REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPL. NO. 745 OF 2017

IN THE MATTER OF MILIMANI CMCC. NO.9749 OF 2003: GEORGE KARIUKI WAITHAKA VERSUS ATTORNEY GENERAL AND ANOTHER

BETWEEN

ATTORNEY GENERAL.....1ST APPLICANT

PRINCIPAL SECRETARY MINISTRY OF DEFENCE.....2ND APPLICANT

AND

GEORGE KARIUKI WAITHAKA.....RESPONDENT

RULING

The Applicant has moved this court by way of Notice of Motion dated the 4th day of December, 2017 under Sections 3, 3A, 79G, Order 42 Rule 6, and Order 51 rule 1 of the Civil Procedure Rules seeking leave to appeal out of time against the judgment by the trial court in CMCC No. 9749 of 2003. The applicant has also sought an order staying execution of the decree pending the hearing and determination of the Appeal.

The application is made on the grounds that; the applicant was not notified of the progress of the proceedings or the delivery of the judgment and the issuance of the subsequent order by the court, that the applicant is aggrieved by the judgment of the Lower Court and he desires to file an appeal against the same, that he has an arguable appeal which has very high chances of success and if the orders prayed for are not granted the applicant shall suffer substantial loss and the Appeal shall be rendered nugatory.

In the supporting affidavit sworn by Alice Mate, a legal officer with the applicant, it is deponed that the applicant was not served with the notice of entry of judgment despite having not been represented when the judgment was delivered and only learnt of the same when the ombudsman's office wrote to the State Law office concerning the matter. The letters are annexed to the affidavit and marked as annexture **AM 1**.

That upon receipt of the letters, the ministry sought to find out what the matter was all about and by the time they learnt about the judgment, the time allowed for filing Appeal had already lapsed. The applicant avers that she is desirous of pursuing an appeal against the said decision and that she has a good appeal with overwhelming chances of success and that the Respondent will not suffer any prejudice if the application herein is allowed.

The respondent has sworn a replying affidavit in opposition to the application. It is averred that, under the government proceedings Act, the defendant (Applicant) is the Attorney General and not the Minister or the Government officers concerned with a particular matter. As such, the A.G. is the Advocate of the relevant ministry and that an advocate is an agent of his/her client and any communication of a party through its Advocate is a communication to it.

The Respondent depones that the Appellants declined to satisfy the decree issued for Kshs.3,858, 529.59cts. as a result of which he was compelled to apply for an order of mandamus to compel the 2nd applicant to satisfy the same. It is averred that the application herein arose from Milimani CMCC No. 9749/2003 (George Kariuki Waithaka Vs. A.G. & another in which judgment was given on the 4th day of September, 2014 and the applicant was represented by the Attorney General. That upon conclusion of the said matter, the 1st applicant was notified of the judgment through its advocates and copies of the decree was forwarded to them. Further to that, it is deponed that the respondent filed an application for leave to apply for an order of mandamus which was served upon the A.G. who participated in the proceedings. That the application was allowed on the 13th July 2016 and the order requiring the principal secretary in charge of the Ministry of defendant to pay the decretal sum was forwarded to the 1st applicant. It is not therefore true that the applicants were not aware of the proceedings and what was going on.

The Respondent contends that the application is based on misapprehension of the law and suppression of the facts. The respondent has relied on the case of **Kenya Agriculture and Livestock Research Organisation Vs. Stephen Ngaruiya Kanyanja (2015) and that of Kenya Bus Services Limited Vs. Susan Muteti; Court of appeal at Nairobi, Civil Appeal No. 15 of 1992** which addressed the point raised by the Applicant that the 2nd applicant was not aware of the proceedings as she was not informed of the same by his Advocate. The court stated that:

> **"The court will not concern itself with the failure of an advocate to inform his clients of the facts he knows; the court, acts on the view that the Advocate acted as required of an agent"**

On leave to appeal out of time, the Respondent contends that, it is within the discretion of the court to grant the leave but the discretion should be exercised judiciously. That the discretion is never exercised in favour of a party which has lied to the court or is guilty of unreasonable delay. It is averred that the application is an abuse of the court process in that the Judicial Review Division is seized of the matter and the only object the application is meant to serve is to stay the proceedings which are before that court.

The court has considered the application and the submissions made by the counsel. The application is mainly brought under Order 42 Rule 5 of the Civil Procedure Rules and Section 79G of the Civil Procedure Act.

On the stay of execution it is trite that the same is governed by Order 42 rule 6 of the Civil Procedure Rules. Under the said order, the applicant has to satisfy the court the following;

1. That the application for stay has been brought without undue delay.

2. That substantial loss may result to the applicant unless the order is made.

3. 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.

It has been averred that the applicant learnt about the judgment through the letters that were written to the State Law office which were copied to it. The said letters are annexed and marked **AM 1**. One of the letters is dated the 30th day of May 2017 and the other 10th August 2016. The application herein was filed on 4th December 2017 which was seven (7) months from the date of the letter dated 30th May 2017. An earlier letter had been done on 10th August, 2016 but the applicant took no step with regard to the matter. I find that the delay is inordinate and the same has not been sufficiently explained.

On substantial loss, I have carefully perused through the affidavit in support of the application. I did not see anywhere in that affidavit where the applicant has stated that she will suffer substantial loss if stay of execution is not granted. Infact, the same has not been alluded to, at all. Substantial loss is the cornerstone of an application for stay of execution. In this case no substantial loss has been alleged by the Applicant. That ground fails.

On security, a perusal of the affidavit in support would reveal that no offer on security was made by the applicant. It is one of the conditions that the applicant has to satisfy under Order 42 rule 6 of the Civil Procedure Rules. I find that this condition was not satisfied. In a nutshell, the applicant has not satisfied this court that she deserves an order for stay of execution to enable the court exercise its discretion in her favour. She has miserably failed and the court has no choice but to disallow prayers (d) and (e) of the application dated 4th December, 2017. In any event, prayers (d) and (e) as framed sought stay orders pending the hearing and determination of the application.

I now turn to prayer (c) of the application which seeks leave to file appeal out of time. This is provided for in Section 79G of the Civil Procedure Act which provides;

> **"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 periods 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 fling the appeal in time.

The Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat Vs. I.E.B.C. & 7 others, SC Appl. 16/2014** laid down principles to be considered when dealing with an application for leave, which are;

1. Extension of time is not the right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.

2. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

3. As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case basis.

4. Whether there is a reasonable cause for the delay. The delay should be explained to the satisfaction of the court.

5. Whether there will be any prejudice to be suffered by the Respondents if the extension is granted.

From the above principles, it is clear that extension of time is an equitable remedy that is only available to a deserving party and the applicant has the burden of laying a basis to the satisfaction of the court. The court should also consider whether there is unreasonable delay and if the same has been explained to the court to its satisfaction.

Under Section 79(G) the appellant has to satisfy the court that he had good and sufficient cause for not filing the Appeal on time.

I have considered the material before me in that regard, and no good and sufficient cause has been shown to the court by the Appellant, for not filing the Appeal on time.

In the premises, I find that prayer (c) of the application has no merits and the same is disallowed.

All in all, the application dated the 4th December 2017 has no merits and it is hereby dismissed with costs to the Respondent.

Dated, Signed and Delivered at Nairobi this 27th day of September, 2018

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L. NJUGUNA

JUDGE

In the presence of:

…….. For the Plaintiff

…… For the Defendant