



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. CIVIL APPLICATION NO. 56 OF 2014

DAVID MIRITI NKURARU.....APPLICANT

- VERSUS -

NTONDEGWA M'THIRINJA.....RESPONDENT

RULING

Leave to appeal out of time and stay of proceedings

[1] The significant orders sought in the application 12th November 2014 are:

1. THAT the applicant be granted leave to appeal outside the statutory period
2. THAT a stay of execution in respect of Maua CMCC NO. 42/2002 be issued till this application is heard and finalized.
3. THAT the costs for and incidental to this application be provided for.

[2] The Notice of Motion is expressed to be brought under Section 1, 1A, 1B and 3A and 79 G of the Civil Procedure Act and Rule 51(1) of the Civil Procedure Rules. The application is premised on the grounds that the applicant was dissatisfied by the judgment, he intends to appeal and his appeal has overwhelming possibility of success. He also stated that the Respondent will not be prejudiced if this application is allowed.

[3] The Respondent opposed the application through a replying affidavit sworn on 2nd March 2015 by Charles Benedict Mwangela, the advocate for the Respondent. The Respondent also filed submissions in support of his standpoint. The major arguments against the application were; that the application for leave has been brought after inordinate delay; the Applicant did not disclose that he had made an application for stay of execution dated 9th October 2014 before the lower court and even made proposals to settle the costs of the suit in monthly installments of Kshs. 2,000.

[4] On 14th July 2016 this court, called for the original file in respect of Maua CMCC No. 42 of 2002 together with duly certified proceedings, judgment and decree before it could ultimately pronounce itself on this application. The file is now before the court and I shall proceed to determine the application dated 12th November, 2014.

DETERMINATION

[5] This court is aware that judgment should be delivered with notice to the parties. And it emphasized that fact in its ruling of 14th July 2016. From the court record, judgment was to be delivered on 29th April 2009 but the Magistrate left before doing so. Judgment was delivered on 11th August 2010 in the absence of both parties. There is no evidence of notice of judgment having been served on either party by the court. However, subsequent actions by the Applicant are startling and have great bearing on this decision. On 9th October 2014 after delivery of the judgment herein, the Applicant filed an application by way of Notice of Motion seeking to be allowed by the court *inter alia* to liquidate the decree in installments. In his affidavit filed in support of his said application, he deposed that he was willing to pay the decretal sum in instalments of Kshs. 2000 per month. He gave his reasons that he was not able to raise the whole amount in lump sum due to poverty. This is an express admission of the sum owed. I do not think that he can go back on the admission and the promise to pay the decretal sum herein. He did not even disclose this fact to the court. Therefore, his hands are tainted and the court will not aid such suitor.

[6] If I turn to the other request for extension of time, see the case of **NICHOLAS KIPTOO ARAP KORIR SALAT vs. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR** where the Supreme Court held:

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it....”

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

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

[7] Again, the Applicant did not act equitably by failing to make full disclosure of important matters, to wit, that he had admitted and sought to pay off the decretal sum but in instalment. In spite of the failure to observe Order 21 Rule 1 of the Civil Procedure Rules which was a material oversight- the Applicant accepted the outcome of the judgment. His admission to pay the decretal sum was under oath in an affidavit sworn by him and that buries everything underneath it. For that reason, he cannot claim that he has overwhelming possibility of succeeding in the intended appeal or otherwise. Accordingly, I dismiss his application dated 12th November 2014. I will not, however, condemn him to cost. It is so ordered.

Dated, signed and delivered in open court at Meru this 26th day of February 2018.

F. GIKONYO

JUDGE

In the presence of:

Mr. Gichuki advocate for applicant

Mr. Mwilalia for respondent

F. GIKONYO

JUDGE