



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 14 OF 2015

NICE RICE MILLERS LTD..... PLAINTIFF/RESPONDENT

VERSUS

MERU COUNTY GOVERNMENT.....DEFENDANT/APPLICANT

R U L I N G

1. Before me is a Notice of Motion dated 13th November 2018, in which the applicant seeks a stay of execution of the judgment and decree of this court delivered on 20th September 2018, It further seeks an order to extend time to file a Notice of Appeal, Memorandum of Appeal and the Record of Appeal to the Court of Appeal. The application is made under **sections 1A, 1B, 3A of the Civil Procedure Act 2010, Order 42 rule 6 of the Civil Procedure Rules, section 7 of the Appellate Jurisdiction Act and Rule and Rule 4 of the Court of Appeal Rules.**

2. The grounds upon which the Motion is grounded upon are set out in the body thereof and in the affidavit of Irah Nkuubi of 13th November, 2018. These are that; a judgment was entered against the applicant on 20th September, 2018 for Kshs.93,708,914/= together with interest and costs; that being dissatisfied with the said judgment and decree, the applicant intended to appeal against the said judgment and decree but the time to do so had lapsed; that on the date the judgment was set for delivery, its clerk was misled that due to an alleged go slow by judicial officers and advocates, the same was to be delivered on notice. The applicant therefore contended that unless the orders sought were granted, it would suffer substantial loss including its officers being cited for contempt of court.

3. The application was opposed vide a replying affidavit sworn by the director of the respondent. He contended that there was no appeal filed since the notice of appeal was filed out of time. That under **section 7 of the Appellate Jurisdiction Act**, this court has jurisdiction only to extend time for giving notice of intention to appeal and not to extend time for filing memorandum of appeal and a record of appeal. That the applicant had not offered any security as is required under **Order 42 Rule 6 of the Civil Procedure Rules.**

4. I have carefully considered the affidavits and the submissions on record. The applicant seeks an order of stay of execution and an order to extend the time within which to file a notice of appeal, memorandum of appeal and record of appeal to the Court of Appeal.

5. *On extension of time to file notice of appeal, memorandum of appeal and the record of appeal to the Court of Appeal, the application has been brought under Section 7 of the Appellate Jurisdiction Act, Cap 9 of the Laws of Kenya (the Act) and Rule 4 of the court of Appeal Rules. Rule 4 is not applicable provision is Section 7 aforesaid which provides: -*

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

...”

6. *It is clear from the foregoing that this court has jurisdiction only to extend time for filing a notice of intention to appeal against its orders. That jurisdiction does not extend to the time for the filing of a Memorandum of Appeal or record of appeal. Accordingly, the application for extension of time for filing of the Memorandum and Record of appeal is hereby declined.*

7. *As regards the prayer for extension of time to file the notice of appeal, section 7 of the Act gives this court wide powers to grant the same. Nevertheless, an applicant must give sufficient reason why he did not file the notice of appeal in time.*

8. *In the present case, the applicant contended that the delay in filing the notice of appeal was not deliberate but was occasioned by a court clerk at the registry who informed the applicant’s clerk that due to the then alleged ongoing go slow by judicial officers and advocates at*

Meru station, judgment will be delivered on notice. That this followed the brutal and unfortunate murder of the child of one of the judicial officers in Meru.

9. This is a court of record and nothing could be far from the truth. The record clearly shows that on 28th June 2018, when the defendant closed its case, judgment was fixed for delivery on 20th September 2018. On the said 20th September, 2018, the court delivered its judgment in the absence of the applicant's advocates while the advocate for the respondent was present.

10. The applicant has but lied regarding the events of 20th September, 2018. There was no go slow by any judicial officer at the Meru Law Courts. On that day, the Deputy Registrar issued a notice in advance advising the litigants that all courts were to start business at Noon as the judicial officers were attending the requiem Mass for a daughter of one of the Magistrates within the region. After the requiem Mass, all the courts proceeded with the business of the day after 12 O'clock and it is then when the said judgment was delivered.

11. Further, all the judgments and rulings fixed for that day were listed in the Cause List contrary to the averments by the applicant. Apart from the judgment in this case, the court delivered two other judgments in which the advocates and the parties were present. All the other judgments and rulings were called out and given a date of 27th September, 2018 for delivery. This court has never, ever delivered any of its judgments or rulings on notice. It is most unfortunate for a litigant to seek to blame the court for its own mistake or that of its advocate.

