



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 121 OF 2017

LUKE NZWIIAPPELLANT/APPLICANT

VERSUS

ALEX MUSAU MUINDI RESPONDENT

RULING OF THE COURT

1. The Appellant/Applicant herein has filed a Notice of Motion dated 15/06/2017 seeking the following prayers namely:-

(I) The Application be certified as urgent.

(II) There be stay of execution of the judgment/decree issued by the Honourable Senior Principal Magistrate Kangundo Law Courts on the 23/11/2016 in SPMCC No. 109 of 2015 – Alex Musau Muindi =Vs= Luke Nzwii & Abdi M. Fidow pending the interparte hearing of the application.

(III) There be an enlargement of time within which the Applicant is to file an Appeal from the judgement of the Honourable Senior Principal Magistrate delivered on the 23/11/2016 and that the Applicant be granted leave to file an Appeal out of time.

(IV) The Memorandum of appeal (Civil Appeal No. 8 of 2017) filed on the 20th January, 2017 be deemed to be properly on record.

(V) Pending the hearing and determination of the appeal lodged by the Applicant being Civil Appeal No. 8 of 2017 there be stay of execution of the judgement/decree issued by the Honourable Court at Kangundo on the 23/11/2016.

(VI) Costs of the Application be in the cause.

2. The Application is supported by grounds on the face of the Application as well as a supporting affidavit of Silvia Motari sworn on 15/06/2017 which raised the following issues:-

(a) The Applicant was not notified in time of the delivery of the lower court judgement and as such the time for lodging an Appeal lapsed.

(b) The Applicant moved the lower court for an order of stay of execution and leave to lodge appeal out of time which was declined by the trial court.

(c) The failure to lodge an Appeal within time and delay in filing the present Application seeking stay of execution and extension of time for appealing are explainable and excusable and not intentional on the part of the Applicant's Advocates.

(d) The Application has been made without unreasonable delay.

(e) The Applicant is desirous of exercising his right of Appeal.

(f) The Respondent has no means of paying the decretal sum back to the Applicant in the event of success of Appeal.

(g) The Applicant is willing to deposit security in accordance with the court orders.

(h) There is no prejudice to be suffered by the Respondent if stay of execution is granted.

(i) That the Applicant's insurers have already paid to the Respondent's Advocates the full decretal sum of Kshs.694,653/= and therefore no prejudice at all will be suffered by the Respondent.

3. The Application was opposed by the Respondent whose counsel filed the following grounds of opposition:-

(i) That the Application is frivolous, vexatious, an after-thought and brought in bad faith as well as filed after inordinate delay and that it is Res judicata.

(ii) The Application offends the provisions of Section 79G of the Civil Procedure Act.

(iii) The Applicant has not shown good grounds to warrant the granting of the orders sought.

(iv) The Application is intended to frustrate the Plaintiff from enjoying the fruits of a lawfully obtained judgement.

4. Learned Counsels for the parties agreed to canvass the Application by way of written submissions. It was submitted for the Applicant that he is coming before this court pursuant to the provisions of Section 79G of the Civil Procedure Act and order 50 Rule 6 of the Civil Procedure Rules seeking to be allowed to lodge Appeal out of time as the delay was due to circumstances beyond his control. It was further submitted that the Applicant should be given a chance to ventilate his Appeal. It was further submitted that since the Applicant has paid the decretal sums in full, the prayer for stay of execution pending appeal be deemed as having been overtaken by events. The Applicants Counsel relied on the cases of:-

(a) EDWARD KAMAU & ANOTHER =VS= ANNAH MUKUI GICHUKI & ANOTHER [2015] EKLR.

(b) PHILIP KEIPTO CHEMWOLO & ANOTHER =VS= AUGUSTINE KUBENDE [1986] KLR 495.

It was submitted for the Respondent that the Application before court is Res-judicata in that a similar Application had been made before the lower court and rejected and that the Applicant ought to have appealed against the same but not to file a similar Application before this court. It was further submitted that the Applicant slept on his rights and his present move is an afterthought meant to deny the Respondent from enjoying the fruits of the judgement. Finally, it was submitted that the Application has been overtaken by events in that the Applicant has already paid the decretal sums leaving a balance of Kshs.100,000/=.

