



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 14 OF 2017**

**VEGPRO KENYA LIMITED .....APPLICANT**

**VERSUS**

**SUSAN WANJA ..... RESPONDENT**

**RULING**

1. Before this court is an application by way of a notice of motion dated 10<sup>th</sup> January, 2017. The applicant seeks enlargement of time to file a memorandum of appeal and that the memorandum of appeal annexed to the motion be deemed filed and served within time. It further sought stay of execution of the judgment and decree it intends to appeal against pending the hearing and determination of the intended appeal.

2. The motion is supported by the affidavit of John Matanyi who is the applicant's Senior Human Resource Manager. He stated that after the delivery of judgment, the applicant instructed its insurers to have an appeal filed but that the instructions were inadvertently issued three days after the prescribed 30 days' period for filing a memorandum of appeal. He stated that the appeal has high chances of success and that it is imminent that the applicant's property will be attached if this application is not heard and the orders sought granted. He further stated that the applicant will be greatly prejudiced as the respondent has no known means or source of income. The deponent expressed the applicant's ability and willingness to abide by any terms as to security as shall be ordered by this court.

3. The motion was opposed by a replying affidavit of Ichaura Wachira who is the advocate in conduct of this matter on behalf of the respondent. He contends that the motion is an abuse of court process because the applicant knew of the judgment bearing in mind that its advocate was present in court when the thirty days' stay was granted. That subsequent to the judgment, the respondent did a letter to the applicant's advocates informing them of the judgment and tabulating their costs. That instructions were purportedly issued on 14<sup>th</sup> December, 2016 but the applicant waited until 11<sup>th</sup> January to file this motion. That the applicant does not deny being aware of the judgment but does not offer an explanation for the delay. That the applicant has casually stated that the delay was inadvertent.

4. In its written submissions, the applicant discussed the guiding principles for extending time. The applicant cited the Supreme Court's decision of **NICHOLAS KIPTOO ARAP SALAT V IEBC & 7 OTHERS, SC APPLICATION NO. 16 OF 2014** summarized by Aburili, J in **TIMSALE PRODUCTS LIMITED KARA CHIWALLA (NAIROBI) LIMITED, [2016] eKLR** as follows:

***"...The above holding can be summarized as follows:***

***i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;***

ii. *The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*

iii. *As to whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis;*

iv. *Whether there is a reasonable reason for the delay; the delay should be explained to the satisfaction of the court;*

v. *Whether there will be any prejudice to be suffered by the respondents if the extension is granted;*

vi. *The application should have been brought without undue delay; and in certain cases, like election petition, public interest should be a consideration for extending time...*”

5. It was submitted that the applicant has satisfied these principles. That it was stated that the three-day delay was an inadvertent administrative delay and was not meant to prejudice the respondent. The applicant further cited *Timsale* case where the judge held:

*“...I reiterate my findings and holding in Edward Kamau & Another v. Hannah Mukui Gichuki & Another, [2015] e KLR wherein I cited with approval Banco Arabe Espanol v Bank of Uganda, [1999] 2 E A 22 where it was held: ‘The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered...’”*

6. On the issue of stay of execution, it was argued that the conditions for grant of stay of execution have been satisfied by the applicant. That the respondent has not demonstrated that she would be able to refund the decretal amount of KShs.200,000/= in the event the appeal succeeds. That it has demonstrated that the delay was inadvertent and not unreasonable and that it is willing to furnish security as may be ordered by court.

7. On the other hand the respondent argued that the applicant ought to have first filed an appeal before filing this motion. In support thereto, the respondent cited *GERALD M’LIMBINE V JOSEPH KANGANGI*, [2009] eKLR and *ASMA ALI MOHAMED V FATIME MWINYI JUMA*, [2014] eKLR where the courts held that an applicant seeking an appeal to be admitted out of time must file such an appeal and at the same time seek court’s leave to have the appeal admitted out of time. It was further submitted that the applicant has not met the threshold for granting stay of execution orders. That **order 51 of the Civil Procedure Rules** set out terms for stay which terms are the essence of **Order 42 rule 6 of the Civil Procedure Rules**. It was submitted that the said conditions are inseparable such that the absence of one will affect the exercise of court’s discretion.

8. It was stated that the above sentiments were reinforced by the Court of Appeal in *MUKUMA V ABUOGA*, [1988] KLR 645. It was submitted that the applicant has not alluded to the loss it is likely to incur if the decretal sum is paid to the respondent. That the fact that execution has been put in motion or is likely to be put in motion, by itself, does not amount to substantial loss. That even when execution has been levied and completed, that is to say, the attached properties have been sold, this does not in itself amount to substantial loss under **Order 42 rule 6** because execution is a lawful process. It was submitted that the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.

9. It was argued that the applicant had not demonstrated that the respondent would be unable to refund the decretal sum. To support this argument, the respondent cited *SOFINAC CO. LTD V NELPHAAT*

**KIMOTHO MUTUU, [2013] eKLR** and **STEPHEN WANJOHI V CENTRAL GLASS INDUSTRIES LTD, HCCC No. 6726 of 1991**. It was argued that the applicant must demonstrate any peculiar circumstances that necessitate the withholding of the decretal sum from the decree holder.

