REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL MISC. APPLICATION NO. 5 OF 2016

SUSAN NJOKI MWANIKI (Suing as administratrix of the estate of

FRANCIS MWANIKI THEURI.....APPLICANT

Versus

JOSEPH KIIRU.....1ST RESPONDENT

TRU PREMIER LIMITED.....2ND RESPONDENT

RULING

FRANCIS MWANIKI THEURI hereinafter referred as the applicant filed a notice of motion dated 8th April 2016 seeking orders from this court for extension of time to file and serve notice of appeal (memorandum of appeal) and record of appeal out of time in respect of the judgement in CMCC 100 of 2015 at Kajiado in a judgement delivered on 3/3/2016 by Hon. Okuche. The second player touches on stay of execution of judgement herein pending hearing and determination of the intended appeal.

The application is grounded on Order 50 rule 6, Order 42 rule 6 (1) of the Civil Procedure Rules, section 3, 3A and 79 (g) of the Civil Procedure Act. The grounds upon which the applicant anchored the application are that when the judgement of the lower court was read he was not present nor his counsel. As a result of that omission he was not aware of the existence of the judgement in order to take steps to remedy the situation. The applicant has a strong appeal with high chances of success. In support of the application is also an affidavit by Mr. Patrick Kimemia an advocate seized of the matter on behalf of the applicant in the lower court. In the affidavit the applicant counsel has deposed that the trial magistrate had directed that them to file submissions before the 17/12/2015 when directions were to be taken. Mr. Kimemia further deposed that he did send his clerk to the Kajiado Law Courts one Daniel Wachira to file submissions and comply with the order by the court on 16/12/2015 where a new date of 4/4/2016 was issued. According to Mr. Kimemia come the 4/4/2016 the matter was not listed only for the clerk to check and confirm that the judgement was read on 3/3/2016. Mr. Kimemia further averred that upon reading the judgement he made a decision that the matter ought to be ventilated vide an appeal to the High Court which has high chances of success. The applicant also sought and filed a second affidavit by Daniel Wachira filed in court on 11/4/2016 reiterating the circumstances arising out of the visit he made to the court registry at Kajiado to follow up CMCC 100 of 2015. According to Mr. Daniel Wachira the bone of contention arises out of a date issued on 4/4/2016 for the court to take certain directions but on the material day the court was not sitting. That the date when the judgement was to be read was never communicated to the applicant or his counsel.

In opposing the motion the respondent filed a replying affidavit that the applicant was aware of the date of delivery of judgement. That the applicant has not demonstrated why he failed to move the court

expeditiously. That no copy of the annexed diary for the 3/3/2016 to support the contention why he did not attend the delivery of judgement. Mr. Kimemia learned counsel for the applicant submitted and maintained that the applicant should be granted extension of time to file an appeal from the judgement of the lower court. Mr. Kimemia urged this court to be guided by the provisions of Order 42 of the Civil Procedure Rules on appellate jurisdiction on matters from the subordinate court to the High Court. Mr. Kimemia reiterated that on hearing the delivery of judgement he moved the court timeously to apply for the record and filing of the necessary applications including the instant one before court. As regards the main appeal Mr. Kimemia submitted that the applicant was dissatisfied with the order and entire judgement of the lower court. Mr. Kimemia argued that the intended appeal has merit and if extension of time is not granted applicant will suffer substantial loss. Mr. Kimemia referred to decisions of the court in the case of ***Antoine Ndiaye v African Virtual University [2015] eKLR*** for the proposition that substantial loss does not represent any particular mechanical formula, rather, it is a qualitative concept. It refers to any loss great or small, that is of real worth or value as distinguished from a loss without value or loss that is merely nominal. Mr. Kimemia further contended that requirement to furnish security should never be used as a reason to delay the right of access to pursue justice on the part of the applicant. He cited the case of ***Noor Mohamed Abdalla v Patel [1962] EA***. He distinguished the case of ***Stephen Somek Takwenyi & Another v David Mbutere Githare & 2 Others Milimani HCC No. 363 of 2009*** regarding the contention that the applicant application is frivolous.

