



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 9 OF 2017

NELLY WAITHERA MUHIA.....APPLICANT/APPELLANT

VERSUS

AUGUSTUS MWANZIA MUSEE & MUIMI MUSEE (Suing as the Administrators of the Estate of

MARGARET MWENDE MUSEE-Deceased.....RESPONDENTS

RULING

1. This is an application by the Applicant seeking two main prayers, firstly leave to enlarge time within which to file an appeal from a judgement and decree entered against her and delivered on 03.08.2016 in **Kithimani PMCC No. 185 of 2015** and secondly stay of execution of judgement and decree in **Kithimani PMCC No. 185 of 2015** pending the hearing and determination of the intended appeal.
2. The Applicant seeks orders for enlargement of time to file Memorandum of Appeal out of time. The intended appeal is from a judgement entered on 03.8.2016. The Application is supported by Supporting Affidavit by Jackson Muia, from the firm of advocates on record in this matter. The judgement was delivered on 3.8.2016. The Applicant did not lodge this Application until 30.01.2017. This was more than thirty-one days after the lapse of the time allowed to lodge appeals.
3. The Applicant deposes that the delay was due the fact that the judgement had mistakes and he had entered into negotiations with the Respondent with a view to compromise the award, however the respondent was keen in commencing execution. The applicant annexed a Draft Memorandum of Appeal exhibiting their grounds of dissatisfaction with the Learned Trial Magistrates judgement. The applicant avers in the supporting affidavit that execution is imminent and has included annexures of the notice of proclamation and warrants of sale and attachment to support this averment
4. The Application is opposed. The Respondent finds that the application has no place in law for it is signed by an advocate who is not a party to the proceedings. He points out that negotiations broke down over 6 months ago and the draft decree was served over 3 months ago and thus the applicant was aware that execution was due any time. Secondly, that the applicant had not satisfied the conditions for grant of stay of execution. Prayer 2 was granted at the interim and when the application came up for interpartes hearing, the same was dismissed due to the absence of the applicant and the applicant made an application for reinstatement that was allowed vide ruling delivered on 24.7.2017.
5. The Application was canvassed by way of written submissions.
6. The applicant's counsel submitted that the applicant has provided sufficient reason to warrant grant of the orders sought. He relied on the case of **Aviation Cargo Support Limited v St Mark Freight Services Limited (2014) eKLR** and reiterated the willingness to offer security as the courts may direct.
7. The Respondent in opposing the application through learned counsel J.A. Makau and CO Advocates cited the case of **Duncan Nduracha v Fuad Mohammed and 2 Others (2011) eKLR** and submitted that the applicant has failed to meet the standard of proof as per Sections 107, 108, 109 and 112 of the Evidence Act. Learned counsel submitted that the applicant has not proved that she will suffer irreparable harm, and that the affidavit on record is deposed by an advocate who does not have any knowledge as to the financial position of the applicant. Learned counsel submitted that the applicant has not deposited security or the decretal sum and sought that the application be dismissed. He cited the provisions of Order 22 rule 22(3) of the Civil Procedure Rules. Learned counsel submitted that the application is a delaying tactic and the respondents will suffer prejudice if the application is allowed for they are being denied the benefits of a judgement. With regard to the intended appeal, learned counsel submitted that the same was filed 5 months after the judgement of the lower court. Therefore the delay is unreasonable and the reasons for the delay are not demonstrated for there is no evidence of negotiations. They sought that the application dated 24.1.2017 be dismissed with costs
8. The issue for determination is whether the Applicant is entitled to an extension of time to lodge his appeal and orders for stay of execution.
9. Section 79G of the Civil Procedure Act is the law applicable in deciding whether the prayer to enlarge time to file the appeal is merited.

The section provides 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.

10. The Respondent opposed the application on one of the reasons that the Application is not properly before court for it is deponed by an advocate. This being an application that seeks leave, the argument by the respondent is not material, and I am unable to agree with the Respondent.

11. The power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis and while not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour. This was stated in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC and 7 Others (2015) eKLR**

12. The Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR**. listed the factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. They include the following:

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.

I will now consider the Applicants' application for extension of time against these factors.

13. The Application was brought almost 3 months after time had run out and the applicant has not explained satisfactorily the reason for the delay. Further I see a thin line between whether this delay is inordinate or not under the circumstances. However, because the applicant has reached the end of the tether, I hold the delay not to be inordinate.

14. Looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is unarguable for all one is required to demonstrate is the arguability of the appeal. The Applicant has easily met that standard. I believe that the Applicant has discharged this burden.

15. The applicant is not averse to the furnishing of requisite security for performance of the decree. I am alive to the apprehensions that the respondent has. However, in light of the fact that the applicant has indicated willingness to furnish security to satisfy the decretal sum and the said applicant is not satisfied with the judgement of the trial court there is some semblance of adverse effects that refusing the order have on the applicant. The Respondent will not suffer any prejudice since security has been offered. Further, it had earlier been confirmed by the Respondent's Counsel that the Applicant had made some part payment of the decretal sums.

16. Consequently, I will grant prayer 3 in the Applicant's Notice of Motion and give some timeline within which the same could be complied with.

17. Next I will address the issue of stay of execution and Order 42 Rule 6 of the Civil Procedure Rules is the law applicable in deciding whether the prayer is merited.

18. The case of **Antoine Ndiaye v African Virtual University [2015] eKLR** gave the guiding principles for stay orders, in semblance with Order 42 Rule 6 of the Civil Procedure Rules; to wit,

a. The Application was brought without undue delay.

b. Substantial loss occasionable to the applicant if the order is not granted.

c. Security for performance of decree that may ultimately become binding upon the Applicant.

19. I have looked at the application herein, and with regard to the condition of undue delay, as analyzed above, the delay is not inordinate. With regard to the issue of substantial loss, I am unable to find the substantial loss that the applicant shall suffer save that his right to be heard on appeal will be extinguished if the order is not granted. On the issue of security for performance, the applicant has indicated

willingness to deposit security as court directs. Therefore, I am satisfied that the applicant has partially met the basic requirements for grant of this order in any event there is evidence that the Respondent has since received a sum of Kshs.500,000/= from the Applicant.

20. Consequently, I will grant prayer 4 in the Applicants Notice of Motion but with certain conditions.

21. In view of the foregoing observations I find the Applicants Application dated 24/1/2017 has merit. The same is allowed in the following terms:-

(a) The Applicant is hereby ordered to file and serve Memorandum of Appeal within the next ten (10) days.

(b) An order of stay of execution of the judgement and decree in Kithimani PMCC No. 185 of 2015 shall issue on condition that half of the decretal sums be deposited in a joint interest earning account in the names of both Advocates within forty five (45) days from the date hereof failing which the stay shall lapse.

(c) The costs of the application shall abide in the appeal.

It is so ordered.

Dated and delivered at Machakos this 30th day of May, 2019.

D.K. KEMEI

JUDGE