



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 482 OF 2018

JOLIFEE KIPCHOKE MURUNGA1ST APPLICANT

MAXMILLAH CHEPKOECH KAIBEL.....2ND APPLICANT

VERSUS

SILAS KIGEN KATWA..... 1ST RESPONDENT

NELLY JEPCHIRCHIR KIMUTAI 2ND RESPONDENT

RULING

1. In the Notice of Motion dated 3rd September 2018, the applicants, *Jolifee Kipchoke Murunga* and *Maxmillah Chepkoech Kaibei* sought four prayers. Two of those prayers namely prayer 1 and 4 are now spent and what remains for this court's determination is prayers 2 and 3 in which the applicants seek orders to enlarge time within which they can file their intended appeal against the decision of the trial court in Nairobi Milimani Law Courts Civil Suit No. 5549 of 2012 and orders of stay of execution pending the hearing and determination of their intended appeal.

2. The application is anchored on the grounds stated on its face and is supported by the depositions made in the supporting and further affidavits sworn by the applicants' learned counsel *Mr. Benard M. Kitindio*.

3. The applicants contend that the failure to file their intended appeal within the time prescribed by the law was not deliberate; that the delay was occasioned by the trial court's action of delivering its judgment on an unscheduled date without notice to the parties after the learned trial magistrate resumed from leave; that the applicants had been informed by the court registry that the judgment was to be delivered on notice but when two months passed without being served with a notice, the applicants' counsel went to the court registry and noted on perusing the file that judgment had been delivered on 8th June 2018 in the absence of the parties; that the applicants were aggrieved by the trial court's decision on quantum of damages awarded to the respondents and are desirous of lodging an appeal; that the intended appeal is arguable and the applicants should be given an opportunity to be heard on appeal.

4. Regarding the prayer for stay of execution, the applicants claim that if stay is not granted, they will suffer irreparable loss as the intended appeal will be rendered nugatory; that the applicants are ready and willing to provide security for the due performance of the decree pending the hearing and disposal of the intended appeal. They urged the court to find that if the application was allowed, the respondents are not likely to suffer any prejudice.

5. The motion is opposed. The 1st respondent swore a replying affidavit on 12th October 2018 in which he stated that if the application was allowed, he will suffer prejudice as his right to enjoy the fruits of his judgment obtained on 8th June 2018 will be unduly delayed. In response to the applicants' claim that the respondents are persons of unknown means and that if stay is not granted the intended appeal will be rendered nugatory, the 1st respondent asserted that he is a person of means having worked in a senior position at Toyota Kenya for 11 years; that he is capable of refunding the decretal amount in the sum of KShs.639,386.50 together with costs and interests in the event that the intended appeal was successful. He annexed to his affidavit his bank statement; a logbook for his motor vehicle registration number KBU 280B valued at KShs.800,000 as per the valuation report annexed as exhibit marked SKK4. He urged the court to dismiss the application.

6. On the date scheduled for hearing, the parties agreed to have the application prosecuted by way of written submissions. Those of the applicants were filed on 14th December 2018 while those of the respondents were filed on 18th January 2019.

7. I have carefully considered the application, the affidavits on record as well as the written submissions filed by counsel on behalf of the parties and the authorities cited. I find that the success or failure of the prayer for stay of execution pending disposal of the intended appeal is dependent upon the outcome of the prayer for enlargement of time within which to file the intended appeal. In the premises, I will begin my determination of this application by addressing the prayer for enlargement of time to file the intended appeal.

8. The law governing the filing of appeals to the High Court is governed by *Section 79 G of the Civil Procedure Act* which states as follows:

“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.”

9. It is clear from the above provision that the prescribed time for filing of appeals to the High Court against orders or decisions made by the magistrates’ courts is 30 days but the High Court has wide and unfettered discretion to admit an appeal filed out of time if it was satisfied that the applicant had demonstrated good and sufficient cause for failure to file his appeal within time.

10. The Supreme Court’s decision in *Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others, [2014] eKLR* laid down the principles which should guide the court in the exercise of its discretion in deciding whether or not to enlarge time prescribed for filing of appeals. The court enumerated the principles as follows:

- a. 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;**
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**
- e. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- f. Whether the application has been brought without undue delay; and**
- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.**

11. The Court of Appeal in one of the cases cited by the respondent namely *Thuitha Mwangi V Kenya Airways Limited, [2003] eKLR* also spoke to the factors which a court should consider in applications such as the instant one. The court identified four factors which are as follows:

- i. The length of the delay;
- ii. The reason for the delay;
- iii. The chances of the appeal succeeding if the application is granted; and
- iv. The degree of prejudice to the respondent if the application is granted.

A reading of the above authority reveals that the court was careful to give a rider to the effect that the above list was not exhaustive and was not meant to be exhaustive and that a judge considering such an application was at liberty to consider any other factor in the exercise of his discretion provided that it was relevant to the issues being considered. Although in that case the court was addressing the exercise of a single judge’s discretion under *Rules 4 and 42 of the Court of Appeal Rules* to enlarge the time for filing of appeals to the Court of Appeal, it is my finding that the said factors just like the principles enunciated by the Supreme Court in the *Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others, (supra)* also apply to the exercise of discretion by the High Court in deciding whether or not to extend time limited for filing of appeals to the High Court.

12. Applying the above principles to the present case, I find that in this case, the judgment sought to be appealed against was delivered on 8th June 2018. This means that the 30 days’ period within which the intended appeal should have been filed expired on or about 9th July 2018. The current motion was filed on 18th September 2018 about two months later. It is not disputed that the judgment was delivered in the absence of both parties and that the applicants’ counsel was not served with a judgment notice. In my view, a delay of about two months in such circumstances is not inordinate and is excusable. It is my finding that the reasons given for the delay are satisfactory.

13. For the foregoing reasons, I find merit in the applicant’s prayer for enlargement of time and the same is allowed on condition that the intended appeal is filed within 7 days of today’s date.

14. With regard to the prayer for stay of execution pending the hearing and disposal of the intended appeal, I find that this prayer is based on speculation and is misconceived. I say so because so far, there is no competent appeal before the court and even if the applicants have been granted leave to file their intended appeal, there is no guarantee that the intended appeal will be filed within the time limited by the court or at all.

As matters now stand, there is no appeal before the court which is capable of being heard and determined which would justify the application

of the provisions of *Order 42 rule 6* of the *Civil Procedure Rules* which empowers the court to grant orders of stay of execution in appropriate cases pending the hearing and determination of appeals.

15. Having found as I have above, I am satisfied that prayer 3 of the motion as drafted is incompetent and is incapable of being granted by this court. The same is consequently dismissed.

16. In the end, the Notice of Motion dated 3rd September 2018 partially succeeds to the extent that prayer 2 seeking enlargement of time within which to file the applicants' intended appeal is allowed on condition that the intended appeal is filed within 7 days of today's date.

17. As the 1st respondent is the only respondent who opposed the motion, he is awarded costs of the application.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 28th day of March, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Musili holding brief for Mr. Kitindyo Musembi for the applicants

Ms Mburu for the respondents

Mr. Salach: Court Assistant