balance, Kshs. 78,750 on 28th May 2002. Mr. Sambu deposes that he forwarded both sums to the applicant's advocates as evidenced in letters dated 20th March 2002 and 20th May 2002 respectively, addressed to the applicant's advocates, Chelule & Co. Advocates.

16. However, upon demanding the discharge of change and letter of consent to transfer the property in order to enable the purchaser, the 2nd respondent, transfer the property to himself, the applicant failed or neglected to forward the documents. As a result, the 2nd respondent demanded a refund of the sums he had paid to the 1st respondent, which the 1st respondent refunded.

17. It is this sum, according to the 1st respondent, that he demanded from the applicant in **Kericho CMCC No. 323 of 2014**. He had thereafter returned the transfer form and the original title documents to the land to the applicant. Neither he nor the 2nd respondent were in possession of the land in contention as the 2nd respondent, not having title documents, could not take possession of the land.

18. Mr. Sambu deposes that the applicant's Memorandum of Appeal annexed to the application does not disclose arguable grounds of appeal and the appeal therefore has no chance of success. In his view, the present application is only meant to delay quick disposal of this matter.

19. In submissions dated 12th October 2018, the applicant argues that the case in CMCC No. 323 of 2014 was heard and concluded *ex-parte*, without its evidence being taken. In its judgment dated 6th June 2018, the court had found that the only issue for determination was whether there should be a refund of Kshs. 105,000 claimed in the plaint and had found that as the plaintiff's case was uncontroverted, it should enter judgment for the plaintiff, which it did.

20. The applicant contends that the court was under a duty to consider the defence on record, in particular the issue of the bank's security which had been sold by public auction. Counsel cited section 79G of the Civil Procedure Act with respect to time for filing of an appeal. It also relied on the case of **M. Paul Musili Wambua vs AG (2015) eKLR** with regard to the unfettered discretion of the court to determine whether or not to extend time for filing an appeal.

21. It enumerated the factors to consider as including the length of the delay, the reason for the delay, the chances of the appeal succeeding and the prejudice to the respondent if the application is granted. It contended that the judgment was delivered on 6th June 2018. It had filed an application to set aside on 7th June 2018, ruling on which was delivered on 12th September 2018. There was therefore no inordinate delay in filing the present application.

22. With respect to the chances of success of the appeal, the applicant argues that the trial court failed to address itself to all issues before it. It had ordered that the plaintiff be refunded the purchase price but did not deal with the issue of the bank's security which had been sold by public auction. Its decision therefore had the effect of compensating the respondents twice.

23. With respect to the application for stay of execution, the applicant cited Order 42 (6) (2). It relied on the case of **Gichohi Susana vs Phillip Muchoki Ngugi & Another (2015) eKLR** and **G. N. Muema t/a Mt. View Maternity & Nursing Home vs Miriam Maalim Bisheru & Another 2018** to urge the court to grant stay of execution as the appeal has overwhelming chances of success.

24. In their submissions in response the respondents submit that there is no suggestion that they will be unable to refund the decretal sum should the appeal succeed. That the averment that 1st respondent was an auctioneer of over 36 years not having been controverted, it was deemed to have been admitted. The respondents cited **Coftea Machinery Services Ltd vs Akiba Bank Ltd & 2 Others (2004) eKLR** and submitted that there was no basis for the court to deny the 1st respondent the decretal sum of Kshs. 234,937. They also relied on the case of **Kenya Shell Ltd vs Benjamin Kenya Kibor & Ruth Wairimu Karuga (1982 -1988) 1023** to submit that a successful litigant should not be denied the fruits of his judgment, noting that payment of a money decree does not render an appeal nugatory.

25. It was also the respondents' submission that the applicant had not appeared at the hearing of the suit and had not given a reasonable explanation to the trial court.

26. The respondents contended that the applicant had been guilty of inordinate delay. It had not given an explanation for the delay of 5 months before filing this application, and reliance was placed on the case of **Salama Mahmoud vs Kikas Investment Ltd & Another (2014) eKLR** for the submission that the delay of 5 months in this case was inordinate, and to urge the court to dismiss the application.

27. Two issues arise for determination in this application. First, whether the court should exercise its discretion and grant the applicant leave to file its appeal out of time. Under section 79 G of the Civil Procedure Act, a party may be granted leave to file an appeal out of time if he satisfies the court that he has good reason for not filing the appeal within the prescribed period.

28. In **Thuita Mwangi vs Kenya Airways Ltd [2003] eKLR**, the Court of Appeal reiterated the conditions to be considered in deciding whether or not to grant extension of time to file an appeal. These are the length of the delay, the reason for the delay, possibly, the chances of success of the appeal if the application is granted, and finally, the degree of prejudice to the respondent if the application is granted.

29. The judgment that the applicant seeks to appeal against was delivered on 6th June 2018. Immediately thereafter, on 7th June 2018, it filed an application to set aside the judgment and re-open the case so that it could present its evidence. The application was dismissed on 12th September 2018, and this application was then filed on 18th September 2018, six days after the dismissal of the applicant's application before the trial court. In my view, the period that elapsed before the filing of the application to file an appeal out of time, given the pendency of the application before the trial court, was not inordinate.

30. The applicant seeks to appeal against the decision of the trial court on the basis that it was erroneous. From what I can glean from the application and the affidavits in support, the error alluded to is that the trial court only considered the case of the plaintiff and did not consider the issue of the applicant's security, even though there was a defence on record.

31. I note that the defence dated 6th October 2014 consisted mainly of denials of the averments in the plaint. At paragraph 8 of the defence, the applicant averred that it had already concluded the transaction and forwarded all the documents to the plaintiff, thus rendering the suit superfluous. I have noted that in its decision, the trial court did note the contents of the defence, and also noted that the applicant in this case had failed to attend court even though the hearing date was given in open court.

32. I am not satisfied, therefore, in the circumstances, that the contention that the trial court erred in confining its decision to the issue before it, the plaintiff's case being uncontroverted, has any merit. I am therefore not satisfied that the applicant has satisfied the condition requiring a demonstration that its appeal has chances of succeeding. Nonetheless, bearing in mind that a party should not lightly be sent away and denied a chance to pursue justice, and noting that there is no prejudice to the respondents that is demonstrated, I will grant the applicant leave to file its appeal out of time.

33. The second issue to consider is whether the court should make an order of stay of execution pending appeal. The amount in contention in this case is Kshs. 234,937.

34. With respect to the grant of orders of stay pending appeal, Order 42 Rule 6 of the Civil Procedure Rules as follows:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.

35. Whether or not to grant an order of stay of execution is discretionary. However, such discretion must be exercised in accordance with the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules set out above: the applicant must demonstrate that the application was made without undue delay, and that substantial loss will result unless the order sought is granted. The applicant must also provide such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant.

36. I have found that the present application was made, in the circumstances, without undue delay. However, the applicant has not demonstrated that it will suffer substantial loss if the order for stay is not granted. The decretal amount is a relatively low amount- Kshs. 234,937. The 1st respondent has deposed, and this has not been controverted, that he has been a licensed auctioneer for 36 years. There is nothing to show that he would be unable to repay the decretal amount to the applicant should the applicant's appeal succeed. I make this finding bearing in mind that the decree sought to be stayed is a money decree, and as observed in the case of **Kenya Shell vs Karuga (supra)** a successful litigant should not be denied the fruits of his judgment.

37. In the premises, the application partially succeeds. The applicant is granted leave to file its appeal out of time. However, I decline to grant the order for stay of execution as it has not been demonstrated that the applicant will suffer substantial loss if the order of stay is not granted. Nor am I satisfied that the appeal will be rendered nugatory by payment of the decretal sum to the 1st respondent.

38. The respondents shall have the costs of this application.

39. It is so ordered.

Dated Delivered and Signed at Kericho this 27th day of February 2019

MUMBI NGUGI

JUDGE