



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MISC. CIVIL APPL. NO. 50 OF 2016**

**REPUBLIC..... APPLICANT**

**-VERSUS-**

**ATTORNEY GENERAL ..... INTERESTED PARTY**

**THE PERMANENT SECRETARY**

**MINISTRY OF TOURISM..... RESPONDENT**

**FANUEL INZIRA MISANGO ..... EX-PARTE APPLICANT**

**RULING**

The application dated 6<sup>th</sup> June 2019 seeks the stay of proceedings until the determination of **HIGH COURT MISCELLANEOUS APPLICATION NO. 82 OF 2019**.

1. By that Miscellaneous Application, the Applicant was seeking leave of the Court to file an appeal out of time.
2. The application seeks the stay of the proceedings in the Judicial Review Application, through which the Respondent herein was seeking orders to compel the Permanent Secretary, Ministry of Tourism to remit Kshs 936,060/= plus Interest and Costs arising from a Decree in **NYANDO SPMCC NO. 184 OF 2013**.
3. The application was canvassed by written submissions.
4. It was the Applicant's submission that he has an arguable appeal, which has a high probability of success.
5. The Applicant believes that he deserves a right to be heard on his appeal.
6. Therefore, in his considered view, if the orders sought were not granted, the Applicant submitted that he would suffer substantial loss.
7. Citing the decision of Ringera J. in **GLOBAL TOURS & TRAVELS LIMITED, HIGH COURT WINDING UP CAUSE NO. 43 OF 2000**, the Applicant reminded me that the court which has been called upon to determine whether or not to stay further proceedings has the discretion to do so, provided that the said discretion was exercised in the interest of justice.

8. Ringera J. said;

***“The sole question is whether it is in the interest of justice to order a stay of proceedings, and if it is, on what terms it should be granted.”***

9. The Applicant submitted that he had satisfied the conditions for the award of the orders sought, because, firstly, he had brought this application expeditiously.

10. The Applicant pointed out that the delay in filing his intended appeal;

***“..... was occasioned by the late transmission of instructions from the client to the Advocate.”***

11. He exhibited a letter dated 20<sup>th</sup> February 2018, seeking instructions.

12. He also exhibited a letter dated 27<sup>th</sup> July 2018, through which the client gave instructions to lodge an appeal out of time.

13. According to the Applicant, he has an arguable Appeal, because the evidence presented at the trial did not support the findings in the Judgment, on the question of Special Damages for Loss of User, for a period of **SEVEN (7) Months**.

14. Finally, the Applicant submitted that if the proceedings were not stayed, his Appeal would be rendered nugatory.

15. In the case of **GICHUKI MACHARIA & ANOTHER Vs KIAI MBAKI & 2 OTHERS, WINDING UP CAUSE NO. 1 OF 2000**, C. Kariuki J. expressed himself thus;

***“..... the Court has to consider a number of issues before it may order for stay of proceedings; the Court should weigh the pros and cons of issuing such order and the ramifications that may arise subsequent to such orders.***

***Further, it was for the court to consider whether the issuing of such orders would be in the interest of justice, or for the expeditious disposition of matters as alluded to under the provisions of Section 1A of the Civil Procedure Act.”***

16. It is common ground that the Judgment in respect to which the Applicant has filed a (separate) application for leave to appeal out of time, was granted on 14<sup>th</sup> October 2014.

17. The Applicant has exhibited a letter dated 27<sup>th</sup> November 2017, showing that it was on that date that the Litigation Counsel handling the case had written to the Deputy Chief Litigation Counsel, informing him about the judgment.

18. It was not until 27<sup>th</sup> July 2018 when the Deputy Chief State Counsel, Mr. Charles Mutinda, wrote back to the Applicant, advising him to take out necessary proceedings, to review or to appeal against the judgment.

19. Following receipt of the said instructions, the Applicant filed an application dated 16<sup>th</sup> May 2019, seeking leave to appeal out of time.

20. As the Respondent has pointed out, it was about four-and-a-half years after the trial court had granted judgment that the Applicant brought the application for leave to appeal out of time.

21. When a party has got a judgment in his favour, he is entitled to reap the fruits of the said judgment. Therefore, for over four years now, the Respondent has been entitled to receive payment of the sums

awarded to him.

22. On the other hand, every party against whom a judgment had been entered has a right to appeal (unless such a right was expressly barred by law).

23. Where an unsuccessful party chooses to exercise his right of appeal, the said right must be balanced against the rights of the successful party, who was entitled to enjoy the fruits of the judgment.

24. In this case, the Applicant does not yet have an appeal.

25. The Applicant is still at the stage of seeking leave to appeal. Therefore, it would be premature to talk about an appeal that was arguable.

26. Secondly, I have got to take into consideration the ramifications of granting an order for stay of proceedings.

27. In so doing, I have to take into account the conduct of the parties from the time the judgment was granted until the time when the application was canvassed.

28. I have to also take into account the impact on the parties' respective positions, going forward.

29. It is clear that the reason for delay in bringing the application for leave to appeal out of time was not brought upon the Applicant by any external matters.

30. The Applicant's advocates informed their client, (which is the Ministry of Tourism) about the judgment.

31. I note that the reason advanced in this matter, for the delay in bringing the application is that the Client delayed in remitting instructions to their advocate.

32. In effect, the Client for whose benefit and interests the application was lodged, is the same person who delayed in giving requisite instructions. I find that the Applicant has not given any explanation for delaying his instructions to the Advocate.

33. I also find that the said Applicant had led the Respondent and the court to believe that they only required time in order to enable them make payment.

34. Indeed, as recently as 1<sup>st</sup> April 2019, the Principal Secretary, Ministry of Tourism and Wildlife wrote to the Principal Secretary, National Treasury and Planning, requesting for a budgetary allocation of the funds required to settle the decretal amount.

35. In the circumstances, it appears that the decision to seek orders that would become a hurdle to the settlement of the decretal amount, is an after-thought on the part of the Applicant.

36. Finally, and in any event, I find that the proceedings which the Applicant seeks to have stayed, are lawful. The said proceedings provide a forum to the Applicant herein and to the Respondent thereto, to satisfy the court on the issue as whether or not the orders should be issued to compel the Principal Secretary to settle the decretal amount.

37. In the case of **JOSEPH GITONGA KURIA V ELIZABETH WAMBUI GITONGA & ANOTHER (2016) eKLR** the Court held as follows;

***“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss.”***

38. In this case, the Applicant has not demonstrated that he would suffer substantial loss if the

proceedings are not stayed.

**39.** In the result there is no merit in the application: It is therefore dismissed with costs to the Respondent.

**DATED, SIGNED and DELIVERED at KISUMU This 26<sup>th</sup> day of November 2019**

**FRED A. OCHIENG**

**JUDGE**