5. I have considered the Application together with the affidavits in support as well as the grounds of opposition. I have also considered the submissions by the learned counsels. It is not in dispute that the

period for lodging an appeal by the Applicants has since lapsed. It is also not in dispute that the Applicant has made part or whole payment of the decretal sums to the Respondent. It is also not in dispute that the Applicant has already abandoned the prayer for stay of execution pending the determination of the Appeal. That being the position, I find the only issue for determination is whether or not the Applicant has convinced this court to grant him leave to lodge his appeal out of time.

6. As to whether this court should grant extension of time for filing an Appeal, the relevant provisions of the law governing the same is found in Section 79G of the Civil Procedure Act which provides:-

“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 or order.”

The above Section 79G of the Civil Procedure Act has a proviso to the effect that an Appeal may be admitted out of time if the Appellant satisfies the court that he had a good and sufficient cause for not filing the Appeal in time.

The Counsel for the Applicant has stated that the delay in filing the Appeal was not intentional since she was not aware of the date of the delivery of the judgment and that she was only made aware of the same on the 14/12/2016 when she received a letter from the Respondent’s Advocates requesting for settlement of the decretal sums and that she filed a Memorandum of Appeal though out of time on 20/01/2017. The Applicant now craves leave to be allowed to lodge Appeal out of time so as to ventilate his Appeal.

The Respondent on the other hand is not convinced by the explanation offered by the Applicant and suggests that the Applicant has slept on his rights and should not be allowed to deny the Respondent the fruits of the judgment. It is the contention of the Respondent that since the Applicant has made substantial payment of the decretal sums, the intended Appeal is an abuse of court process.

7. Looking at the averments of the Applicant in the affidavit in support of the Application and the submissions of his learned Counsel, I find that indeed he is desirous to ventilate his Appeal. This is despite the fact that the Applicant admits to have made full payment of the decretal sums to the Respondent. Indeed the Applicant is not seeking for an order of stay of execution as confirmed by his learned Counsel in the submissions but only wants the Appeal to be lodged. The issue of the merits or demerits of the said Appeal shall have to be determined during the hearing. As the Respondent has received all or part of the decretal sums, I do not see how he is likely to be prejudiced if the Applicants is granted his wish to lodge Appeal out of time. The debacle the Applicant found himself in while pursuing the process of lodging the Appeal should be excused. In the cited case of **PHILIP KEIPTO CHEMWOLO & ANOTHER =VS= AUGUSTINE KUBENDE [1986]KLR 495** the Court of Appeal thus:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of having his case determined in its merits.”

8. The East African Court of Appeal in the case of **BRANCO ARABE EPANOL =VS= BANK OF UGANDA [1999] 2EA 22** seems to have been of the same view as the Kenyan Court of Appeal (supra) when it held as follows:-

“The Administration of justice should normally require the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessary debar a litigant from the pursuit of his rights and unless lack of adherence to rules renders the Appeal process difficult and inoperative, it would seem that the main purpose of litigation namely the hearing and determination of disputes should be fostered rather than hindered.”

9. I am guided by the above two authorities and find that it would be fair and just to grant the Applicant

his day in court to ventilate his Appeal. Even though the Respondent is of the view that the Appeal should not be entertained since the decretal sum has already been paid, the rights of the Applicant should not be shut out and washed away. The Memorandum of Appeal appears to raise triable issues and is not in my considered view a frivolous one. The payment of the decretal sums by the Applicants to the Respondent is not a bar to him from being allowed to ventilate his Appeal. It is possible that the payment of the decretal sums might have been made by the Applicants to ward off auctioneers from seizing his property at the time and further the payment could have been made on a “without prejudice” basis.

10. In the result I am inclined to grant the Applicant’s request to file Appeal out of time. To this end therefore the Applicant’s Application dated 15/06/2017 is allowed in the following terms:-

(1) The Memorandum of Appeal (Civil Appeal No. 8 of 2017) filed on the 20th January, 2017 be deemed to be properly on record.

(2) The costs hereof shall be to the Respondent.

Orders accordingly.

Dated and delivered at Machakos this **18th** day of **January** 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Miss Motari for the Applicant

No appearance for Mutunga for the Respondent

Kituva - Court Assistant