



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**MISCELLANEOUS CIVIL CASE NO. 67 “B” OF 2018**

**MWANIKI MURANGIRI.....APPLICANT**

**VERSUS**

**NDWIGA MURANGIRI MURUAMBUKI.....1<sup>ST</sup> RESPONDENT**

**SELESTE MBOGO NJERU.....2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Introduction**

1. This is a ruling for the application dated 2<sup>nd</sup> November 2018 seeking for the following orders;

*a) That this honourable court be pleased to grant the applicant leave to appeal out of time against the judgement of Hon. M.N. Gicheru Chief Magistrate delivered on 6<sup>th</sup> August 2018 in succession cause no. 446 of 2017.*

*b) That this Honourable Court be pleased to stay execution of the judgement delivered by the honourable court at Embu in Succession cause 466 of 2017 on 6<sup>th</sup> August 2018 and all consequential orders.*

2. The parties consented to have the application disposed of by way of filing submissions.

**B. Applicants’ Case**

3. It is the applicant’s case that being dissatisfied with the judgement delivered; he applied for typed proceedings to enable him file the appeal, proceedings which he got on the 3<sup>rd</sup> October 2018 when the 30 days’ time for right of appeal had elapsed.

4. It is the applicants case that the reason that he filed this application late was because he appointed a new advocate who had to go through the proceedings again to enable her prepare a draft memorandum of appeal.

5. The applicant further puts forth the case that he will suffer substantial loss if the judgement delivered by the lower court is not set aside.

**C. Respondent’s Case**

6. The respondents in the replying affidavit sworn by the 2<sup>nd</sup> respondent put forth the case that the applicant filed the instant application 30 days after receiving the typed proceedings, an inordinate delay which is unexplained and inexcusable and as such the application must fail.

7. It is the respondents case that the applicant did not require proceedings to file an appeal and consequently the current application lacks merit, is an abuse of the court process and ought to be dismissed with costs.

**D. Applicant’s Submissions**

8. It is the applicant’s submission that the current application was brought without any unreasonable delay as the delay was occasioned on the part of the lower court who took time before supplying him with court proceedings and judgement and further that he engaged his current advocate to file the application as time had already lapsed.

**E. Respondents’ Submissions**

9. The respondents submitted that the delay in filing the appeal is inordinate and unjustifiable as the applicant had not explained it considering he was supplied with copies of judgement and proceedings on the 4<sup>th</sup> October 2018.

10. The respondents further submit that the excuse raised by the applicant with regard to employing a new advocate fails as it is not clear from the applicant when he engaged his new advocates and further that changing an advocate is not a good and sufficient reason for not filing the appeal on time.

11. It is respondents' submission that the applicant has not explained any loss he is likely to suffer nor has he offered any security for costs in his quest for an order of stay of execution. The respondents further submit that the applicant unprocedurally applied for stay of execution in his miscellaneous application instead of in succession cause number 446 of 2017 which was the main file.

12. It is the respondents' submission that the application dated 2<sup>nd</sup> November 2018 lacks merit and ought to be dismissed with costs.

#### **F. Analysis & Determination**

13. Section 79G of the *Civil Procedure Act* provides 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.”***

14. Therefore, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633**, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

15. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

16. In this case judgement was entered on the 6<sup>th</sup> August 2018. Copies of the typed proceedings and the judgement were supplied to the applicant's advocate on the 4<sup>th</sup> October 2018. The applicant filed his draft memorandum of appeal on the 5<sup>th</sup> November 2018. To date the applicant has not filed his record of appeal.

17. In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See **Ratman vs. Kumarasamy [1964] 3 All ER 933; Savill vs. Southend Health Authority [1995] 1 WLR 1254 at 1259.**

18. What is the explanation for the default in this matter? The only reason given by the applicant for not taking action within the prescribed time is that he changed his advocate and the new advocate needed time to peruse the proceedings and prepare a draft memorandum of appeal.

