



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL MISCELLANEOUS APPLICATION NO. 72 OF 2016

FREDRICK NJOROGE.....1ST APPLICANT

GATERI JAMES.....2ND APPLICANT

-VERSUS-

STEPHEN WARUI JOHN.....RESPONDENT

R U L I N G

1. Before me is the Notice of Motion filed on 28/11/2016 expressed to be brought under Order 42 Rule 6 (1) of the Civil Procedure Rules and Section 79 (a) and 95 of the Civil Procedure Acts *inter alia*. It seeks leave to the Applicant to file an appeal out of time and stay of execution pending appeal, and is supported by the affidavit of the 2nd Applicant, Gateri James.

2. The gist of the Applicant's grounds, affidavits and submissions are that the Applicants are not to blame for the delay in filing an appeal against the lower court judgment delivered on 30th September 2016. Rather that having given timely instructions to counsel, an error in the counsel's office occasioned the delay.

3. That they will suffer irreparably if the time is not enlarged, and the Respondent does not stand to suffer any prejudice if the prayers are granted. Other matters canvassed relate to stay of execution pending an appeal, which as yet has not been filed herein.

4. Through grounds of opposition and submissions, the Respondent sees the application as a waste of judicial time and an attempt to thwart the Respondent's realization of the fruits of his judgment, hence occasioning him prejudice. That the reasons advanced to explain delay in filing of the appeal are not solid and have not been substantiated.

5. Having considered the arguments of the parties, and the undisputed background to the application, I note firstly, that the delay in bringing this application, is about 2 months since judgment. That cannot by any stretch be said to be inordinate delay. Secondly, the explanation for the delay is reasonable and believable, even if no affidavit was filed by the advocate's clerk whose tardiness brought about the delay.

6. The proviso to Section 79G of the Civil Procedure Acts states that the Applicant must demonstrate "**good and sufficient cause for not filing the appeal in time**".

7. The decisions of the court in (**Wasike -Vs- Swala [1984] KLR 591, Kimaru -Vs- Rukungu [1984] KLR 393**) were concerned with the application of Rule 4 of the Court of Appeal Rules which has been amended over time. The current rule is almost in similar terms as Section 95 of Civil Procedure Act. The

authorities therefore provide useful guiding principles for the consideration of an application brought under Section 79G and 95 of the Civil Procedure Act. These principles include the consideration whether delay has been inordinate and whether the extension of time will occasion prejudice upon the Respondent and possibly, whether the intended appeal is arguable.

8. The above principles were reiterated in **Mwangi -Vs- Kenya Airways Limited [2003] KLR 486** where the Court of Appeal held:-

“Matters which the Court takes into account in deciding whether or not to grant extension of time are:-

(a) the length of delay

(b) the reason for the delay

(c) possibly, the chances of the appeal succeeding if the application is granted; and

(d) the degree of prejudice to the respondent if the application is granted.”

9. In **Bagajo -Vs- Christian’s Children Fund Inc. [2004] 2 KLR 73** the court emphasized that in exercising its discretion relating to extension of time, *“the court’s primary concern should be to do justice to the parties.”* With regard to the intended appeal, the draft memorandum appears to raise serious questions for argument.

10. The main interest is to do justice to the parties, and notwithstanding the delay, it is my considered view that justice can still be done between the parties. (See **Ivita -Vs- Kyumbu [1984] KLR 441**). The Respondent will not be unduly prejudiced as he can be adequately compensated through costs. I do therefore grant leave to the Applicants to file an appeal within 14 days of today’s date.

11. With regard to prayer 4, there is considerable merit in the Respondent’s submission that the filing of an appeal is a condition precedent to the exercise of this court’s appellate jurisdiction under Order 42 Rule 6 (1). Although the provision does not expressly say so, this can be inferred from the rule. Further an analogy can be drawn from Order 42 Rule 6 (4) of the Civil Procedure Rules which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given.

12. Equally Order 42 Rule 6 (6) of the Civil Procedure Rules states:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

13. It would seem that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by the filing of an appeal, or compliance with the procedure for filing appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the Civil Procedure Rules). Until the Memorandum of Appeal is filed, the court may be acting in *vacuo* by granting a stay of execution pending appeal.

14. I am fortified on this position by the pronouncement of the Court of Appeal in the case of **Equity Bank -Vs- Westlink MBO Limited [2013] eKLR**. Commenting on Rule 5 (2) (b) of the Court of Appeal Rules which is substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules and on Order 42 Rule 6 (6) of Civil Procedure Rules, the Court of Appeal left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also **Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR**).

15. I therefore reject prayer 4 of the Notice of Motion as being prematurely brought, and for the avoidance of doubt, that part of the Notice of Motion is deemed as struck out. In the interest of justice however I order that the status quo be maintained during the 14 days allowed for the filing of the appeal. All the costs occasioned by the application are awarded to the Respondent.

Delivered and signed at Naivasha this **24th** day of **March, 2017**.

In the presence of:-

N/A for Applicants

N/A for Respondent

Court Assistant – Quinter Ogutu

C. MEOLI

JUDGE