



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**MISC. CIVIL APPL. NO.61 OF 2019**

**NANCY MUTHONI NYARUAI.....APPLICANT**

**V E R S U S**

**JOHN NDERITU NDUNGU.....RESPONDENT**

**R U L I N G**

For determination by this court is the Notice of Motion dated 27/6/2019 in which the applicant Nancy Muthoni Nyaruai seeks the following orders:

**1. ....spent;**

**2. ....**

**3. That the Hon. Court be pleased to grant the applicant leave to file an appeal out of time against the judgment delivered on 25/3/2019 in *Nya.CMC.50/2013, Nancy Muthoni Nyaruai v John Nduati Ndungu*;**

**4. That the defendant's Memorandum of Appeal attached herewith be deemed as duly filed upon the payment of the requisite court fees;**

**5. That pending the hearing and determination of the appeal, there be a stay of execution of the certificate of costs, notice to show cause dated 23/5/2019 and all consequential orders in the said case;**

**6. Costs of the application.**

The grounds upon which the application is brought are that the applicant filed a suit by a plaint dated 1/4/2015 seeking payment of Kshs.50,000/= from the respondent plus interest as was set out in a friendly loan agreement; that the respondent admitted to owing the applicant Kshs.35,000/= and on 26/5/2016, the court ordered him to pay the said sums which he did; that the suit proceeded till full hearing and on 25/2/2019, it was dismissed with costs to the respondent. The applicant was aggrieved by the said decision and asked her counsel to prefer an appeal but due to her mother's illness, she was not able to, the applicant was served with NTSC dated 23/5/2019 for payment of costs awarded to the respondent and the same is scheduled to be heard on 1/7/2019. She therefore prays to be granted leave to appeal out of time and that the execution be stayed.

The application is also supported by the affidavit of Nancy Muthoni Nyaruai dated 27/6/2019 where she reiterated the same grounds.

Mr. Waichungo, counsel for the applicant submitted that the delay in filing appeal of two months is not inordinate and the respondent will not suffer any prejudice. Counsel relied on decisions of:

**1. *Edward Kamau & another v Hannah Gichuki. H.C.Misc.78/2015; and***

**2. *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi H.C.Misc.Appl.108/2017.***

He argued that a right of appeal is a Constitutional right and if denied, it will be infringing on the rights to access justice. Counsel annexed the draft memorandum of appeal and contends that the appeal has high chances of Success and that if an order of stay is not granted, the applicant will suffer irreparable loss because the respondent is a man of straw and will not be able to refund the Kshs.61,080/= decretal sum which was deposited in court following the court's order; that it took the respondent nine months to repay Kshs.35,000/= and may take longer to repay; the decretal sum counsel relied on the decision in *National Industrial Credit Bank Ltd v Agnes Francis Wasike*

C.A.238/2005 where the court held that where an applicant expresses fear that the respondent may not be able to pay back the decretal sum, the evidential burden must shift to the respondent to show what resources he has which is a matter within his knowledge. Mr. Waichungo added that since no affidavit of means has been filed to demonstrate that the respondent is a man of means, the court should grant an order of stay.

The respondent filed a replying affidavit dated 4/7/2019 in which he admitted that the parties did enter into a friendly loan but the trial court found it to have attained illegal interest and found the applicant to be entitled to the principal sum only and it was paid; that the judgment was delivered in the presence of the applicant and she had ample time to file an appeal; that the applicant has not given good reasons as to why the court should exercise its discretion in his favour.

Mr. Nderitu, counsel for the respondent submitted that the applicant has not provided any evidence to show that her mother was sick in order to be allowed to file an appeal out of time; that the applicant's counsel was present in court when the judgment was delivered; that the medical documents show that the illness started in May, whereas the judgment was read on 25/3/2019 and the period within which to file appeal had expired by May.

Counsel also submitted that a money decree cannot be rendered nugatory and that the applicant has not demonstrated what loss will be suffered if money is released to the respondent.

Counsel further argued that there is no possibility of the appeal succeeding because the applicant was doing shylock business which is illegal.

I have given due consideration to the application and submissions by both counsel. The first issue that this court needs to address is whether the court can grant leave to file an appeal out of time before addressing the issue of stay. Although the applicant did not invoke the applicable law, Section 79G of the Civil Procedure Act deals with appeals.

