REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 103 OF 2018

ANN WANJIKU NDUATI.....APPLICANT

-VERSUS-

FREDRICK OOGO OYUOYA.....RESPONDENT

RULING

1. The Notice of Motion before me is dated 1st February, 2018. The same is supported by the grounds set out on the body thereof and the affidavit of *Ann Wanjiku Nduati*. The applicant seeks the following orders:

> **i. Spent.**
>
> **ii. Spent.**
>
> **iii. THAT there be a stay of execution of the decree arising out of CMCC NO. 5932 OF 2010 pending the hearing and determination of the application and intended appeal.**
>
> **iv. THAT the applicant be granted leave to file an appeal out of time against the judgment, decree and all subsequent orders.**
>
> **v. THAT the costs of the application be provided for.**

2. The deponent avers that she was wrongfully sued in the lower court proceedings since she was not the owner of the subject motor vehicle registration number KAK 373P at the time of the alleged accident; that she was never served with summons to enter appearance and only came to be aware of the existence of the suit after the judgment was delivered and her property was attached. It was also the deponent's contention that she was never served with the notice of entry of judgment but that the same was sent to a postal address not belonging to her.

3. The deponent stated that she purchased the subject motor vehicle on 6th May, 2010 which was long after the alleged accident had occurred and that she later sold the said vehicle to a third party, namely Charles Mwangi Muraguri. That the previous owner of the motor vehicle (Joshua Nyamu Wagogi) swore an affidavit clarifying that he was the owner of the said vehicle at the time of the alleged accident and in fact knew the person believed to have caused the accident. The deponent stated that she attempted to have the ex parte judgment set aside and the attachment of her properties declared unlawful but her various applications were dismissed.

4. Further, the deponent explained that the delay in filing the application was not deliberate but was caused by the numerous attempts at being heard on the previous applications. That the applicant was also unable to file the appeal in good time due to the delay in obtaining the proceedings and that she stands to suffer irreparable loss should the respondent be allowed to proceed with execution.

5. The respondent offered a response to the Motion by filing both Grounds of Opposition and a Replying Affidavit. The Grounds brought out the fact that the application is frivolous, vexatious, lacks in merit and is an abuse of the court process; that the applicant had previously filed a similar application seeking a stay of execution but that the same was struck out by the High Court on 6th November, 2017 and hence the present Motion is *res judicata*. That the applicant has not demonstrated how she will suffer loss if the orders sought are declined, neither has she demonstrated that the appeal has high chances of success. That further, no security has been provided.

6. In her replying affidavit, *Salome Muhia Beacco* averred that upon delivery of the interlocutory judgment on 21st November, 2012 the respondent was heard on merit and a final judgment was delivered on 28th February, 2014. That the respondent thereafter sent out a notice of entry of judgment to the applicant but there was no action. The deponent further stated that warrants of attachment were applied for and issued on three (3) separate occasions and it was only later that the applicant sought to have the judgment set aside for non-service of summons. That the trial court determined that there was proper service and therefore dismissed the application. It was the deponent's declaration that the applicant thereafter filed a similar application dated 16th March, 2017 which was dismissed on grounds that the applicant had failed to file a defence within the prescribed timelines.

7. The deponent added that the subject motor vehicle has since been sold and hence the application has been overtaken by events. That further, the applicant has not disclosed to this court that the issues raised herein were heard and determined in Misc. Application No. 243 of 2017 and hence this amounts to an abuse of the court process.

8. The Motion was disposed of by way of written submissions. The applicant on her part reiterated the averments made in the supporting affidavit; adding that the trial magistrate vide her ruling of 14th June, 2017 declined to set aside the ex parte judgment despite the fact that the applicant's advocate had attached the draft defence to their submissions dated 15th November, 2016 and which defence raises triable issues. That the trial magistrate did not address the issue of service of the summons and yet this was a substantial issue; that the trial magistrate did not take into account the documents annexed to the application dated 16th March, 2017. The applicant maintained that she has the right to be heard on merit and that she will suffer substantial loss if the order for a stay of execution is not granted since her property has been attached. That the issue of leave to appeal has never been entertained by any court and cannot therefore be termed as *res judicata*.