The respondent counsel Mr. Kinyanjui vehemently opposed the application vide the written submissions filed in court on 13/12/2016. Mr. Kinyanjui submitted that the applicant has not fulfilled the condition for grant of stay as provided for under Order 42 rule 6 of the Civil Procedure Rules. Mr. Kinyanjui further argued and contended that the applicant has not filed the application without unreasonable delay. In this regard learned counsel cited the case of ***Stephen Somek Takwenyi & Another (Supra)***. The case of ***Machira T/A Machira & Co. Advocates v East African Standard No. 2 of 2002 KLR 63, Firose Nzirah Hurji v Housing Finance Company of Kenya Ltd & Another [2012] eKLR.*** Further Mr. Kinyanjui for the respondent submitted that the applicant manifest bad faith, ill will on the part of the applicant amounting to an abuse of the court process. Mr. Kinyanjui argued that the applicant has not approached the seat of justice with clean laws and hence judicial direction should not be exercised in his favour. In this aspect he cited the case of ***Patrick Waweru Mwangi & Another v Housing Finance Co. of Kenya Ltd [2013] eKLR***. Mr. Kinyanjui further submitted that in exercise of discretion each case has to be decided on the strength of its peculiar facts. He observed that the applicant has not demonstrated the ground on substantial loss to warrant favour from this court. Mr. Kinyanjui in this issue cited the cases of ***Antone Ndiaye (Supra), James Wangalwa v Agnes Nakake Msc. Application No. 42 of 2011, Machira T/A Machira & Co. Advocates (Supra)***. Mr. Kinyanjui asserted that the applicant has not fulfilled the conditions to enable this court enlarge time of which he has to bring an action against the respondent. Mr. Kinyanjui contended that the application by the applicant smacks of bad faith as there is no evidence of an arguable appeal as alluded to by the applicant. Mr. Kinyanjui argued and submitted that the prayers sought are all a waste of the court's judicial time.

The questions before this court are two fold:

1. Whether the application for extension of time to appeal should be allowed?

2. Whether the applicant has satisfied the criteria under Order 42 rule 6 of the Civil Procedure Rules to be granted stay of execution?

The general principle of law is that an application for extension of time will not be granted as a matter of course to the aggrieved parties but one who demonstrates that such compelling reasons exist for the court to exercise discretion in his favour. The sequences of events in this matter are deposed in the affidavit by Mr. Kimemia advocate and his clerk Daniel Wachira.

The other reference point is the trial court record and judgement. A perusal of the record reveals the following the learned trial magistrate ordered the parties to file submissions on or before 17/12/2015. The matter was again mentioned on 17/12/2015 when a further mention date of the 4/2/2016 was issued by the court to the parties. On the 4/2/2016 the record is crystal clear that both parties were represented when

the following order was made:

> **"Court – submissions on 3/3/2016. Judgement notice to issue."**

It is not disputed that the learned trial magistrate delivered the impugned judgement on 3/3/2016 in the presence of Mr. Muema for the defendant but in absence of the plaintiff/applicant in this notice of motion. The date when the judgement was delivered had been set for a mention to receive submissions from the parties. In the clear language of the court judgement was to be on notice to be served upon the parties. I have perused the record no such notice or date of judgement was set by the court as required by the law.

The time for filing appeals is provided for under section 79 (a) of Civil Procedure Act Cap 21 of the Laws of Kenya. It provides hereunder:

> **"Every appeal from a subordinate court to the High Court shall be filed with a period of thirty days from the date of the decree or order appealed against, exceeding 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."**

The power of the court to extend time is also provided for under Order 50 rule 6 of Civil Procedure Rules:

> **"Where a limited time as been fixed for doing any act or taking any proceedings under this Rules or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not meant until after the expiration of the time appointed or allowed.**
>
> **Provided that the costs of any application to extend such time and of any order meant thereon shall be bone by the parties making such application unless the court orders otherwise."**

The words in the Civil Procedure Act and Rules as justice of the case may require and the words good and sufficient under section 79 (g) signifies that the court is to exercise discretion to achieve the ends of justice on the merits and circumstances of each case. The discretion of the court under these clear provisions of the law is not fettered. There is no limit placed by the Civil Procedure Act section 79 (g) and Order 50 Rule 6 of the Civil Procedure Rules on the factors the court may consider in the exercise of discretion section 3A is even more sacrosanct:

> **"Nothing in this Act shall limit or otherwise affect the interest to make such orders as may be necessary for the ends of justices or to prevent abuse of the process of the court."**

Section 1A:

> **"(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**
>
> **(2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**
>
> **(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objectives of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court."**

The court therefore has to balance the competing interest of the parties with the rules and the interest of justice as a whole. The court is therefore mandated under section 79 (g) and Order 50 rule 6 not to fetter discretion with a view to deny the defaulting party an extension of time to do whatever necessary to

maintain the action, appeal or any other relief sought to secure justice. While exercising discretion the courts should bear in mind that the rules of practice were devised in the public interest to promote expeditious and timeliness of litigation. The drafters of the constitution and statute prescribed the time limits required to be met by the parties in an adjudication forum.