It reads as follows:

***“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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 of 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.”***

The provisions of Section 799 Civil Procedure Act allows the admission of an appeal out of time if the applicant satisfies the court that he had a good and sufficient cause for not filing the appeal in time. The grant of the order is therefore an exercise of the court's discretion, which depends on the explanation given by the applicant.

I am guided by the Supreme Court's decision in Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others CC.App.16/2014 which laid down the principles to be considered by a court before extension of time is allowed. They are as follows:

- 1. 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;***
- 2. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
- 3. As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case basis;***
- 4. Whether there is a reasonable reason for the delay. The delay should also be explained to the satisfaction of the court;***
- 5. Whether there will be any prejudice to be suffered by the respondent if the extension is granted;***
- 6. The application should have been brought without undue delay; and***
- 7. In certain cases, like election petitions, public interest should be a consideration for extending time.***

In the instant case, this application was filed on 27/6/2019 whereas the court's ruling had been delivered on 25/3/2019, that is three months after the judgment and two months after the time for filing had lapsed. The reason for the delay is that the applicant was not able to take action because her mother was admitted at Kikuyu Hospital and she was the only person who could have attended to her. She attached a receipt from the hospital which indicates that the said patient was admitted on 30/5/2019 and discharged on 2/6/2019. By the time the said patient was admitted, it was over a month after time lapsed. The illness of the applicant's mother is not therefore a good explanation for the delay because it came two months after the court's decision.

Besides, the applicant had counsel who was present when the judgment was read and could have moved to file appeal in time if instructed. So far, no good explanation has been given for the delay. However, I would not categorize the delay of two months as inordinate delay.

As noted above, the grant of leave to appeal out of time is a discretionary remedy which the court will grant on case by case basis based on the special circumstances of each case.

Whether the applicant has an arguable case, it has been argued for the applicant, that the respondent having admitted to owing money to the appellant, the costs should have been awarded to the applicant. On the other hand, the respondent argues that the appeal does not stand any chance of success because the applicant was doing illegal business of a shylock. At this stage, the court is not called upon to determine the merits of the appeal and the court must take care and avoid delving into the merits thereof.

A right of appeal is a constitutional right and to deny a party that right is in effect denying the party access to justice which is guaranteed under Article 45 of the Constitution. Under Article 50(1) the right to hearing is a fair right that cannot be limited. On the other hand, the respondent has a right to enjoy the fruits of the lower court's judgment. This court has therefore that delicate task of balancing the competing rights under Article 159 of the Constitution which requires that justice be done to all without regard to status.

The applicant claims that the respondent is a man of straw and unable to repay the decretal sum if it is paid to him and the appeal succeeds. The applicant contends that if the respondent could not repay the loan of Kshs.35,000, he cannot be able to repay costs of Kshs.61,000/=.

In law, he who alleges must prove. In the case of *Stanley Karanja & another v Ridon Anyangu Mtibwa Nairobi HCCA.427/2015* said as follows:

***“It is not right for the respondent to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view, the respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge. The Court of Appeal while dealing with a similar situation in National Industrial Bank Ltd v Aquinas Francis Wasike & another (UR) CA.238/2005 stated:***

***This court has said before and it would be repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or looks for them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”***

Guided by the above authorities, the respondent bears the evidential burden to prove that he is not a man of straw as alleged by the applicant. The respondent did not attempt to discharge that burden. The respondent has not disclosed its source of income or what he owns, that he would use to refund the applicant the decretal sum in the event the appeal succeeds. I find that the applicant has therefore demonstrated that she will suffer substantial loss if stay is not granted.

The applicant has already deposited the decretal sum with the court as security and it will remain as such. The same was deposited on 28/6/2019. It demonstrates that the applicant is serious about prosecuting the appeal.

For the above reasons and in exercise of this court's discretion, I find that the applicant is deserving of the orders sought and I make the following order:

- 1. Leave is hereby granted to the applicant to file an appeal out of time.***
- 2. The appeal be filed and served within 7 days hereof.***
- 3. An order of stay of execution pending the hearing of the appeal is hereby granted.***
- 4. The decretal sum which has been deposited with the court will remain with the court as security till the appeal is heard and determined.***
- 5. The draft memorandum of appeal be filed and served within 7 days from today.***
- 6. Costs of this application to be borne by the applicant, due to the delay in filing the appeal.***

**Dated, Signed and Delivered at NYAHURURU this 27th day of November, 2019.**

.....

**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Miss Njoki Muriithi holding brief for

Mr. Waichungo for applicant/appellant

Mr. Nderitu for Respondent/Respondent

