



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KERICHO

MISC. APPLICATION NO.34 OF 2016

PETER KIPLANGAT TUWEI.....APPLICANT

VERSUS

ALFRED CHERUIYOT SANG.....DEFENDANT

**RULING**

1. In his application dated 28<sup>th</sup> July 2016, the applicant seeks the following orders:

- 1. That this application be certified as urgent and the same be heard ex-parte in the first instance.***
- 2. That the applicant be granted leave to lodge an appeal, against the judgment in Kericho CM CC No.477 of 2010 (Alfred Cheruiyot Sang vs Peter Kiplangat Tuwei.***
- 3. That if leave to file an appeal out of time is granted, this Honourable Court be pleased to order that there be stay of execution of the decree in Kericho CM CC No.477 of 2010 (Alfred Cheruiyot Sang vs Peter Kiplangat Tuwei pending the filling, hearing and determination of the intended appeal.***
- 4. That the intended appeal be filed within fourteen (14) days from the date of granting leave, or alternatively the proposed Memorandum of Appeal filed herein be deemed to have been dully filed upon payment of the requisite fees within Seven (7) days from the date of granting leave.***
- 5. That pending the inter-parties hearing and determination of this application, this honourable court be pleased to order that, there be stay of execution of the decree in Kericho CM CC 477 of 2010 (Alfred Cheruiyot Sang vs Peter Kiplangat Tuwei.)***
- 6. That this application e heard interparties on the ..... day of ..... 2016 at .... am/pm.***
- 7. That the costs of this application be provided for.***

2. The application is supported by the applicant's affidavit dated 28<sup>th</sup> July 2016 and is based on the following grounds:

- 1. That the firm of G.M.Maengwe & Co. Advocates misled the applicant that they had filed an appeal against the judgment in Kericho CM CC 477 of 2010.***

*2. That the applicant became aware of the appeal having not been filed after the respondent moved to execute the decree.*

*3. That the applicant was not personally at fault to file the intended appeal within time.*

*4. That the applicant has overwhelming chances of success in his intended appeal.*

*5. That if the orders of stay are not granted, the applicant would suffer irreparable loss and damage including invaluable loss of liberty in the event that the applicant's appeal is successful.*

*6. That the applicant will not remove him from the jurisdiction of this court and is prepared to enter a recognizance to that effect.*

*7. That the delay caused in proceeding in the ordinary way would or might entail irreparable loss or serious mischief.*

3. The applicant seeks leave to file an appeal out of time against the decision of the court in **CM CC No.477 of 2010 Alfred Cheruiyot Sang vs Peter Kiplangat Tuwei**. His Learned Counsel, Mr. Koskei, submitted that there was no inordinate delay on the applicant's part in filing the appeal in time. He had instructed his then Counsel, Mr. G.M. Maengwe, to file the appeal when the judgment was read but the advocate failed to do so. When he inquired whether the appeal had been filed, his then advocate gave him a copy of a Memo of Appeal dated 23<sup>rd</sup> March 2015 (annexure DKT 2) but the appeal had not been filed.

4. Mr. Koske submitted that the applicant was all along under the impression that the appeal had been filed. He became aware that it had not been filed on 14<sup>th</sup> July 2016 when the respondent moved the lower court for execution of the decree. It is his submission that he has an arguable appeal as evidenced in his Memorandum of Appeal (annexure PKT 5). He prays that the application be allowed in the interests of justice.

5. With regard to the response to the application by the respondent set out in his replying affidavit dated 5<sup>th</sup> September 2016, the applicant observes that his former advocates, Mr. G.M.Maengwe, had filed an affidavit dated 1<sup>st</sup> September 2016 (annexure ACS 1) in which he concealed material facts. The applicant alleges that his advocate concealed the material fact that he had been instructed to act for the applicant and file an appeal. He relied on the decision in **Nyeri High Court Misc. Civil Appl. No.50 of 2015 – Mutahi Kiharanga vs Margaret Wangari Waweru and Another** for the proposition that an application should be allowed where there is a reasonable chance of succeeding on appeal.

6. He also cited the decision in **Mombasa Misc. Appl. No. 40 of 2013 – Gyka Fuel Mart Ltd vs Bwana Mshiri Sungura** to support his submission that an intended appeal must be arguable and not frivolous. His submission was that the applicant's appeal, which consisted of 13 grounds, was arguable and not frivolous. Should the application not be allowed and an order of stay of execution also granted, the applicant was likely to suffer irreparable loss and damage.

7. The application was opposed. The respondent relied on his affidavit sworn on 6<sup>th</sup> September 2016. Submissions were made on his behalf by his Counsel, Mr. Mbeche.

8. Mr. Mbeche submitted that the application raised two issues for determination. The first was whether the court should grant stay of execution, and the second whether leave should be granted to the applicant to file his appeal out of time.