9. On his part, the respondent sustained his argument that a similar application was heard and determined by Justice J. Sergon on 6th November, 2017, who found that the same had been overtaken by events. That the issues raised in the present application have been addressed in previous applications which have been determined and this court is functus officio on the issue of a stay of execution. The respondent was emphatic that the applicant had ample time to lodge an appeal but failed to do so and hence confirming that the application is only intended to delay the respondent's enjoyment of the fruits of his judgment.

10. The respondent advanced his arguments further by submitting that the applicant has neither demonstrated substantial loss nor that the appeal will be rendered nugatory nor provided any form of security to warrant the granting of a stay of execution. Reference was made to various judicial authorities in respect to this.

11. I have duly considered the grounds set out in the Motion and affidavit in support thereof, the replying affidavit together with the rival submissions by the respective parties. Before delving into the substantive prayers sought, I deem it necessary to address the res judicata issue raised by the respondent as concerns the prayer for a stay of execution. The respondent indicated that a similar application was entertained by the High Court in a separate miscellaneous cause. However, neither of the parties have availed a copy of the ruling by Honourable Justice Sergon to me for my perusal and confirmation of the arguments raised. I therefore find no basis in which to determine that the prayer for a stay of execution is *res judicata*.

12. I now wish to first address the subject of whether or not to grant the applicant leave to file an appeal out of time. In doing so, I make reference to *Section 79G of the Civil Procedure Act* which expresses that:

> **"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 any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: 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."**

13. A reading of the above provision illustrates that a party wishing to file an appeal out of time ought to present a reasonable basis, otherwise termed as sufficient cause. In giving my view on the same, I am guided by the analyses in *Apa Insurance Limited v Michael Kinyanjui Muturi [2016] eKLR* and *Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR* respectively.

14. In *Apa Insurance Limited* (supra) reliance was placed on the case of *Mwangi v Kenya Airways Ltd* (supra) which laid down the following conditions to be met in an application for leave to appeal out of time: **the length of delay; the reason for the delay; whether the appeal is arguable; and the degree of prejudice that will befall the respondent if the application is granted.**

15. As concerns the length and explanation of delay, I am aware that on the one hand the ex parte judgment was entered on 28th February, 2014 whereas the impugned ruling was delivered on 14th June, 2017. On the other hand, the Motion was filed on 1st February, 2018. Undoubtedly, there has been an extended delay in bringing the application. This leads me to the question of whether or not there is sufficient reason for such delay. As I may recall, the applicant argued that she remained unaware of the existence of both the suit and ex parte judgment up until her property was proclaimed and attached for purposes of execution. That she instructed her advocates to file an application dated 13th October, 2016 seeking to set aside the ex parte judgment and have the attachment declared unlawful but which application was dismissed. Subsequently, the applicant filed another application dated 16th March, 2017 seeking similar orders and that this particular application was equally dismissed on 14th June, 2017.

16. I have taken it upon myself to peruse the ruling of 14th June, 2017 and noted that the magistrate therein mentioned that on 27th October, 2016 the applicant was granted leave to file a statement of defence together with her submissions in respect to the application dated 13th October, 2016 but that only the written submissions were filed, thereby leading the earlier court to dismiss the application of 13th October, 2016. The magistrate in turn noted that the applicant had attached the draft defence to the application before her and determined that the applicant had already been granted the opportunity of filing such defence but did not comply. In fact, the magistrate termed the application then before her as an abuse of the court process.

