



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**MISC APPLICATION NO. 47 OF 2017**

**K-REP BANK LIMITED.....1<sup>ST</sup> APPLICANT**

**NYAITUGA COMPANY LIMITED.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**JOSEPH NTARA M' ITHAI.....RESPONDENT**

**RULING**

1. Before me is a Notice of Motion Application dated 13<sup>th</sup> September, 2017 which is brought pursuant to Sections **3A, 79G** and **95** of the Civil Procedure Act (**CAP 21**), **Order 22 Rule 22**, **Order 42 Rule 6**, **Order 50 Rule 6** and **Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010** and all other enabling provisions of the Law.
2. In the motion, the applicant has sought an order of stay of execution of the judgment and decree in **Meru Chief Magistrates Court Civil Suit No. 587 of 2010; Joseph Ntara M' Ithai vs K-Rep Bank Ltd & Another** pending the hearing and determination of the intended appeal and for leave to appeal against the said judgment out of time.
3. The grounds upon which the motion is grounded are set out on the body of the motion and in the affidavit sworn by Beverline Chweya a Legal Officer of the 1<sup>st</sup> applicant. These include that, the judgment sought to be appealed against was delivered on 13<sup>th</sup> July, 2017 and the defendants were granted 30 days stay of execution. That the applicants are aggrieved by the entire judgment and that they have made the application timeously and without any unreasonable delay.
4. The application was opposed vide a Replying Affidavit of Joseph Ntara M' Ithai sworn on 4<sup>th</sup> October 2017. He deposed inter alia, that judgment in this matter was delivered on 13<sup>th</sup> July 2017 which was 60 days to the date the application was made. That the applicants had failed to appeal on time because they knew that the appeal had no merit; that the applicants had offered no security and were therefore not entitled to any order of stay. Consequently, the respondent urged the court to dismiss the application with costs.
5. When the application came up for hearing on 5<sup>th</sup> October 2017, the parties agreed that the same be canvassed by way of written submissions. It was submitted for the applicants that upon delivery of judgment on 13<sup>th</sup> July 2017, the applicants instructed their advocates to obtain judgment for perusal before a decision on whether or not an appeal should be preferred. That by the time the applicants' advocates obtained the judgment, the statutory time line within which an appeal could be filed had lapsed; that the failure to file the appeal within time was caused by the delay in obtaining the copy of the judgment of the lower court.
6. That in the circumstances, the delay is excusable as the application for stay and enlargement of time was made without undue delay. The Court of Appeal decision in **Mwangi vs Kenya Airways**, that was cited with approval in **APA Insurance Limited vs Michael Kinyanjui Muturi (2016) eKLR** was relied on for the proposition that in such an application, the court has to consider; the length of the delay, the reasons for the delay, the chances of the appeal succeeding and the degree of prejudice to be suffered by the opposite party.
7. The applicants therefore contended that they had met the threshold set out in the above case and urged the court to allow the application. The Respondent did not file any submissions.
8. I have carefully considered the application and the rival contentions by the parties. This is an application for stay of execution and for leave to appeal out of time.
9. The circumstances under which the court will grant a stay of execution pending appeal are clearly set out in **Order 42 Rule 6 of the Civil Procedure Rules**. These are that the application should be made timeously; the applicant must demonstrate that he would suffer substantial

loss if the stay is not granted and that the applicant must give security for the performance of the decree

10. On the first limb, the application was not made timeously. Time to appeal expired on 12<sup>th</sup> August 2017. The present application was made on 18<sup>th</sup> September 2017, a delay of 36 days. That delay was inordinate.

11. As regards the second limb, the applicants contended that should the money decree the subject of the judgment in the lower court be paid to the Respondent, it will be out of the applicant's reach and the appeal will therefore be rendered nugatory. The Respondent on the other hand contended that he had the means to refund the decretal sum of KShs.560,000/= if the same was released to him since he was a this contention remained uncontested.

12. Substantial loss is the cornerstone of the jurisdiction of any court to grant an order of stay of execution pending appeal. The court has to balance between two competing interests; the appellants' right of appeal not to be rendered nugatory and the successful party's right to enjoy the fruits of his litigation. All that an applicant has to show is that if, the money decreed is paid over and in the event the appeal succeeds, the applicant is unlikely to recover the same. Once an applicant swears positively to such a fact, the evidentiary burden of proof shifts to the respondent to show that he is not a man of straw. That he is capable of refunding the money in the unlikely event the appeal succeeds.

13. In the present case, the applicants swore that they will lose the money in the event it is paid over and the appeal succeeds. The respondent stated that he is a businessman and a farmer. He did not disclose the sort of business he engages in, the sort of farming he undertakes and the approximate income he makes to prove his capability to refund the decretal sum if it is paid over to him. To my mind the second limb was proved.

14. As regards the 3<sup>rd</sup> limb; provision of security, the applicants did not make any mention of the same and as was rightly contended by the respondent, they offered none. However the court is at liberty to impose the same if it is minded to grant a stay.

15. With regard to the prayer for leave to appeal out of time, **Section 79G of the Civil Procedure Act** gives the court a wide discretion to extend time and admit an appeal out of time if it is satisfied that there is sufficient cause for not filling the appeal in time.

16. In the case of ***Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR*** the Supreme Court of Kenya held that:-

***“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 underlying 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.”***

17. In the present case, there was a delay of about 36 days. The reason advanced was that it took time for the applicants to get a copy of the judgment from the trial court. The applicants did not offer any evidence to show when they first applied for the copy of the judgment; the effort they made in pursuing the same and the date they finally got the same. That explanation lacking, I find it very difficult to find that any reasonable explanation has been offered for the delay. An applicant who seeks an equitable remedy must as of necessity be as candid as possible. This is not the case.

18. As to prejudice, the respondent is a beneficiary of a judgment that arises from a 7 year litigation. **Article 159 of the Constitution** decrees that justice be dispensed without undue delay. A delay from 13<sup>th</sup> July, 2017 to 18<sup>th</sup> September, 2017 having not been explained, I consider it undesirable to give the applicant more time.

19. In the circumstances, the application is without merit and the same is hereby dismissed with costs.

**DATED and DELIVERED at Meru this 21<sup>st</sup> day of March, 2018.**

**A. MABEYA**

**JUDGE**