12. In any event, the affidavit of Josephine Nyambura Mwaura sworn on 13th November, 2018, did not disclose the name of the court clerk at the registry who allegedly gave her the misleading information.

13. Accordingly, I am not satisfied that there has been any good and sufficient reason that has been advanced why there was any delay in the filing of the notice of appeal against the impugned judgment. Further, there is nothing to show that either the applicant or its advocate called the respondent's advocates the following or any other day or the court registry to inquire about the said judgment. The applicant waited until it was served with a demand to settle the decretal amount for it to rush to court.

14. As if that is not enough, even after filing the notice of appeal on 11th October, 2018, the applicant failed to file the present application until after 43 days.

15. In **Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015)eKLR** the Court of Appeal stated:-

“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.

The parameters for the exercise of such discretion are clear. See MUTISO V MWANGI, CIVIL APPLN NO. NAI 255 OF 1997 (UR), MWANGI V KENYA AIRWAYS LTD, [2003] KLR 486 and FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO. NAI 332 OF 2004 (unreported) where this court rendered itself thus:-

The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”

16. Accordingly, in absence of any sufficient explanation as to why the appeal was not filed on time, the defendant's application is completely without merit.

17. However, I have considered that the decree is for a substantial amount of money and that the applicant is a public body which has to settle the decree from public funds. I am alive to the complaint by the respondent that it will suffer prejudice by any further delay, but I am convinced that the applicant will take sufficient steps to lodge and prosecute its appeal within a reasonable time. For the foregoing reason alone, I will exercise my unfettered discretion and grant the applicant the extension of time for the filing of the notice of appeal.

18. Accordingly, the Notice of Appeal filed on 11th October, 2018 against the judgment of this court of 20th September, 2018 is hereby deemed to have been filed and served within time.

19. On the second prayer for stay of execution pending appeal, **Order 42 Rule 6 of the Civil Procedure Rules** is clear on the principles applicable. The application should be made timeously; the applicant must demonstrate that he would suffer substantial loss if the stay is not granted and the applicant must give security for the performance of the decree that would ultimately be binding on him.

20. In **Butt v Rent Restriction Tribunal [1982] KLR 417**, the court of appeal held that: -

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so

that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

21. On the first limb, the application was made over 60 days from the date of the judgment. However, since the court has already excused the applicant for that delay, I will hold that the application was lodged timeously.

22. As to whether the defendant would suffer substantial loss in the event the stay sought is not granted, the applicant only stated that the amount is substantial and that its officers may be cited for contempt. To my mind that is not enough. This is a money decree. It was not averred that if the decretal sum is paid over, the respondent will not be capable of refunding the same were the intended appeal to succeed. Further the applicant did not give any security for the performance of the decree.

23. Be that as it may, the court must always be mindful of the tenets of justice, ie. that the intended appeal, if successful, is not rendered nugatory and that the successful party is not unreasonably prevented from enjoying the fruits of its judgment. Considering that the amount involved is substantial, I am minded to grant a stay on terms. The respondent has also complained that the matter has taken so long. I am minded that this is a claim based on business.

24. Counsel for the applicant relied on the cases of *Josphat Gatheo Kibuchi .v. Kirinyaga County Council [2015] e KLR and Raiply Woods (k) Ltd & Anor .v. County Government of Baringo & 2 others [2017] e KLR* on the proposition that since the applicant is a County Government, no security should be ordered. I did not understand the said cases to rule that a County Government cannot be ordered to give security for the performance of the decree. The party cited counsels submissions in those cases and not the ratio decidendi of the case. To my mind, nothing stops the court from ordering a County Government to give security in exchange for a stay of execution order.

25. A stay of execution of the judgment and decree of this court dated 20th September, 2018 hereby issued on condition that the applicant deposits the sum of KShs.134,145,234/70 in an interest bearing account in the names on the Advocates on record for the applicant and the respondent within 30 days of the date of this ruling. The period given is reasonable considering that the period between 21st December, 2018 and 13th January, 2019 does not count by operation of law.

26. The respondent will have the costs of the application.

DATED and DELIVERED at Meru this 17th day of December, 2018.

A. MABEYA

JUDGE