



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC. MISC. APPL. NO. 69 OF 2018

EXPRESS TRAVEL GROUP.....APPLICANT

VERSUS

PETER KASYOKI.....RESPONDENT

RULING

INTRODUCTION

1. By Notice of Motion dated 07/05/2018 and supported by affidavit sworn same date prays for orders *inter alia*.

1) **That** the Applicant be granted leave to appeal out of time and the annexed Memorandum of appeal be deemed as filed upon the payment of the court requisite fees.

2) **That** the court do grant a stay of execution of the judgment entered on PMCC. No. 185 of 2016 – Kilungu Law Courts pending hearing and determination of the intended appeal.

2. The same is supported by grounds on the notice of motion in addition to aforesaid Supporting Affidavit. The same is opposed and the Respondent has filed an affidavit he swore on 26/06/2018.

3. The parties agreed to canvass the same via written submissions which they filed and exchanged.

APPLICANT'S SUBMISSIONS

4. The Applicant submits that, the insurer of the Applicant instructed its advocate on 03/05/2018 to lodge an application for appeal out of time.

5. The Advocate failed to communicate outcome of the judgement in time thus the delay in filing appeal. It is urged that the blunder was committed by the Applicant's advocate office whose clerk took the letter to the insurers of Applicant on 20/04/2016 when stay period was about to end.

6. Thus the Applicant/Defendant should not be blamed for the mistake of its lawyer's clerk. This mistake is excusable and should not be used to deny the Applicant his right to appeal.

7. It is contended that, there is no long delay since the filing of the instant application as the 1st application was filed in the lower court on 08/05/2018 which was subsequently withdrawn as lower court could not give the Applicant leave to appeal out of time. This application was filed on 11/05/2018 and an order for stay was granted.

8. The Applicant prays for leave to appeal out of time and at the same time seeks orders for stay of execution pending the hearing and determination of the appeal.

9. The applicant submits that, it is going to satisfy the requirements of order 42 Rules 6 (a), (b) CPR.

10. The Applicant's submits that the appeal shall be rendered nugatory if the execution is allowed before the appeal is heard. The appeal shall serve no purpose if the execution proceeds.

RESPONDENT'S SUBMISSION

11. The Respondent submits that, the application is incompetent as it is not accompanied by a proposed appeal.
12. The judgment of the lower court was delivered on 23/03/2018, in presence of applicant advocate and who did obtain orders for a stay of execution for 30 days.
13. There is no reasonable/justifiable explanation given as to how the 30 days the Applicant had at its disposal was used when temporary stay was granted to manifest the intention of lodging an appeal to the high court.
14. No proceedings have been requested neither is there proof of payment for the said typed proceedings. Further, there is no certificate of delay applied for by the Applicant.
15. The Applicant filed the instant application on 11th May, 2018 for stay of execution. Prior to that the applicant had successfully obtained a stay of execution in the lower court vide an application dated 7th May, 2018.
16. At the time of the mention of 4th July, 2018 the application at the lower court had been mentioned on 22nd June, 2018.
17. The Applicant had 2 orders to its benefit to the disadvantage of the Plaintiff/Respondent. The actions of the Applicant amount to an abuse of court process.
18. The Applicant was supposed to disclose these facts to the High Court and thus it is submitted that the application for stay was made with an ulterior motive. See **REPUBLIC -VS- KENYA MEDICAL TRAINING COLLEGE & ANOTHER EX-PARTE KENYA UNIVERSITIES AND COLLEGES CENTRAL PLACEMENT SERVICE (2015) Eklr** Justice Onguto held that:-

“Before summarizing the relevant legal principles and safeguards relevant to the instant issues, I must state and emphasize the high duty of candour fixed upon any applicant to court, appearing ex-parte. A party appearing before the court without notice to the other (ex-parte must exhibit a high quality and degree of sincerity and honesty. He must be guileless. He must be frank. He must be open. He must keep nothing that touches on the matter away from the court. He must act in utmost good faith. If he does not so act, he does so at his own risk.”

19. **On the second limb of application is prayer for stay of execution. It is submitted that,** the applicant has not fulfilled the set conditions for stay of execution.

ISSUES, ANALYSIS AND DETERMINATION

20. After going through the pleadings and parties submissions, I find the only issue is whether the application has merit.
21. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in **MWANGI -VS- KENYA AIRWAYS LTD [2003] KLR**. They include the following:
 - a. **The period of delay;**
 - b. **The reason for the delay;**
 - c. **The argue-ability of the appeal;**
 - d. **The degree of prejudice which could be suffered by the Respondent is the extension is granted;**
 - e. **The importance of compliance with time limits to the particular litigation or issue; and**
 - f. **The effect if any on the administration of justice or public interest if any is involved.**
22. On the first element above the delay spans from 23/3/2018 to 11/5/2018.
23. The reason given is that the party's advocate committed blunder and same should not be visited on the party.
24. The judgment in the lower court was delivered on 23/03/2018, the advocates for the Applicant/Defendant, was present in court and he requested for a stay of execution for 30 days. The grant thereof was unopposed by the Respondent's/Plaintiff's advocates.
25. The Plaintiff advocates served the applicant's advocates with a 10 days' notice which also expired, there is no reasonable/justifiable explanation given as to how the 30 days the Applicant had at its disposal was used when temporary stay was granted to manifest the intention of lodging an appeal to the high court.
26. No proceedings have been requested neither is there proof of payment for the said typed proceedings. More importantly there is no

certificate of delay that has or was requested or applied for by the Applicant.

27. The Applicant filed the instant application on 11th May, 2018 for stay of execution. Prior to that the Applicant had successfully obtained a stay of execution in the lower court vide an application dated 7th May, 2018. At the time of the mention of 4th July, 2018 the application at the lower court had been mentioned on 22nd June, 2018.

28. The Applicant had 2 orders to its benefit to the disadvantage of the Plaintiff/Respondent. The actions of the Applicant amount to an abuse of court process.

29. The Applicant was supposed to disclose these facts to the High court. See **Kenya medical Training College & another Ex-parte Kenya Universities and Colleges Central Placement Service (2015) ECLR** supra.

30. The argue-ability of the appeal has not been demonstrated nor alluded to by the applicant. On the other hand the respondent argues that the delay will prejudice him as he will be kept away from his fruits of his judgement.

31. It was the applicant's duty to demonstrate the above elements to justify the exercise of discretion in his favour. In absence of that demonstration; the court is constrained to decline to exercise such discretion in applicant's favour.

32. On the application for stay of execution pending appeal, the applicant contends that the same was lodged without delay, the appeal will be rendered nugatory if execution proceeds thus suffer irreparable loss as Respondent has not shown ability to refund the decretal amount if appeal succeeds and finally the applicant proposes to deposit security.

33. However the above submissions can only be valid where the appeal is filed.

34. There is no appeal nor has applicant succeeded in persuading court to grant leave to lodge same out of time.

35. The court thus declines to grant same stay of execution sought. In sum the court makes the following orders;

i. The application is dismissed

ii. Costs to the respondent.

SIGNED, DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER, 2018 IN OPEN COURT.

C. KARIUKI

JUDGE