17. That said, the applicant explained that the delay in filing the application resulted from the previous attempts at being heard. To my mind, this does not do well to explain the inaction of over six (6) months from the date of delivery of the impugned ruling. In the same manner, it was the applicant's argument that there was a delay in obtaining copies of the proceedings to enable her appeal. I have perused the court file and failed to come across any documentary evidence indicating that a request was made for the said proceedings for purposes of the appeal: the only related document before me is the draft memorandum of appeal. In my view, the applicant has not shown sufficient cause for the delay in filing either the appeal or at the very least, the current application. In actual fact, the court in *Diplack Kenya Limited* (supra) cited *Alibhhai Musajee v Shariff Mohammed AlBet Civil Appeal No. 283 of 1998* where the Court of Appeal reasoned the following:

> **"…whereas the Civil Procedure Act allows for extension of time for filing appeal if good and sufficient cause is shown, failure to act does not constitute a good or sufficient cause."**

18. The second principle relates to whether the applicant has an arguable appeal. Numerous authorities have stated and restated that an arguable appeal is not necessarily one that must succeed, but one that raises arguable issues. I have perused the draft memorandum of appeal hand in hand with the ruling delivered by Honourable E.A. Nyaloti on 14th June, 2017. I am alive to the fact that the aforementioned magistrate took note that the applicant had not complied with the previous court order of 27th October, 2016 that she file her statement of defence and thus, the draft defence which was filed together with the application before the said magistrate could not be considered.

19. I have also established that contrary to the averments made by the applicant in her submissions that the second application on which the impugned ruling is premised was for a review, the same appears by and large to be similar to that of 13th October, 2016; both of which were dismissed. It would appear there was therefore no reason for the magistrate to consider the draft defence as the same was improperly before her. To my mind, the filing of similar applications consecutively while at the same time neglecting to comply with orders made by the court is an abuse of the court process and more so, where no reasonable explanation has been given for the inaction. The court in *Dilpack Kenya Limited* (supra) seemed to agree so when reference was made to *Berber Alibhai Mawji v Sultan Hasham Lalji & 2 Others [1990-1994] EA 337*, that:

> **"inaction on the part of an advocate as opposed to error of judgment or a slip is not excusable. Therefore pure and simple inaction by counsel or a refusal to act cannot amount to a mistake, which ought not to be visited on the client."**

Furthermore, the applicant admitted that the subject motor vehicle was sold to a third party and this would mean the prayer for a release of the same has already been overtaken by events. Under the circumstances, I am not convinced that a prima facie arguable appeal exists.

20. I will now address the subject on whether the respondent stands to suffer prejudice. It has been acknowledged that an ex parte judgment was entered in favour of the respondent and that the execution of the decree is underway. It is therefore evident that should the applicant be allowed to lodge an appeal out of time, the respondent's enjoyment of the fruits of his judgment would be halted. Furthermore, the ex parte judgment was entered in 2014 and since then, the applicant has filed consecutive applications, both of which have been dismissed. However, I have observed that following the dismissal of the previous application on 14th June, 2017, the respondent has taken no further action towards executing the decree. That notwithstanding, it is fair to state that the respondent would stand to suffer a level of prejudice since he already has an ex parte judgment in place and has made attempts at executing the decree.

21. While I recognize that I am required to exercise my discretion judiciously, there is nothing to persuade me that the applicant has presented me with sufficient cause to grant leave to appeal out of time. I am backed by Justice Aburili's argument in *Apa Insurance Limited* (supra) in this sense:

> **"The power of the court to grant leave to file an appeal out of time as stipulated in Section 79G of the Civil Procedure Act is discretionary which discretion must nonetheless be exercised judiciously and depending on the circumstances of each case as no two cases are the same; and as leave by itself is not a matter of right. Therefore, the applicant must satisfy the court by placing before it material upon which such discretion may be exercised in their favour…"**

22. In view of the above and having declined to grant the applicant leave to lodge an appeal out of time, I find no reason to address the prayer on a stay of execution and the same automatically rests.

23. The upshot is that the Motion lacks merit and I have no option but to dismiss the same with costs to the respondent.

Dated, signed and delivered at NAIROBI this 21st day of February, 2019

L. NJUGUNA

JUDGE

In the presence of:

……. for the Applicant

……. for the Respondent