



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL MISC. APPLICATION NO. 57 OF 2018

MUTUA MAKAU MUTWETI.....APPLICANT

VERSUS

NDEWA MUTIA MULATYA.....RESPONDENT

RULING

1. In an application dated the **18th** day of **July, 2018**, the Applicant seeks leave to file an Appeal out of time. Secondly, he prays for stay of execution of the Decree of the Lower Court the subject of the intended Appeal pending hearing and determination of the Appeal.
2. The Application is premised on grounds that upon delivery of the Judgment on the **30th November, 2017** the Applicant applied for a copy of Judgment and proceedings. That the inordinate delay was occasioned by delay in acquiring the Judgment which was being typed; That the Respondent will not be prejudiced if the orders prayed for are not granted as it is in the interest of justice that the orders be granted as the Appeal has high chances of succeeding.
3. The application is supported by an affidavit sworn by **Mutua Makau Mutweti**, the Applicant who deposes that he instructed his Advocate to file the Appeal before the lapse of the statutory period of filing the Appeal but the Appeal was not filed as the Advocate was waiting for typed proceedings and if stay of execution is not granted the Appeal shall be rendered nugatory.
4. The application is unopposed.
5. The principle to be considered in extending time within which to file an Appeal out of time is stipulated in **Section 79G** of the **Criminal Procedure Act** that provides thus:

“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.”

6. The Judgment the Applicant intends to Appeal was delivered on the **30th November, 2017**. It is alleged but not demonstrated that the Appellant applied for a copy of the Judgment and Proceedings upon delivery of the Judgment. It is not stated when the Judgment was subsequently acquired. This is tantamount to no sufficient cause being shown. However, since the application is unopposed it may be in the interest of justice to allow the application on the stated prayer.
7. The second limb of the application is stay of execution of the Decree of the Lower Court pending hearing and determination of the intended Appeal. The criteria for granting stay of execution pending Appeal was set out in the case of **Elena Doudoladova Korir vs. Kenyatta University (2014) eKLR** where the Court stated that:

“The Application must meet a criteria set out in precedent and the criteria is best captured in the case of Halai & Another v Thorton & Turpin (1963) Ltd (1990) KLR 365 where the Court of Appeal Gicheru JA, Chesoni & Cockar Ag. JA (as they all were) held that:

The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.

In addition the issue of whether the intended appeal will be rendered nugatory is critical as was held in the case of Hassan

Guyo Wakalo v Straman East Africa Ltd (2013) eKLR as follows:-

“In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other.”

8. The Applicant has not alleged that he will suffer substantial loss if the order sought is not granted. An Appeal is not an automatic condition of stay. In the premises there is absolutely nothing to move this Court to grant the relief sought.

9. In the result I grant the Applicant leave to Appeal out of time within **14 days**.

10. It is so ordered.

Dated, Signed and Delivered at Kitui this 26th ay of September, 2018.

L. N. MUTENDE

JUDGE