10. I have considered the dispositions of the parties in regard to this motion. The preliminary issue I would like to deal with is whether or not this motion is properly before this court or rather whether or not it is competent. The substantive law as regards the filing of appeals in the High Court is found in **section 79 G of the Civil Procedure Act**. It 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.”***

11. It follows therefore that an appeal which is filed out of time can be validated by an application for leave to validate that appeal. It is also my considered view that a party can also move the court by way of a miscellaneous application as in this case.

12. I am therefore inclined to depart from the position in **M’Limbine Asma Ali** considering the fact that there is no prejudice the respondent shall suffer in the event leave is granted. I am further fortified by the position held by Ringera, J (as he then was) in **MICROSOFT CORPORATION V MITSUMI COMPUTER GARAGE LTD & ANOTHER, [2001] KLR 470** at page 481 and the Court of Appeal in **NICHOLAS KIPTOO ARAP KORIR SALAT V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS, [2013] eKLR** where it was held as follows respectively:

**MICROSOFT CORPORATION V MITSUMI COMPUTER GARAGE LTD & ANOTHER, [2001] KLR 470** at page 481:

***“... Rules of procedure are hand maidens and not mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect ought not be treated as nullifying the legal instruments thus affected. In those instances, the Court should rise to its higher calling to do justice by saving the proceedings in issue. ... That purpose may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on record.”***

**NICHOLAS KIPTOO ARAP KORIR SALAT V INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 6 OTHERS, [2013] eKLR:**

***“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”***

13. In the circumstances, I decline to dismiss the motion on the basis that it is incompetent.

14. In determining whether the applicant has satisfied the conditions for leave to file an appeal out of time, I am guided by the principles laid down in **THUITA MWANGI V KENYA AIRWAYS LTD, (2003) eKLR** thus:

***“it is now well settled that the decision whether or not to extend 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; and 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.”***

And the Supreme Court in **NICHOLAS KIPTOO ARAP KORIR SALAT V. IEBC & 7 OTHERS, (2014) eKLR**:

***“1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;***

***(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***

***(3) Whether the court should exercise the discretion to extend, is a consideration to be made on a case to case basis;***

***(4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;***

***(5) Whether there will be any prejudice suffered by the respondent if the extension is granted***

***(6) Whether the application has been brought without undue delay; and***

***(7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”***

15. Essentially, an applicant ought to give sufficient explanation for the delay, and the court ought to consider if, whether even with such delay justice can still be done. The applicant explained that instructions were given to its insurer to employ the services of an advocate to file an appeal. It was stated that the said instructions were issued three days after the lapse of the 30 days' period within which an appeal ought to be filed. I note that no reason was given for the delay. However, considering that it was only three days delay I find that the same is excusable since the respondent can be compensated by way of costs and justice can still be done. In the circumstances, I allow the prayer for extension of time.

16. The third issue is whether or not the applicant has satisfied the conditions for grant of stay of execution. The substantive law on stay of execution is ***Order 42 Rule 6 of the Civil Procedure Rules*** which provides as follows:

***“6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

**(2) No order for stay of execution shall be made under subrule (1) unless—**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

17. For a stay of execution to be granted, an applicant must satisfy that:

*a. this application was made without unreasonable delay from the date of the decree or order to be stayed;*

*b. that it will suffer substantial loss if the orders of stay is not granted, and*

*c. the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.*

18. The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

19. The period for filing a memorandum of appeal is 30 days and it is within the said period that an application for stay of execution ought to be filed. There is no doubt therefore that there is delay in filing this motion. I have however dealt with the issue of whether such delay is inordinate and inexcusable and shall reiterate that the respondent shall not be prejudiced by this delay in a manner that cannot be compensated by costs.

20. As for substantial loss the Appellants are apprehensive that the Respondent will be unable to refund the decretal sum in the event the appeal succeeds. On this point **see the case of ROSE MBITHE NDETEI V MATHEW KYALO MBOBU, CA NO. 86 OF 2008** where the Respondent rebutted not being a man of straw and proved his financial capability. In this case, there is no evidence tendered by the Respondent as to her financial standing. Where an applicant alleges that the Respondent is a man of straw, the burden to prove otherwise shifts to the Respondent. See the Court of Appeal's decision in the case of **ILRAD V KINYUA, (1990) KLR 403 at Page 406** where it was held as follows:

***“We have considered what Mr. Sehimu has said. However, we must “observe that the onus was upon the respondent to rebut by evidence that the claim that the intended appeal if successful would be rendered nugatory on account of his(respondent’s) alleged impecunity”.***

21. For security, the appellant herein has indicated willingness to deposit security. In view of the foregoing, the applicants have satisfied the requirements of **Order 42 Rule 6**. This application is hereby allowed as prayed but on condition that the decretal sum be deposited in court within 30 days from today. It is so ordered.

**Dated, signed and delivered at Nairobi this 27<sup>th</sup> day of April, 2017.**

.....

**L. NJUGUNA**

**JUDGE**