



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 57 OF 2017

MOSES KIRIMI.....1ST APPELLANT

SPARKLES MOBILE CENTER.....2ND APPELLANT

-Versus-

G K J (Suing as the next friend of J K-minor).....RESPONDENT

RULING

[1] Before me is a Notice of Motion dated 10th July 2017, which is expressed to be brought under Sections **1A, 1B, 3A and 76G** of the Civil Procedure Act (**CAP 21**), **Order 42 Rule 6 of the Civil Procedure Rules 2010** and all other enabling provisions of the Law. The Appellants have sought two significant orders, namely:-

a. Stay of execution of the decree issued in Githongo SRMCC CIVIL SUIT NO. 5 OF 2017 G K J V MOSES KIRIMI and SPARKLE MOBILE CENTER pending the hearing and determination of this application; and

b. Leave to file an appeal out of time against the said decision delivered on 31st May 2017, by Hon C. Kemei.

[2] The motion is premised on the grounds set out in the motion, and the affidavit sworn by Joseph Kathurima Ringera trading as Sparkles Mobile Center, the 2nd Appellant herein. These include that, (i) judgment was delivered in this matter on 31st May 2017 in the presence of the Respondent but in the absence of Appellant; (2) the Appellant only got to know of the delivery of the judgment on 21st June 2017, upon advice from the Respondent Advocate on record; (3) that as a result the Appellant was not in a position to file the appeal within the prescribed period; (4) that the Appellants would most probably suffer substantial loss as he had no knowledge of the Respondent's known assets should the appeal be successful; and (5) that the Appellants were willing to deposit the decretal sum in court in a joint interest earning account in the name of the parties Advocates.

[3] The application was opposed vide a Replying Affidavit of Kimathi Kibiti sworn on 12th July 2017, in which he deposed inter alia that it was not true that counsel for the Applicant learnt about the judgment of the trial court on 21st June 2017 as on 24th May 2017. He stated that they had written to the Appellants firm of advocates notifying them of the judgment date erroneously indicated to be 31st July 2017, and that copies of the judgment, decree and certificate of costs were obtained by the Respondents and sent to the

Appellant's Advocates. Therefore, the Appellant's Advocates had necessary arsenals to launch the appeal long before the expiry of 30 days of the Trial Court's judgment of 31st May. They could not complain of not knowing about the judgment in good time. They had not met the principles for granting stay of execution pursuant to Order 42 Rule 6 of the Civil Procedure Rules.

[4] When the Application came up for hearing on 20th July 2017, it was agreed that it be canvassed by way of written submissions. It was submitted for the applicants that they had met the conditions precedent for granting of stay of execution. On substantial loss, it was submitted that the Applicants were not aware of any known assets of the minor or his next friend and consequently urged the court to grant stay as the applicants had demonstrated that substantial loss would occur should the appeal be successful. With regard to unreasonable delay, it was submitted that the delay of 10 days was as a result of inadvertent mistake of counsel as they had failed to attend the judgment date as a result of wrong judgment date advice by their counterparts; notice issued to them was that judgment was to be delivered on 31st July instead of 31st May 2017. The notice of delivery of judgment reached the Applicants only on 21st June 2017, hence they had only 9 days to file the appeal from the date of the notice of judgment. The Applicants further submitted that they were ready and willing to secure the decretal amount and were willing to deposit the decretal amount in a joint interest earning account in the name of the parties advocates or to abide by the court orders as to furnishing of security or the decretal amount and that with regard to the issue of leave to appeal out of time, the Applicants had satisfied the conditions precedent to granting of extension of time to appeal out of time.

[5] On the other hand it was submitted for the Respondents that the Applicants had not met the conditions precedent for granting of stay namely; that the Applicants had not approached the court timeously and they had not demonstrated that they would suffer substantial loss unless the stay was granted. In effect, they had not demonstrated that the Respondent was not capable of refunding the decretal sum in the unlikely event that the appeal succeeds. They had not also offered security.

DECISION OF COURT

Good order

[6] The application before me is a twinning of request for leave to appeal out of time and stay of execution. Good order demands that I should start with the request for leave to appeal out of time as the outcome thereof will determine whether I should consider stay of execution.

Leave to appeal out of time

[7] Section 79G of the Civil Procedure Act gives the court the discretion to extend time and admit appeal out of time if it is satisfied that there was sufficient cause for not filling the appeal in time. Principles for extension of time were aptly stated in *the case of NICHOLAS KIPTOO ARAP KORIR SALAT vs. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS* [2014] eKLR by the Supreme Court of Kenya as follows:-

“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.”

[8] In this case, there was a delay of about 9 days. Reasons for the delay have been rendered by the Appellant. They are plausible and sufficient explanations. I accept them. This will become clearer when I will be addressing delay under the head stay of execution. Accordingly, I allow the Appellants to file appeal within 30 days of today.

Of stay of execution

[9] The circumstances in which the court will grant stay of execution pending appeal are clearly set out in Order 42 Rule 6 of the Civil Procedure Rules. See Order 42 Rule 6 (1) & (2) which provides as follows:-

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 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 of stay 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 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

[10] It is clear from the wording of Oder 42 Rule 6 (1), for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely;

(a) Substantial loss may result to the applicant unless the order is made;

(b) The application has been made without undue delay; and

(c) Provide such security for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant

Timeous application

[11] Judgment herein was delivered on 31st May 2017 and this application was filed on 11th July 2017. If were go by these dates, there was a delay of about 11 days. Nonetheless, the delay herein was caused by inadvertent mistake of the Respondent in serving a notice communicating wrong judgment date. The mistake was admitted by the Respondents. Accordingly, the delay herein is excusable and is not inordinate. The application was made without unreasonable delay. I have paid my debt.

Substantial loss occurring

[12] The hallmark of the jurisdiction under rule 6 of Order 42 of the CPR is to prevent substantial loss from occurring. Here, the court ensures that the Appellant's appeal is not rendered nugatory; while at the same time, preventing the right of the Respondent to immediate realization of fruits of judgment from being routed away. Such is now commonly known as novel judicial balancing act of competing rights. Please see the kind of description of this balancing act in the case of **ABSALOM DOVA vs. TARBO TRANSPORTERS [2013] eKLR** that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination”.

[13] The applicants contended that they were not aware of any known assets of the Respondents and that they were most likely to suffer irreparable and substantial pecuniary loss if the appeal be successful. There was really no evidence that the Respondent cannot make a refund of the decretal sum. Nonetheless, this is a claim on behalf of a minor but also involves substantial amount. I should therefore administer justice in accordance with the facts of the case.

Of security deposit

[14] I note that the Appellants are ready, able and willing to deposit *the entire decretal amount in a joint interest-earning account in the name of the parties' advocates. The fairest decision therefore is this. There shall be a stay of execution herein provided that the Appellant shall:-*

a. Pay 1/3 of the decretal sum to the Respondent within 30 days; and

b. Deposit, within 30 days hereof, the balance thereof in an interest earning account in the joint names of counsels pending the hearing of the appeal to be filed herein. Should the appeal not be filed as ordered, the stay order lapses automatically unless otherwise ordered by the court.

[15] The costs of the application shall abide outcome of the appeal. *It is so ordered.*

Dated, signed and delivered in open court at Meru this 19th day of March 2018

F.GIKONYO

JUDGE

In the presence of:

Mr. Mutegi advocate for Respondents

Non appearance for Applicants

F.GIKONYO

JUDGE