



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**MISCELLANEOUS CIVIL CASE NO.107 OF 2018**

**KIMANI STEPHENE.....1<sup>ST</sup> APPLICANT**

**DANIEL KIMANI MAINA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**PETER NG'ANG'A KAMAU.....RESPONDENT**

**RULING**

1. Before me is the application for leave to file appeal out of time and for stay of execution pending appeal, filed on 4<sup>th</sup> May, 2018. The judgment which is the subject of the intended appeal was delivered on 30<sup>th</sup> October, 2017, pursuant to a consent on liability in 2016, now disputed by the applicant's advocate.

2. The grounds on the face of the application and affidavit sworn by the advocate dwell on the circumstances in which the said consent and subsequent judgment came to be recorded. The advocate asserts that in the material periods, she was away on the 'campaign' trail, that the Respondent will not be able to refund any decretal sum paid over, thereby exposing the applicants to substantial loss and rendering the appeal nugatory.

3. The applicants' submissions once more, dwell on the validity of the consent on liability that led to the judgment in the lower court. It is alleged that the consent was fraudulently obtained and that the applicants ought to be granted leave to file an appeal out of time. It is submitted that the entire decretal sum has already been deposited into an account at the Co-operative Bank.

4. The Respondent in his written submissions raises technical issues relating to the date of the orders alleged by the applicants as issued in the lower court and the applicants' right to appeal thereon. The Respondent asserts that no ruling or order was given by the court on 28<sup>th</sup> November, 2016 as alleged by the applicants. He points out that the applicants have not explained their delay since 30<sup>th</sup> October 2017 in filing an appeal. Secondly, the Respondent points out that the impugned consent was recorded prior to the judgment and no efforts were made to have it set aside.

5. The Respondent challenges the applicants' claims that the consent was obtained fraudulently asserting that the consent is equivalent to a contract between the parties. Stay of execution pending appeal is opposed on grounds that there is no basis for the intended appeal. The Respondent claims to have filed an affidavit in opposition to the application but none can be traced on the record.

6. Be that as it may, the court has considered the material canvassed in respect of the instant application. Section 79G of the Civil Procedure Act provides as follows:

**“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.”**

7. In this matter, it was incumbent upon the applicants to demonstrate to the court that there was good and sufficient cause for not filing the appeal on time. The delay in respect of the judgment is about 7 months. The advocates affidavit, while being long on matters related to the impugned consent is short on the reasons for delay. Indeed only a general statement, not directed at the delay is made, to the effect that the advocate was away participating campaigns for leadership positions in the material period. The specific nature and particulars of the campaign are not stated.

8. In *Niazons (K) Ltd v China Road & Bridge Corporation (Kenya) Corporation (2002) eKLR*, the Court of Appeal stated that the court's discretion under section 79G of the Civil Procedure Act though unfettered, must be exercised judicially, considering the length of the delay,

the explanation for it, and possibly the chances of the appeal succeeding the degree to which the Respondent will be prejudiced by the late filing of an appeal. (*See also Mwangi v Kenya Airways Limited (2003) KLR486.*)

9. The delay in this case is substantial and the Applicants' advocate has not given any plausible reason by way of explanation, instead dwelling on the consent leading to the impugned judgment. In my view an applicant who has delayed for over a year to make any attempt to set aside a consent filed prior to the judgment now intended to be appealed from, and who makes generalized statements on the failure to file an appeal soon after the judgment cannot expect the court to exercise its discretion on her behalf.

10. From the material proffered by the Applicants' advocate, she was only roused to action by the process of execution in the matter. It is not enough to claim that the advocate was away "campaigning for a leadership position". After all the record shows that a firm of advocates **Otieno Maangi and Company** was seized of the matter which suggests that there were other advocates in the firm.

11. There may or may not be an arguable appeal in the case but the tardiness demonstrated by the applicant is such that the prayer for leave to appeal out of time ought not to be granted. Although there was a consent on liability recorded prior to the judgment in the lower court, the parties did file submissions for the court's consideration before delivery of the judgment. I decline the prayer for leave to appeal out of time.

12. Regarding the prayer for stay of execution pending appeal, my view is that the existence of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6(1) of the Civil Procedure Rules, as read with Order 42 Rule 6(4) and 6(6) of the Civil Procedure Rules. Until a memorandum of appeal is filed, this court cannot exercise that jurisdiction (see also the decision of the Court of Appeal in *Equity Bank v Westlink MBO Limited (2013) eKLR* – an application to the Court of Appeal for stay of execution under Rule 5(2) b of the Court of Appeal Rules which is substantially similar to Order 42 Rule 6(1) Civil Procedure Rules cannot be entertained before an appeal or notice of intended appeal is filed. The prayer for stay of execution pending appeal in this case is therefore premature and is declined. In the result, the entire application has failed and is dismissed with costs.

**Delivered and signed at Kiambu this 27<sup>th</sup> Day of July, 2018.**

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**C. Meoli**

**JUDGE**

In the presence of:

For the Applicants Mrs Fundi holding brief for Otieno

For the Respondent: Non-appearance

Court Assistant: Nancy Mburu