



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

MISCELLANEOUS CIVIL APPLICATION NO. 24 OF 2017

ROSALINDI WANJIKU MACHARIA.....APPLICANT

-VERSUS-

JAMES KIINGATI KIMANI (Suing as the legal representative

of the Estate of MARTIN MUIRURI (Deceased).....RESPONDENT

R U L I N G

1. The Notice of Motion filed on 16/3/2017 seeks several prayer, number 2 of which is relevant for the purposes of this ruling. Prayer 2 seeks:-

“That this Honourable Court be pleased to grant leave to the Applicants to appeal out of time against the judgment of the Honourable E. Kimilu (Senior Principal Magistrate) delivered on 7th February 2017 in Naivasha CMCC No. 550 of 2013; JAMES KIINGATI KIMANI (Suing as the legal representative of the Estate of MARTIN MUIRURI (Deceased) -Vs- Rosalindi Wanjiku Macharia.”

2. The application is brought under Section 3A, 79G and 95 of the Civil Procedure Acts and Order 42 Rule 6, 50 Rule 6 of the Civil Procedure Rules, *inter alia*.

3. The grounds on the face of the application are that:

“(a) THAT Judgment herein was delivered on the 7th February, 2017 and the thirty (30) days within which an Appeal is to be filed have lapsed.

(b) THAT the Applicants are dissatisfied and aggrieved by the said Judgment on the quantum awarded and seek leave to appeal out of time.

(c) THAT the Application is timely made and without any unnecessary delay.

(d) THAT the Applicant’s stand to suffer substantial loss and irreparable loss and damage as there is likelihood that the Applicants will be unable to recover the decretal sum awarded herein from the Respondent.

(e) THAT unless this Application is allowed, the Applicants’ intended appeal will be rendered nugatory.

(f) THAT the Applicants have a good arguable appeal which has high chances of success.

(g) THAT the Respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs if this application is allowed.”

4. It is supported by two affidavits sworn by **Anne Odongo**, the Claims Director at **Directline Assurance Company Limited**, and by **Hannah Gitau** an advocate in the firm of Kairu and McCourt Advocates for the Applicant.

5. The two affidavits contain similar depositions. The gist thereof is that the Applicant is aggrieved by the quantum awarded in the judgment delivered by **Kimilu, PM** on 7th February 2017, in **CMCC 550 of 2013 Martin Muiruri –Vs- Rosalindi Wanjiku Macharia** (sic). The applicant explains that the appeal was not filed in time because the advocate concerned fell ill, resuming duty only after the period for filing appeal had lapsed.

6. Further, the Applicant is willing to furnish security and will suffer substantial loss if the application is rejected, while no undue prejudice will be occasioned to the Respondent if the orders sought are granted.

7. In submissions, the Applicant argued that the application herein is justified under Section 95, 79G and 3A of the Civil Procedure Act. Further that the draft Memorandum of appeal raises an arguable appeal. She cited **Bake ‘N’ Bite (Nrb) Limited -Vs- Daniel Mutisya Mwalonzi [2015] eKLR** and **Kenya Revenue Authority -Vs- Sidney Keitany Changole & 3 Others [2015] eKLR**.

8. On the exercise of the court’s discretion the Applicant asserts that it is unfettered and calls to her aid the decision of Havelock J (as he then was) in **Esther Wamaitha Njihia -Vs- Safaricom Limited [2014] eKLR**. In her view, she has demonstrated good and sufficient cause for the failure to file her appeal in time. The rest of the Applicant’s submission are devoted to a prayer of stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. However the 3rd prayer in the Motion sought stay of execution “*pending the hearing and determination of the Application herein.*” I will return to this question later on in the ruling.

9. The Respondent identified himself as **James Kiingati Kimani**, who on the face of it, had brought the suit in the lower court, in his capacity as the legal representative of the late **Martin Muiruri**. The deponent states that notice of the judgment delivered on 7/2/2017 was sent twice to the Applicant via Securicor courier, on 7th February 2017 and again on 11/3/2017. Evidence of the service of the said notice is attached to the affidavit as annexure **JK1 (a)** and **JK1 (b)**.

10. The Respondent states that the Applicant has not demonstrated a convincing reason for the delay or shown that the intended appeal is arguable. In his opinion the application is an abuse of the court process, brought to delay his enjoyment of the fruits of judgment. Further that if the prayers sought are granted, he will suffer prejudice.