The second cardinal principle which can be drawn from the provisions of Article 159 of the constitution is that in the ordinary sequence of events a party to a suit should not be denied a chance to adjudicate his claim on the merits because of a procedural default unless the default occasions prejudice or injustice to the opposing party for which an award of costs cannot compensate. This question on exercise of discretion on enlargement of time has occupied the minds of judges in the courts within the common law jurisdiction and our own superior courts in Kenya. As drawn from the decisions by English Courts sometimes I am intrigued with the development of their jurisprudence on this area. The reference to persuasive authorities from the English courts is therefore mainly targeted at enriching the discussion on this issue. In the case of ***Ratnam v Cumarasamy [1965] 1WLR 8 the Privy Council*** stated:

> **"The rules of court must, prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion if the law will otherwise a party in breach would alive an anqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of mitigation."**

In ***Savill v Southern End Health Authority [1995] 1WLR 1254*** the court held interalia:

> **"…….Realistically, the court may be satisfied with an explanation for a minimal delay even possibly forgetfulness, which it would not accept for substantial period of delay. Nevertheless there must be some material on which the court can exercise its discretion."**

In ***Beachley Property Ltd or Edgar [1996] TLR 439 Lord Woof*** added to the debate on extension of time with a proposition that eh court must consider the effect of default in administration of justice. In the above authority he stated as follows:

> **"One had to consider the position not only from the plaintiffs point of view, but from the defendants and also the point of view of among justice between other litigants as well the proper and regular administration of burdency in general before the courts should not be disputed as a result of breaches of the rules of the court which occurred without justification whatsoever. It was very important that the courts resources should be used as efficiently and effectively as possible that was not possible unless the parties co-operated; their co-operation involved them obeying the rules of the court."**

In our own jurisdiction, the Court of Appeal in the case of ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No. 255 of 1997 UR*** the court stated as follows:

> **"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general rule the matters which this court takes into account in deciding whether to grant an extension of time are:**
>
> **First, the length of delay, secondly, the reason for the delay, thirdly, (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted."**

This court is of the view that the above legal principles are the ones in which the realm of judicial discretion vested in the court should be exercised. The period of limitation the applicant was to file the appeal lapsed. The applicant has explained the reasons for the delay which includes failure not to be notified of the judgement date and delay in being supplied with the certified record and judgement of the trial court. In my understanding of the law delay is just one of the elements the court has to labour to make a finding as to whether it falls under the category of a party guilty of laches.

In addition to this element the court has to consider other factors particularly the conduct of the affected party from the time he realized that time to do a particular thing has lapsed. Answers to questions like whether the delay could have been avoided, the degree of due diligence and care on the part of the applicant whether the delay has been sufficiently explained whether granting the relief for enlargement of time would prejudice the respondent in a manner that an award of costs will not be adequate in the circumstances of the case.

After having evaluated the affidavit evidence, the rival submissions by both counsels and the prevailing law there are good and persuasive reasons why the applicant failed to lodge his appeal within the stipulated period. The applicant has demonstrated through the annexed intended memorandum of appeal that there exist a prima facie case why the appeal should be heard for the above consideration.

I find merit in the application to enlarge time in favour of the applicant to file an appeal against the judgement of the trial court delivered on 3/4/2016. I therefore grant the following orders:

> **1. That time be and is hereby extended to allow the applicant to file notice of intention to appeal out of time against the decision of Kajiado Magistrate Court in CMCC No. 100 of 2015.**
>
> **2. That time be and is hereby extended to allow the applicant to file the grounds of appeal out of time against the judgement and decision of the judgement in CMCC No. 100 of 2015.**

The second limb is whether the applicant has satisfied the criteria under Order 42 (b) of the Civil Procedure Rules to be granted stay of execution. This application falls within the same notice of motion filed in court on 15/4/2016 seeking enlargement of time to file an appeal. The applicant in the stated application applied for an order that the execution of the judgement and decree of the lower court be stayed pending the determination of an intended appeal.

In the application the applicant Mr. Kimemia advocate advances two main reasons for seeking stay that the applicant is dissatisfied with the decision of the lower court in CMCC No. 100 of 2015. That the judgement from the intended memorandum of appeal the learned trial magistrate misdirected himself on both points of law and facts rendering the judgement to contain the essential elements upon which the decision was based to the detriment of the applicant, that the intended appeal has high chances of success. That if stay is not granted the applicant would suffer substantial loss. Mr. Kimemia the learned counsel for the applicant contended that the provisions of Order 42 rule 6 of the Civil Procedure Rules stand in favour of the applicant. Counsel pointed out that although there was save bit of delay the same has been clearly explained and reasons given to support the extension of time. Counsel further advanced the argument that the applicant since the dismissal of the suit has been diligent to have a shot of the entire judgement evaluated afresh by this court on appeal. In support of the submissions learned counsel invited the court to have a look at the intended memorandum of appeal which on the face of it raises a prima facie case to be heard on the merits at the hearing of the appeal interpartes. The learned counsel further submitted that the applicant would suffer substantial loss if stay is not granted to await the outcome of the appeal. In support of this legal proposition learned counsel relied on the case of ***Antoine Ndiaye v African Virtual University [2015] eKLR*** where the court held interalia:

> **“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small that is of real worth or value as distinguished from a loss without value or a loss that is thereby normal.”**

In his view learned counsel argued that this judgement of the trial court whose orders are being challenged raises substantial issues of law affecting the rights of the applicant. That by dismissing the claim filed by the applicant and condemning her to pay costs is in itself substantial loss which invites the court to grant stay until the outcome of the appeal.

Mr. Kimemia counsel for the applicant further submitted that the issue of security should not be used as a barrier to deny the applicant to access of justice before the appellate court in pursuit of her rights. For this

proposition learned counsel relied on the case of ***Noor Mohammed Abdulla v Patel [1962] EA:***

> **"The policy of the law seems to be that the poverty of an individual plaintiff should not deny him access to justice to pursue a genuine claim in a court of law."**

Mr. Kinyanjui counsel for the respondent on his part vehemently submitted against grant of stay of orders under Order 42 rule 6 of the Civil Procedure Rules for want of merit and sufficient reasons. Mr. Kunyanjui contended that the applicant has not brought herself within the criteria set under Order 42 by demonstrating that the application has been filed without unreasonable delay.

Secondly there is failure on the part of the applicant to show that substantial loss will occur unless stay orders are allowed and finally the applicant has not demonstrated that she is willing and ready to deposit security sufficient enough to satisfy the decree which might be binding on the applicant. Mr. Kinyanjui argued that the principles of law on the following referenced authorities should guide the court not to exercise discretion in favour of the applicant. The applicable cited authorities are; ***Stephen Somek Takwenyi & Another v David Mbuthia Githare & 2 Others Nairobi Milimani HCCC No. 363 of 2009, Macharia T/A Macharia & Co. Advocates v East African Standard (No 2) [2002] KLR 63, Firoze Nurali Hirji v Housing Finance Company of Kenya Limited & Another [2012] eKLR, Patrick Waweru Mwangi & Ano. v Housing Finance Co. of Kenya Ltd [2013], Kenya Revenue Authority v Sidney Keitany Changole & 3 Others [2015] eKLR.***

Last Mr. Kinyanjui submitted that the applicant's notice of motion should be dismissed for being an abuse of the court process and waste of the court precious time.

I have carefully considered the rival submissions of the counsels from both sides and further perused the attached relevant case laws together with the provisions of Order 42 rule 6 of the Civil Procedure Rules. The general principle of law is that the court will not without sufficient reason deny a successful party in a litigation in obtaining the fruits of his or her judgement. The discretion to stay the final judgement of a court in a civil claim can only be premised if and only justice requires that the successful litigant whose judgement in the interim on very good cause subject to certain terms to be imposed by the court.

From the above submissions it appears to me the unsuccessful applicant has demonstrated existence of a legitimate ground that she has an appeal which has some prospect of success at the hearing on merits. The applicant has demonstrated that she will suffer substantial loss if stay is not granted to pursue the appeal against the judgement of the trial court. The applicant has invited the court to peruse the intended memorandum of appeal to be argued to buttress the argument that there exist sufficient reasons to allow the application.

In light of the above and applying the principles on the cited cases of Firoze (Supra) and Macharia (Supra) to the facts of the instant case, I find the applicant has satisfied this court that without a stay order of execution she will be ruined for not having a chance to pursue the appeal on the merit which has some prospect of success.

For the above reasons I allow the application for stay of execution with the following conditional orders:

> **1. That he record of appeal be filed and served upon the respondent within 14 days from this order.**
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> **2. That the parties do take directions for hearing of the appeal soon after service of the appeal.**
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> **3. That the stay order of execution is subject to deposit of Ksh.50,000 as security for costs pending the outcome of the appeal within 30 days to the Deputy Registrar High Court.**
>
> **4. That the costs of this application do abide the final orders of the appeal.**

It is so ordered.

Dated, signed and delivered in open court at Kajiado this 30th day of March, 2017

…….

R. NYAKUNDI

JUDGE

Representation

Ms. Ndunda for Kimemia for the appellant present

Mr. Chege for Mbugua for respondent present

Mr. Mateli Court Assistant