REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 72 OF 2018

JOSEPH KAKOMO MBENGA.....PLAINTIFF

VERSUS

MAINGI CHARLES.....1ST DEFENDANT

MUEMA MARY.....2ND DEFENDANT

RULING

1. These proceedings, from their inception are improperly intituled. Whereas the proceedings are purportedly intituled as an appeal, the parties, throughout the proceedings are described as Plaintiff and Defendants respectively. It would seem that the applicant has used the description of the parties in the proceedings intended to be challenged in these proceedings as well. I must make it clear that in appellate proceedings the parties are always appellants and applicants on one hand and the Respondents on the other hand. In other words there is no room for plaintiffs and defendants in appellate proceedings.

2. Nevertheless, as no issue was taken by the Respondent in these proceedings regarding the description of parties, I will say no more on that issue at this stage.

3. In these proceedings, the applicants herein, **Maingi Charles** and **Muema Mary**, seeks in substance, that this Court extends or enlarges time within which he should file and serve a Memorandum of Appeal outside the prescribed time and that his draft Memorandum of Appeal annexed to the application be deemed as properly filed and served upon payment of court filing fees. They further seek that pending the hearing and determination of his intended appeal there be a stay of execution and all consequential orders arising therefrom (sic).

4. According to the applicants, judgement in this (sic) matter was delivered on 9th May, 2018 in favour of the plaintiff/respondent herein. It was deposed by the applicants, based on their advocate's advice, that when the matter came up for mention on 18th April, 2018 the advocate indicated that the matter was slated for judgement on 6th June, 2018. However on 17th May, 2018 his advocates were served with a letter advising that judgement had been delivered. This, the applicants contended, necessitated the perusal of the court file by their advocates to confirm whether the judgement had been delivered and based on information received from their advocates, they averred that though their advocates tried to get hold of the for instructions, they were not able to get through to them on phone. Subsequently the advocates wrote to the applicants a letter on 21st May, 2018 advising on the contents of the judgement and seeking to know whether the applicants were satisfied therewith which letter the applicants did not receive till 10th June, 2018 by which time the time for filing and serving the memorandum of appeal had lapsed.

5. It was therefore the applicants' case that they did not have sufficient time to lodge the memorandum of appeal. In their view, the delay is not inordinate yet they have an arguable appeal that raises triable issues and they were ready and willing to deposit half of the decretal sum as security in court or in a joint account in the names of advocates

6. The applicants averred that they were apprehensive that the Respondent was not a person of means and may not be able to refund the decretal amount should the intended appeal succeed. On the other hand, they contended that no prejudice would be visited upon the respondent hence the respondent would not be prejudiced if the orders sought are granted in the wider interest of justice.

7. In opposition to the application, the Respondent relied on the following grounds of opposition:

> **1. That the application is frivolous, incompetent and vexatious; is bad in law; is incurably defective; is an abuse of the court process; is an afterthought and brought in bad faith; and is brought after inordinate delay.**
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> **2. That the judgement in this matte was delivered on 9th May, 2018 which is almost (2) two months ago and this application is brought after inordinate delay.**

3. That the Defendants/Applicants have not given any good reasons to warrant the granting of the orders sought.

4. That this application is not brought in good faith as it is brought as an afterthought from its timing.

5. That the provisions of section 79G of the Civil Procedure Rules are clear on the time for lodging of appeal.

6. That the law cannot be bend (sic) to suit individuals due to their laxity.

7. That the annexed copy of a purported appeal does not raise any triable issues.

8. That the applicants/defendants application lacks merit and is an abuse of the Court process.

8. In support of their application the applicants cited Order 50 rule 6 of the ***Civil Procedure Rules*** and relied on Nairobi HCCA Misc. Application No. 78 of 2018 – **Edward Kamau & Anor vs. Hannah Mukui Gichuki** and **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22**.

9. As to whether the applicants are entitled to stay the applicants cited Order 42 rule 6(2) of the ***Civil Procedure Rules***, **Carter & Sons Ltd vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997**, **Winfred Nyawira Maina vs. Peterson Onyego Gichana [2015] eKLR** and submitted that the right of appeal is constitutional right which is the cornerstone of the rule of law hence to deny a party that right would in essence be denying them access to justice which is guaranteed under Article 48 of the Constitution and also a denial to a right to fair hearing guaranteed under Article 50(1) of the Constitution. In this regard the applicants relied on **Butt vs. Rent Restriction Tribunal Nairobi Civil Application No. 6 of 1979**. In this case it was submitted based on **Silverston vs. Chesoni [2002] eKLR** that the applicants are aggrieved by the judgement if the Court delivered on 9th May, 2018 where the applicant was condemned to damages of Kshs 149,400/-. In the applicants' view, the Respondent is not a peon of means and no affidavit was sworn affirming that he is capable of settling the judgment sum in the event that the appeal succeeds.