19. Section 79G of the *Civil Procedure Act* requires that before the Court enlarges the time for appealing the applicant must satisfy the court that he had good and sufficient cause for not filing the appeal in time. In **Alibhai Musajee vs. Shariff Mohammed Al-Bet Civil Appeal No. 283 of 1998**, the Court of Appeal held that whereas the *Civil Procedure Act* allows for extension of time for filing appeal, if good and sufficient cause shown, failure to act does not constitute a good or sufficient cause.

20. In this case the applicant has not expounded on the nature and quality of the inadvertence alluded to. This seems to be a case of mere inaction and as was held in **Berber Alibhai Mawji vs. Sultan Hasham Lalji & 2 Others [1990-1994] EA 337**, inaction on the part of an advocate as opposed to error of judgement 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.

21. I am therefore not satisfied that the delay or default on the part of the applicant has been satisfactorily explained. However, the applicant has a constitutional right to appeal. Extension of time to file appeal is a matter of exercise of discretion. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. Discretion of the court must always be exercised judiciously. The applicant has already filed a draft memorandum of appeal. My view is that he should be given an opportunity to pursue the appeal by giving him an extension of time within which to file the appeal.

22. I now turn to the prayer for stay of execution. Stay of execution in the High Court is provided under Order 42 rule 6 of the Civil procedure Rules. It provides;

***“No order for stay of execution shall be made under sub-rule (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.”***

23. The applicant needs to satisfy the court on the following conditions before they can be granted the stay orders:

**a) Substantial loss may result to the applicant unless the order is made,**

**b) The application has been made without unreasonable delay, and**

**c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.**

24. I will now consider whether these conditions have been met.

**a) Substantial loss occurring**

25. The onus of proving that substantial loss would occur unless stay is issued rests upon and must be discharged accordingly by the applicant. It is not enough to merely state that loss will be suffered; the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given.

26. The Court of Appeal has dealt with the issue in the case of **Charles Wahome Gethi v Angela Wairimu Gethi [2008] eKLR**. The Court of Appeal held the following view on the issue of substantial loss;

***“In the circumstances of this case, the applicant would suffer substantial loss rendering the appeal, if successful nugatory only if the suit land is disposed of before the appeal is determined. The applicant does not claim that the suit land would be disposed of. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.”***

27. The applicant must establish other factors to demonstrate that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein N. Chesoni [2002] 1KLR 867**, and also in the case of **Mukuma V Abuoga** quoted above.

28. The applicant already has his land LR. Gaturi/Nembure/1409 which is bigger share than the shares of the respondents bequeathed by the court. The respondents may go ahead and execute the grant in this succession cause. Although this is not clearly explained in the supporting affidavit. It may result in substantial loss. For this reason, the court finds that this loss may render the appeal nugatory in the event that it is decided in the applicant’s favour.

29. This succession cause and the offer for security should not be overly emphasised. However, the respondents will incur costs in pursuing the appeal. In the event that the appeal fails, the respondents may require to be paid costs. For this reason, this court may make an order for security of costs.

30. Judgement was entered on the 6<sup>th</sup> August 2018. Copies of the typed proceedings and the judgement were supplied to the applicant’s advocate on the 4<sup>th</sup> October 2018. The applicant filed this application on the 5<sup>th</sup> November 2018. The applicant has not explained this long delay before filing an application for stay of execution.

31. I find that the applicant has established a case for stay of execution herein.

32. The application dated 2<sup>nd</sup> November 2018, is hereby allowed in the following terms: -

***i. That prayers 2 and 4 in the application is hereby allowed.***

***ii. That the applicant is hereby ordered to deposit Kshs. 100,000/= in court as security for costs within 30 days.***

***iii. That the appeal be filed within ten (10) days.***

***iv. That due to the delay in filing the application, the applicant is condemned to pay costs of this application.***

33. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27<sup>TH</sup> DAY OF MAY 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muthoni for Applicant**

**Mr. Okwaro for Respondent**