9. According to the respondent, the applicant had filed an application before the lower court seeking stay of execution. The application, which was dated 28<sup>th</sup> July 2016, was argued and granted, subject to the applicant depositing the full decretal sum in a joint account with the respondent at the Kenya Commercial Bank, Kericho, within 60 days. The ruling, according to the respondent, which was delivered on 18<sup>th</sup> August 2016, was not complied with, and the 60 day period expired on 18<sup>th</sup> October 2016. Further, that

there had been another application for stay which was heard by Hon. Limo and dismissed.

10. With respect to the application for leave to file an appeal out of time, the respondent argued that the judgment sought to be appealed against was delivered on 22<sup>nd</sup> January 2015. It was now close to two years since the delivery of judgment. He further observed that the purported Memorandum of Appeal is dated 23<sup>rd</sup> March 2015, when judgment was delivered in 22<sup>nd</sup> January 2015.

11. He also relies on an affidavit sworn by Mr. Maengwe in which the Counsel denied having been instructed to file an appeal for the applicant. Mr. Maengwe also disowned the Memorandum of Appeal dated 23<sup>rd</sup> March 2015 which the applicant alleged had emanated from his office. Mr. Mbeche submitted that the applicant had the burden of proving that he had instructed the firm of G. M. Maengwe & Co. Advocates perhaps by producing a receipt, but had not done so.

12. Counsel cited the provisions of section 79 G of the Civil Procedure Code which require that an appeal from a subordinate court to the High Court shall be filed within a period of 30 days. The applicant had not complied with this requirement, nor had he given any reasons for his failure to file the appeal. It was his submission therefore that it would be unfair to the respondent, who has been waiting for the fruits of his judgment, to grant the applicant the orders he was seeking. The respondent therefore prayed that the application be dismissed.

13. In his reply, Counsel for the applicant conceded that the lower court had indeed granted the applicant stay on certain conditions. He therefore stated that he was abandoning the prayer for stay of execution. He asked the court to consider instead the applicant's prayers 2, 4, 5, 6 and 7. He maintained that the applicant had instructed the firm of Maengwe and Company but an appeal was not filed as instructed.

### **Determination**

14. I have read and considered the application before me, the documents in support, and the response from the respondent together with the annexures to his affidavit in response.

15. Following a hearing of his claim against the applicant for destruction of some tea bushes, the respondent obtained judgment against the applicant for a sum of Kshs 617,989.50 together with costs and interest. The respondent commenced the process of execution against the applicant for the total sum of Kshs 792,338.

16. However, pursuant to an application dated 28<sup>th</sup> July 2016, the applicant was granted an order of stay of execution by the lower court (Hon. C.K. Mungania, SRM) subject to his depositing the decretal sum in a joint interest earning account in the names of Counsel for the parties. In default, the orders of stay were to automatically lapse.

17. Counsel for the applicant conceded at the hearing hereof that the applicant had indeed been given the orders for stay, and he therefore abandoned the prayer for stay of execution. The substantive prayer remaining for consideration by this court is whether to grant the applicant leave to file an appeal out of time.

18. Section 79G of the Civil Procedure Act provides as follows:

***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 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.***

19. In the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)**, the Court expressed the following view:

***“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 the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the 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.”*** (Emphasis added)

20. I am not satisfied that the applicant in this case has satisfied the requirements of section 79G. Judgment against him was delivered on 22<sup>nd</sup> January 2015. He had 30 days within which to file his appeal. He has annexed a Memorandum of Appeal dated 23<sup>rd</sup> March 2015, which he alleges that his then Advocates, Maengwe & Co, had informed him had been filed on his behalf.

21. Aside from the fact that Mr. Maengwe has disowned this Memorandum of Appeal, which the applicant did not contest in any way, even had the Memorandum of Appeal not been disowned, it would still have meant that the intended appeal was filed out of time, without leave. Thus, there was a delay of two months in filing the appeal, if one accepts the applicant’s argument, a delay that has not been explained.

22. However, I have considered the proposed Memorandum of Appeal drawn by the applicant’s current advocate which contains some 13 grounds of appeal. Bearing in mind that the extension of time is within the court’s discretion, in the interests of justice, I am inclined to grant the applicant leave, which I hereby do, to file his appeal against the decision of the lower court out of time. The applicant is directed to file his appeal and serve within 14 days as he prays.

23. However, and for the avoidance of doubt, there is no order for stay of execution granted by this court. The order for stay granted by the lower court having lapsed, the applicant is under a duty to pay the decretal sum failing which the respondent is at liberty to execute.

24. The application therefore partially succeeds, and I therefore direct that each party bears its own costs of the application.

**Dated, Delivered and Signed at Kericho this 29<sup>th</sup> day of March 2017.**

**MUMBI NGUGI**

**JUDGE**