



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 412 OF 2019

**CORNELLA APONDI OHANGA (Suing as an administrator of the estate of
ROSEMARY ANYANGO-Deceased).....APPELLANT/APPLICANT**

-VERSUS-

ANTHONY OPIYO T/A COPPER BELT ENTERPRISES.....RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 18th July, 2019 taken out by the appellant/applicant herein, in which she sought for an order for stay of execution of both the decree dated 26th November, 2018 and the order dated 15th July, 2019 pending the hearing and determination of the appeal and a further order for extension of the time for filing an appeal against the judgment of 26th November, 2018 or leave to file the main appeal out of time.
2. The Motion is supported by the grounds set out on its body and the facts deponed in the affidavit of the applicant.
3. In opposing the said Motion, the respondent put in Grounds of Opposition dated 29th July, 2019 and further filed the replying affidavit he swore on 8th August, 2019.
4. When the Motion came up for interparties hearing before this court, the respective advocates for the parties made brief oral submissions.
5. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing the Motion; the Grounds of Opposition; and the rival oral arguments made by learned counsels.
6. It is evident that the orders being sought in the Motion are two-fold: first is the order seeking for enlargement of time to appeal and for leave to appeal out of time against the impugned judgment and decree.
7. **Section 79G** of the **Civil Procedure Act** sets the timelines for lodging an appeal against the decision of a subordinate court as 30 days from the date of the decree or the order being appealed against. The provision goes on to express that an appeal can be admitted out of time where sufficient cause has been shown.
8. Further to the above, under the provisions of **Section 95** of the **Civil Procedure Act** and **Order 50, Rule 6** of the **Civil Procedure Rules**, the courts have power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
9. That said, the courts have developed various conditions to offer guidance in deciding whether to extend the period for filing an appeal out of time. In this regard, I draw from the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** where the Court of Appeal illustrated the conditions to be met.
10. On the first condition on length of delay, the respondent was of the view that the applicant is guilty of inordinate delay in bringing the application. The applicant did not touch on this subject.
11. While it is apparent from the record that no copy of the impugned judgment was availed to this court, the parties are in agreement that the aforementioned judgment was entered on 26th November, 2018 which is about eight (8) months prior to the filing of the Motion. In my mind, while there has clearly been a delay in filing the application, I do not find the same to be inordinate.
12. As concerns the reason for the delay, the applicant explained that following delivery of the judgment, her advocate requested for typed

and certified copies of the judgment, decree and proceedings to enable her lodge an appeal against the same but the copies were never availed.

13. I have looked at the letter dated 26th November, 2018 and marked as annexure "CO 1" attached to the supporting affidavit and confirming the averments set out hereinabove. There is nothing to indicate that the Executive Officer of the Chief Magistrate's Court responded to the same or availed the requested copies. I therefore find the explanation given to be reasonable.

14. As relates to whether or not an arguable appeal exists, it is the applicant's assertion that hers is an arguable appeal as indicated in the draft memorandum of appeal. In contrast, the respondent took the position that the appeal has minimal chances of success and that in any event, the applicant has failed to avail a copy of the impugned judgment for this court's reference.

15. Upon perusal of the grounds of appeal raised in the draft memorandum of appeal, I find that the appeal is primarily contesting various aspects of the trial court's analysis of the pleadings and evidence placed before it, such as the issue as to whether a contract existed between the parties and whether all the prayers in the respective pleadings were taken into account. I am satisfied that the applicant has demonstrated arguable points of law and fact in her appeal, regardless of whether or not the appeal succeeds.

16. In addressing the final condition on prejudice, it is apparent that the judgment was in favour of the respondent herein. It therefore follows that the respondent is lawfully entitled to enjoy the fruits of his long-awaited judgment since the filing of the suit in 2005. Suffice it to say that it would not be in the interest of justice to lock out the applicant who is aggrieved by the judgment of the trial court. I therefore find it reasonable for the applicant to be given the opportunity of challenging the subordinate court's decision on appeal.

17. The second prayer is for stay of execution of the decree pending appeal. It is noted that the applicant had made a similar application before the trial court, which application it would appear was allowed conditionally vide the ruling delivered on 15th July, 2019. It is not disputed that the applicant did not comply with any of the conditions set out in the aforementioned ruling, thereby resulting in the lapse of the stay order. It is thus clear that there is nothing further for this court to determine in respect to the aforesaid ruling.

18. However, this court is not prevented from considering a fresh application seeking a similar order for a stay of execution.

19. The guiding provision is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the following conditions in determining an application for stay.

20. The first condition is that the application must have been made without unreasonable delay. I am satisfied that this condition was sufficiently addressed hereinabove. It is not contested that part of the time was taken up by the hearing of the application for stay previously filed before the trial court.

21. Under the second condition, the applicant must show to this court's satisfaction the substantial loss she would suffer if the order for stay is denied. On her part, the applicant asserted that the respondent is intent on selling the property known as L.R. NO. NAIROBI/BLOCK 103/183-House No. 249 Mugoya Estate ("*the suit property*") which happens to be the sole property belonging to Rosemary Anyango ("*the deceased*") and from which the beneficiaries to the estate of the deceased derive their livelihood by virtue of its generation of Kshs.50,000/ every month.

22. On his part, the respondent argued that the applicant has not demonstrated the substantial loss that will be visited upon her or the beneficiaries of the deceased's estate, stating that the applicant has not shown her ability to pay the decretal sum should the appeal fail.

23. In considering that the beneficiaries of the deceased's estate have a stake in the suit property by virtue of the succession proceedings coupled with the applicant's responsibility as an administrator to protect the rights of such beneficiaries, I am satisfied that there exists a probability of substantial loss if the order for stay is not granted.

24. The final condition is the provision of security for the due performance of such decree or order, the applicant conveyed her willingness to deposit the title deed to the suit property, a position which was restated by *Mr. Oguwe*, her learned counsel.

25. Mr. Kibunja learned advocate for the respondent opposed the proposal arguing that the same is neither appropriate nor adequate.

26. I agree with the respondent that it would not be proper in the circumstances for the applicant to be permitted to deposit title documents as security. I think the appropriate security is for the applicant to deposit the decretal sum.

27. In the end, the Motion dated 18th July, 2019 is found to be meritorious hence it is allowed thus giving rise to a grant of the following orders:

a. The applicant shall file and serve the memorandum of appeal within 7 days from today and ensure to prepare, file and serve the record of appeal within 60 days from today.

b. There shall be an order for stay of execution of the judgment and decree issued on 26th November, 2018 pending the hearing and determination of the appeal on the condition that the applicant deposits the decretal sum of ksh.1,793,700/ in an interest earning account in the joint names of the advocates or firms of advocates within 45 days from the date of this ruling in default of which the stay order shall lapse.

c. Costs of the Motion shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 29th day of November, 2019.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent