



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL MISC. APPLICATION NO. 3 OF 2017

SEDRICK MUSYOKA MATHUKU.....APPLICANT

VERSUS

MAKASA KITHU.....RESPONDENT

THE HON. ATTORNEY GENERAL.....INTERESTED PARTY

RULING

1. In an application dated **3rd February, 2017**, the Applicant seeks leave to appeal out of time. The application is based on reasons that the decree was passed on the **21st September, 2016** against the Defendants jointly and severally; the Applicant has been served with a notice of entry of judgment; the amount he ought to pay is not clear; the delay in seeking leave is not inordinate and deliberate and it is in the interest of justice that the Applicant be given an opportunity to be heard.
2. The Applicant swore an affidavit in support of the application where he deponed that having been sued together with the Interested Party in the Lower Court, Judgment was entered against him and a Decree served upon him on the **19th January, 2016**; There was a delay in obtaining the Judgment; there is a likelihood of the Appeal succeeding such that if the order sought is not granted he will suffer irreparable loss and damage.
3. The Respondent filed a Replying Affidavit where he deposed that the application is intended to scuttle his efforts to realize the fruits of his Judgment. That having been represented when the Judgment was delivered, if the Applicant were dissatisfied he should have appealed within the prescribed time.
4. It was further averred that the Applicant is keen on delaying execution of the matter because he only rushed to Court after being served with the Notice to Show Cause. That it has not been demonstrated that the Applicant will suffer irreparable harm. The Decree is a money Decree and not land therefore an introduction of land adjudication matters is intended to obscure the real issue and the Applicant has failed to disclose that execution is already in motion.
5. The application was canvassed by way of written submissions.
6. In the Applicant's submissions he opted to rely entirely on the application, Supporting Affidavit and Annexures, then, some three (3) authorities.
7. The Respondent submitted that the Applicant's application is not clear as to what Judgment or order it was appealing against. That the Supporting Affidavit and Memorandum of Appeal spoke of Judgment delivered on the **26th October, 2016** when the Judgment in contention was delivered on the **21st September, 2016**. That no plausible explanation has been given for failure to appeal within the time which they were to appeal.
8. Further he prayed that if the Court were to grant the extension of time to appeal out of time it should not operate as stay of execution of Judgment as conditions of stay of execution as provided by **Order 43 Rule 6** of the **Civil Procedure Rules** have not been satisfied.
9. The Interested Party filed submissions where he stated that extending time within which to appeal is discretionary. He cited the case of **Stanley Kahoro Mwangi and Two (2) Others vs. Kenyawivi Trading Company Limited (2015)** which set out guiding principles to be considered if the Court has to make such an order and argued that the Respondent shall not suffer any prejudice if the order is granted.
10. Further it was argued that the relief of stay of execution of the Judgment is discretionary and is guided by **Order 42 Rule 6** of the **Civil Procedure Rules**.
11. This is a matter where the Applicant failed to appeal within the prescribed time. **Section 79G** of the **Civil Procedure Rules** provides

thus:

“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.”

12. From the aforesaid proviso, the Superior Court has the discretion to extend time within which the Appeal may be filed as long as the Applicant gives a plausible explanation for not acting according to the law. But, it is trite that the discretion must be exercised judiciously and upon good reasons. This should not be baseless or on basis of personal whim. The explanation must be credible. (See **Julius Kamau Kithaka vs. Wariguru Kithaka Nyaga & 2 Others, CA No. 14 of 2013**).

13. The Judgment herein was delivered on the **21st September, 2016** in the presence of Counsel for the Applicant who at the outset orally sought for stay of execution that was granted. When the matter came up for assessment of costs on the **26th October, 2016** the parties were present in Court. The costs were assessed. It is submitted that the Applicant was served with a Notice to Show Cause why execution could not issue following his failure to satisfy the Decree. It is then that the Applicant filed the instant application.

14. It is stated that the delay in seeking leave is not inordinate and deliberate. That there was delay in obtaining the Judgment. I have perused the copy of the Judgment which was certified on **10th February, 2017**. It may have been imperative for the Applicant to read and discern the content of the Judgment prior to filing a Memorandum of Appeal. What was not demonstrated is however, if any effort was made by the Applicant to request for proceedings and/or Judgment prior to the stated date.

15. Secondly, I have been asked to grant a stay of execution pending the intended Appeal. The law regarding this discretionary relief is stipulated in **Order 42 Rule 6** of the **Civil Procedure Rules** that provide thus:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 subrule (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 subrule (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 subrule (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 was therefore duty bound to establish that if the order sought is not granted:

(i) Substantial loss may result.

(ii) The application has been made without unreasonable delay and;

(iii) His willingness to deposit security for due performance of the decree or order that may be granted.

16. The Applicant deponed in Paragraph 9 of the Affidavit thus:

“That I urge the court to grant my request otherwise I will suffer grave loss and damage should I be ordered to pay before I exhaust my appeal.”

The claim was for damages for malicious Prosecution and false imprisonment. The Applicant's Counsel filed sketchy submissions where he stated thus:

“Our application is dated 3rd February, 2017 seeking leave to file appeal out of time and a stay. We rely entirely on the application, supporting affidavit, annexures thereto and a supplementary affidavit sworn on 28th March, 2018. We are also relying on the case of:-

1. Hon. John Njoroge Michuki & another vs Kaentazuga Hardware Limited (1998) eKLR Civil Application No. 16 of 1998.

2. Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission & 7 others (2014) eKLR Application No. 18 of 2014.

3. Gyka Fuel Mark Ltd vs Bwana Mshiri Sungura (2013) eKLR Misc. Civil Application No. 40 of 2013.”

There is absolutely nothing on record to suggest what kind of loss he will suffer. The decree herein is a money decree. In the case of **Kenya Hotel Properties LTD vs. Willesden Properties LTD Civil Application No. NAI 322 of 2006 (UR)** it was stated that:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the Respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant....”

17. It has not been suggested that the Respondent is a man of straw or may not pay the money if the Appeal succeeds therefore this Court cannot interrogate that issue.

18. Lastly, the Applicant did not make any suggestion as to his willingness to furnish any security for due performance.

19. In the premises I have absolutely no reason to exercise my discretion in favour of the Applicant to stay the execution.

20. However, in the interest of justice I will grant him leave to file the Memorandum of Appeal within **seven (7) days**.

21. Costs of the application shall be in the cause.

22. It is so ordered.

Dated, Signed and Delivered at Kitui this 30th day of May, 2018.

L. N. MUTENDE

JUDGE