11. His submissions also reiterate matters contained in the Replying affidavit, emphasizing in particular, that no satisfactory reason has been advanced to explain the Applicant’s delay. The Respondent relied on the decision of **Rael Munyaka & 6 Others -Vs- Waitaluk Land Disputes Tribunal & 3 Others [2007] EKLR** as cited in **Hilda Kaari Mwendwa -Vs- Zakayo M. Magara & 2 Others [2016] EKLR**, and urged the court to dismiss the application.

Based on the same authorities, the Respondent contends that the proposed appeal is not arguable and that granting the orders sought will occasion prejudice to him.

13. I have given due consideration to the matters canvassed before me. The decision intended to be challenged was delivered on 7/2/2017. The Applicant had notice of the ruling, going by her own supporting affidavits. Equally, there is uncontroverted evidence in the form of annexures provided by the Respondent that the Respondent instantly notified the Applicant of the judgment and sent a reminder on 11/3/2017.

14. Section 79G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court of 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 time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.” (Underlining supplied)

15. In addition Section 95 of the Civil Procedure Act grants to the court the “*discretion, from time to time, to enlarge*” any time fixed for the doing of any act under the Act. Ditto Order 50 Rule 6 of the Civil Procedure Rules.

16. Thus, as argued by the Respondent, it is incumbent upon the Applicant to satisfy the court that she had good and sufficient cause for not filing the appeal on time, and is thus deserving of the court’s discretion. The reason given by the Applicant is that counsel handling the matter was indisposed and returned to work only after the appeal period had lapsed.

17. In light of the foregoing, I had hoped that the second affidavit by **Hannah Gitau** the advocate, would identify the concerned advocate and annexe documents to support the illness claim. Instead, the Affidavit of **Ms Gitau** merely repeats depositions in the affidavit of **Anne Odongo**. Surely, a counsel who allegedly stayed away for almost a month from the office due to illness would have sought medical attention. No medical notes are attached to the affidavit. Indeed not even the name of the advocate concerned is supplied.

18. In **Niazsons (K) Limited -Vs- China Road and Bridge Corporation (Kenya) [2002] eKLR**, the Court of Appeal stated that the court’s discretion under Section 79G of the Civil Procedure Act though unfettered, must be exercised judicially considering the length of delay, the explanation for it, and possibly the chances of the appeal succeeding, and the degree of prejudice to the Respondent. (See also **Mwangi -Vs- Kenya Airways Limited [2003] KLR 486.**)

19. The case of **Wasike –Vs- Swala**, also cited in the **Hilda Kaari’s** decision was 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 Procedures 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.

20. The above principles were reiterated in **Mwangi –Vs- Kenya Airways Ltd [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.”

With regard to (c) the Court qualified that this is not a mandatory requirement but merely “something for a “possible” consideration.”

21. In this case, it was not until 16th March 2017 that the Applicant rushed to court. The delay since

judgment spans a period of almost 40 days, notwithstanding reminders sent by the Respondent to the Applicant. In my view, neither the reason given for the delay is satisfactory in the circumstances of this case, nor is the delay insignificant. A party invoking the court's discretion ought to place before the court genuine and credible reasons supported by evidence to explain delay.

22. I have perused the proposed Memorandum of appeal which principally challenges the quantum of damages awarded. Without determining the point conclusively, on the material available, the appeal could go either way. The lower court suit commenced in 2013, and clearly the Respondent would be forced to wait longer to enjoy the fruits of his judgment, if the application is granted.

23. Weighing one thing against another and having regard to the primary concern that in exercising its discretion the court's aim is to do justice to the parties, I am not persuaded that the Applicant should be allowed to file an appeal out of time. With that, the prayer for stay pending appeal as canvassed in the Applicant's affidavits and submissions, but not stated in the Motion must also fail.

24. In my view, even if the prayer to appeal out of time had been granted, and the said prayer for stay pleaded in the Motion, it would still have failed for the reason that the existence of an appeal is a condition precedent to the exercise of this court's discretion under Order 42 Rule 6 (1) of the Civil Procedure Rules. This can be inferred from the wording of the rule.

25. 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.”

26. 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 would be acting in *vacuo* by granting a stay of execution pending appeal.

27. 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**).

28. In the result, the Motion before me fails entirely and is dismissed with costs.

Delivered and signed at Naivasha this 31st day of **May, 2017**.

In the presence of:-

Miss Kithinji holding brief for Ms Wambui for the Applicant

No appearance for the Respondent

Court Assistant - Barasa

C. MEOLI

JUDGE