



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. CIVIL APPLICATION NO. 110 OF 2018

STEPHEN K. CHEBOI.....APPLICANT

VERSUS

ELIJAH KITUM & 3 OTHERS.....RESPONDENTS

RULING

The applicant filed an application on 11th June 2019 seeking orders for stay of execution and leave to file the appeal out of time.

APPLICANT'S CASE

The applicant filed his submissions on 25th November 2019. The applicant lost a case, Eldoret CMCC 902 of 2009 wherein the court found that he had not proven his case and the respondents had succeeded on their counterclaim.

The applicant submitted that he can satisfy the court that he has good and sufficient reason for not filing the appeal within time. He has sworn an affidavit in support of his application wherein he has stated the reasons for his non-compliance. They satisfy the threshold envisioned by *Section 79G* of the *Civil Procedure Act*.

The judgment in the lower court was rendered on 12th December 2016 in the absence of the plaintiff. No notice was served on him until the NTSC was taken out. That coupled with lack of resources to mount an appeal in time conspired to determine the appellant the right of appeal.

The applicant stated that the danger of execution is real and under order 42 rule 6 the applicant deserves the order. In all judicial processes the right to be heard in a fair and transparent process is a basic right. It matters not whether the right is exercised late.

The applicant deponed that he stands to suffer substantial loss as the respondents have commenced the process of execution of the judgment. He also deponed that he was willing to abide by any conditions and terms as to security that the court may deem fit.

RESPONDENT'S CASE

The respondent filed submissions on 16th November 2019.

The respondent cited *Order 42* of the *Civil Procedure rules* and submitted that the applicant has not demonstrated that he will suffer substantial loss if the stay was not granted. He submitted that the application was merely a delay of the execution process and no reasonable grounds have been advanced to warrant stay of judgment and extension of time to file the appeal as he was aware all along of the existence of the judgment. The respondents relied on the case of *Joseph Gachie T/A Joska Metal Works v Simon Ndeti Muema (2012)*.

The judgment was delivered on 12th February 2016 and 3 years have passed before the application herein was filed. It is more damning that the applicant did participate in court proceedings and did not deem it fit to ask for stay of execution. The applicant has not given reasons as to why he filed the application late. It is apparent that the application was not brought timeously.

The applicant has failed to demonstrate willingness to abide by security conditions imposed by this court. The omission is fatal as the provision of security is mandatory under order 42 rule 6 of the civil procedure rules. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so it is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.

The respondents submitted that the prayer for extension of time and leave to file an appeal out of time is fatally defective. The respondents

cited *Section 79 G of the Civil Procedure Act* in this regard.

They relied on the case of ***Fahim Yasin Twaha v Timamy Issa Abdalla (2015) eKLR*** and submitted that the applicant has failed to establish or advance grounds through its application sufficient enough to persuade the court to exercise its discretion to file an appeal out of time under the above thresholds. The court should find the applicant guilty of laches as the applicant has lost entitlement to be granted an extension of time as the applicant has waited for over 3 years.

The applicant has laid no reasons to convince the court to grant an extension of time. The applicant has failed to explain satisfactorily that the inordinate delay was inevitable.

The applicant having failed to prove his application on a balance of probabilities costs should be shouldered by him. They cited the case of ***Fahim Yasin Twaha v Timamy Issa Abdalla (2015) eKLR*** and submitted that costs follow the event.

The applicant has not met the threshold necessary to grant the orders sought.

ISSUES FOR DETERMINATION

- a) Whether the applicant should be granted stay of execution
- b) Whether the applicant should be granted an extension of time and leave to appeal out of time.

WHETHER THE APPLICANT SHOULD BE GRANTED STAY OF EXECUTION

The application was brought under *Order 42 Rule 6 of the Civil procedure rules* which provides that:-

Order 42 Rule 6 provides;

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.

(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

The Applicant must prove that substantial loss may result if stay is not granted, that the application has been made without unreasonable delay and that there shall be security furnished.

Whether substantial loss may result

In the case of ***Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR*** the court held;

In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...

The applicant has not shown how substantial loss will result if the orders for stay of execution are not granted.

Whether the application has been brought without unreasonable delay

The judgment was delivered on 12th February 2016. The application was made on 11th June 2019, three years after the judgment. The applicant participated in the suit and did not make an application for stay after judgment. I find that three years' delay which is not satisfactorily explained, is inordinate.

Security

In *Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates* Justice Gikonyo stated that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor..... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

The applicant has not made any offers for security and has merely stated that he will abide by any such terms as the court shall give with regards to the same. I find that he has not met this requirement. However, given that the orders sought are discretionary, this fact alone wouldn't hinder the court from granting a conditional stay.

WHETHER THE APPLICANT SHOULD BE GRANTED EXTENSION OF TIME AND LEAVE TO FILE THE APPEAL OUT OF TIME

Section 79G provides as follows:

79G. 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.

It is apparent that the appellant must satisfy the court that he had good and sufficient cause for not filing the appeal within time. The applicant has not explained why he took three years to file the appeal. The delay is inordinate. I find that the application is an abuse of the court process and an attempt to delay the respondents from enjoying the fruits of their judgment. The explanation that the case could proceed after the 1st defendants were substituted is not sufficient to explain the delay.

In the premises the application lacks merit and is dismissed with costs to the Respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF DECEMBER, 2019.

In the presence of;

Mr. Ngigi Mbugua for the Applicant

Ms. Karuga holding brief for Ms. Chesoo for the Respondent

Ms Abigael - Court assistant