10. According to the applicants they are ready to deposit half the decretal sum in court or in a joint account. It was their case that the application, having been filed on 22nd June, 2018 was filed without inordinate delay.

11. On the authority of Nairobi Civil Appeal No. 74 of 2015 – **Housing Finance Company of Kenya vs. Sharok Kher Mohamed Ali Herji**, it was submitted that the applicants have shown that they have an arguable appeal and that if the appeal succeeds the same would be rendered nugatory.

12. On the part of the Respondent it was submitted that no good reason has been given by the applicants as to why they never appealed on time yet the judgement of the subordinate court was delivered on 9th May, 2018. To the Respondent, the decision to attempt to lodge an appeal out of time is just an afterthought.

Determination

13. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.

14. Section 79G of the ***Civil Procedure Act*** provides that:

> **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:**
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> **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.**

15. Therefore an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633**, there is no difference between the words "sufficient cause" and "good cause". It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

16. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

17. In this case the Respondent did not file a replying affidavit hence the factual averments by the applicants are not controverted. Having

considered the reasons advanced by the applicants I am satisfied that with the reasons for the delay. With respect to costs, I did not hear the Respondent contend if the application is allowed he will suffer such prejudice that cannot be compensated by an award of costs. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See **Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.**

18. As regard the merits of the case, the Respondent has not taken issue with the same hence I cannot base the decision to disallow the application thereon. In **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22** it was held that:

> **"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a 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."**

19. As regards the prayer for stay of execution, the principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the ***Civil Procedure Rules*** which provides as follows:

> **No order for stay of execution shall be made under subrule**
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> **(1) unless—**
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> > **(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**
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> > **(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.**

20. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the ***Civil Procedure Rules*** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is nolonger limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

21. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.** This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

> **"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court…The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant…For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss… Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation…At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a**

balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."

22. Therefore this Court must guard against any action or inaction whose effect may remove pith of this litigation and leave only a shell as was appreciated by the Court of Appeal position in **Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others Civil Application No. Nai. 31 of 2016** in which it cited the Nigerian Court of Appeal decision of **Olusi & Another vs. Abanobi & Others [suit No. CA/B/309/2008]** that:

"It is an affront to the rule of law to…render nugatory an order of Court whether real or anticipatory. Furthermore… parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity."

23. It is trite that in giving effect to the rights the courts must balance fundamental rights of individual against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions. See **Bell vs. DPP [1988] 2 WLR 73.**

24. Apart from that as the Supreme Court appreciated in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, the Court must consider whether or not it is in the public interest that the order of stay be granted and that this condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.

25. On the first principle, **Platt, Ag.JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money".

26. On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

"It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

27. Dealing with the contention that the fact that the respondent is in need of finances is an indication that he would not be in position to refund the decretal sum, **Hancox, JA** (as he then was) in the above cited case when he expressed himself as follows:

"I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age."

28. Therefore the mere fact that the decree holder is not a man of means does not necessarily justify him from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".

29. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

30. The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, *upon reasonable grounds*, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge

that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum. **See Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

31. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success. As was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991,** financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income. In my view, even if it were the case that an applicant does not know the respondent's financial capability, that would not necessarily give rise to the presumption that the respondent will be unable to repay the sum. There must be some other factors present on the basis of which such a presumption can be made and mere apprehension however founded cannot be the basis for suspending the successful litigant's right to enjoy the fruits of a judgement that has not been set aside.

32. In this case, the applicants' apprehension that the Respondent will not be able to refund the sum in question which sum cannot be said to be huge, and in the absence of any ground for that belief, the pray for stay cannot be granted.

33. In the result I hereby extend the time limited for filing of the appeal. Let the applicants file and serve a proper memorandum of appeal within 7 days from the date hereof. I however disallow the application for stay. As none of the parties had, by the time of writing this ruling complied with the Court's directions to furnish soft copies, there will be no order as to costs.

34. It is so ordered.

Read, signed and delivered in open Court at Machakos this 31st day of July, 2018.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey