



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

MISC. CIVIL CASE NO. 28 OF 2019

CO-OPERATIVE BANK OF KENYA LIMITED.....APPLICANT

VERSUS

JEOPFRICK N. MUINDE t/a

KIMU AUCTIONEERS.....RESPONDENT

RULING

1. By the Notice of Motion dated 24th January 2019 filed herein on even date the applicant seeks orders: -

“1. (Spent)

2. (Spent)

3. THAT the Honourable Court be pleased to grant leave and extend time to the Applicant to file its Appeal out of time in respect to KEROKA CIVIL MISC. APP. NO. 39 OF 2018.

4. THAT the Honourable Court be pleased to grant stay of execution of the Decree in KEROKA MISC. APP. NO. 39 OF 2018 pending the hearing and determination of the intended Appeal herein.

5. THAT costs of the Application be in the cause.”

2. The gist of the application is that the trial Magistrate heard and dismissed the appellant’s preliminary objection which sought to stay taxation of the respondent’s charges without giving reasons and proceed to tax the bill; that the applicant was aggrieved by the ruling of the trial Magistrate but delayed in filing an appeal due to beauracracy in its organization; that the applicant is intent on filing the appeal; that the appeal is arguable and risks being rendered nugatory if the orders sought are not granted; that the orders sought herein will not prejudice the respondent or make him suffer any hardship and lastly that the respondent is willing to abide by any such conditions as may be imposed by this court.

3. The application is opposed on grounds that: -

“1. The application is misconceived, frivolous and vexatious.

2. It is brought in bad faith and intended to unduly delay satisfaction of the matter.

3. It is lacking in merit and an abuse of due process of the court.”

4. Counsel for both parties agreed to canvass the application by way of written submissions. The same were duly received and have been considered fully.

5. Time for filing appeals from subordinate courts is governed by **Section 75G of the Civil Procedure Act** which states: -

“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.”

6. The condition imposed by statute for such an application is to show that one has a good and sufficient cause for not filing the appeal in time. Over time however the condition has been expanded by the courts and in **Mwangi Vs. Kenya Airways [2003] eKLR** cited with approval by Joel J in **Samuel Mwaura Muthumbi Vs. Josephine Wanjiru Ngugi & Another [2018] eKLR**, the Court of Appeal set out the following conditions: -

- (a) **The period of delay;**
- (b) **The reason for the delay.**
- (c) **The arguability of the appeal.**
- (d) **The degree of prejudice which could be suffered by the respondent if the extension is granted;**
- (e) **The importance of compliance with time limits to the particular litigation or issue; and**
- (f) **The effect if any on the administration of justice or public interest if any is involved.**

In **NICHOLAS KIPTOO KORIR SALAT VS. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR**, the same court held that: -

“..... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion: - Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petition, public interest should be a consideration for extending time.”

7. The applicant had seven (7) days to file an appeal – **see Rule 55 (5) of the Auctioneers Rules, 1997**. In his submissions, Counsel for the respondent concedes that the court’s power to extend time for filing an appeal is discretionary but contends that the discretion must be exercised judiciously. It is his submission that this application has not met the threshold set by the Court of Appeal in the two cases cited above his argument being that the fact that there was no delay in bringing this application should not be the only consideration. I am however persuaded that the applicant has met the threshold to warrant this court to exercise its discretion in his favour. Firstly, the delay in filing the appeal is not inordinate given that the applicant had to first seek the leave of this court to do so and this application was admittedly filed timeously. Secondly, the applicant has given a plausible explanation for the delay. Thirdly, from a perusal of the Bill of Costs placed before the trial Magistrate the applicant indeed has an arguable appeal and lastly there is no prejudice that will be suffered by the respondent that cannot be compensated by an award for costs. **Accordingly, the application for extension of time for filing the appeal is allowed.**

8. On the prayer for stay of execution pending appeal, again, the discretion of this court is unfettered. It must however be exercised judiciously and within the parameters set out in **Order 42 Rule 6 of the Civil Procedure Rules**. A court shall not issue a stay of execution 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.”

Authorities on this issue are legion and some of them have been cited by Counsel.

9. I am satisfied that in the circumstances of this case a stay of execution is necessary to safeguard the applicant’s right of appeal. As I have already stated the applicant has an arguable appeal in all the twenty-eight applications now before me. The Bills in the applications as assessed add up to quite a substantial amount and the respondent may not, if the appeals succeed, be in a position to refund that sum to the applicant and the applicant is therefore likely to suffer substantive loss.

10. The applicant has expressed its willingness to deposit security for the due performance of such decree or orders as may ultimately be binding on it. To demonstrate its bonafides and as a condition for grant of the stay, **the applicant is hereby ordered to deposit a sum of Kshs. 200,000/= (two hundred thousand shillings only) within twenty-one (21) days of this ruling as security for costs either in this court or in an interest earning account in the joint names of the Advocates for the parties. For the avoidance of doubt the sums of Kshs. 200,000/= shall be paid only in Misc. Civil Case No. 01 of 2019 but shall be the deposit for security in all the 28 files in this series of cases. So shall the sum of Kshs. 20,000/= ordered as thrown away costs.**

11. In addition, the applicant shall: -

(i) File and serve a memorandum of Appeal within seven (7) days of this ruling;

(ii) File and serve the Record of Appeal within thirty (30) days of this ruling.

(iii) Thereafter the applicant's Advocate shall within fourteen (14) days of the filing of the Record of Appeal notify the Deputy Registrar to place the appeal before the Judge for directions.

(iv) In order to minimize delay in the disposition of the appeal, the Deputy Registrar is by a copy of this Ruling directed to call for the lower court record.

12. The applicant shall pay to the respondent Kshs. 20,000/= (twenty thousand shillings only) as thrown away costs (once only) but costs of the applications shall abide the appeal.

13. The Ruling in this cause shall apply mutatis mutandis in **Misc. Applications No. 2 to 28 of 2019.**

14. It is so ordered.

Signed, dated and delivered in Nyamira this 29th day of March 2019.

E. N. MAINA

JUDGE