



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL MISC APPL NO. 611 OF 2016
BONIFACE OBALA.....APPLICANT/APPELLANT
VERSUS
J N O (Minor suing through father and ..
next friend P N O).....RESPONDENT

RULING

Before me is a Notice of Motion dated 5th day of December 2016 brought by the Applicant under, Order 42 Rule 6, Order 22 Rule 22, Order 50 Rule 5 of the Civil Procedure Rules, Section 1 A 3A and 79G of the Civil Procedure Act and all enabling provisions of the law . The application seeks the following Orders;

1. That Applicant be granted leave to file appeal out of time.
2. That there be a stay of execution of the decree herein pending the hearing and determination of the intended appeal against the Judgement and order of the Honorable Magistrate.
3. That the Costs of the Application be provided for.

The application is premised on the grounds particularized on its face and its supported by the affidavit of Linda Mukami sworn on the 5th day of December 2016. The crux of the application is that a judgment was delivered against the Applicant on 3rd November, 2016. In the Supporting Affidavit of Linda Mukami, the insurance company advised their advocates via email to lodge appeal on 2nd December, 2016 which was not accessed on time by the advocate and by the time the same was accessed on the 2nd November, 2016 the time to lodge the appeal had lapsed with two days.

In his Replying Affidavit dated 19th January, 2016, P N O, the deponent, maintains that the appeal is an afterthought, defective, incompetent and only aimed at frustrating or slowing down the wheels of justice. In the event that the Honorable Court is inclined to allow the application, he maintains, as an alternative to the stay orders sought in the application, the Court should consider granting the Stay within the spheres of the following guidelines;

- a. That the Appellant do release at least half (1/2) of the decretal amount awarded pending the hearing of the intended appeal.
- b. That the Appellants deposit the remaining half in a joint interest earning account in the names of the Advocates on records.

c. That the Appellant undertake to set down and prosecute the Appeal herein within the next six months otherwise the Respondent be at liberty to list the same before a judge for dismissal.

Determination

(a) Extension of time

The effect of **Section 79G of the Civil Procedure Act Cap 21** is that an appeal may not be brought after the expiry of a particular period of time. Thus it provides;

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.

In other words, the act prohibits the bringing of an appeal after the specified period of limitation but does not necessarily extinguish such appeals. As held in ***Peter Githiu Komu Vs Suleiman Ndua Kiarie (2014) ECLR***, the discretion is entrusted with the Court to admit an Appeal out of time if sufficient cause for not filing in time is shown. The Supreme Court in ***Nicholas Kiptoo arap Korir Salat –v – IEBC & 7 Others, Supreme Court Application No. 16 of 2014*** laid down the following as the under-lying principles that a Court should consider in exercising of discretion to extend time:

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;

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

Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

Whether there is a reasonable explanation for the delay. The delay should be explained to the satisfaction of the Court;

Whether there will be any prejudice suffered by the respondents if the extension is granted;

Whether the application has been brought without undue delay; and

Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

The reasons advanced by the Applicant must be mirrored against the above principles. The Applicant has stated that the instructions to lodge an appeal were given to their advocate on a Friday via an email on 2nd November, 2016 which unfortunately was accessed late, at a time when the time to lodge appeal had lapsed with two days. By dint of the decision in ***Next Generation Communication Ltd V George Kirungaru (2015) eCLR***, I am inclined to believe that, an insurance company might delay to give instructions to their advocates to file an appeal because of lengthy decision making process. It is also noted that, the instructions were given via email on a Friday which was accessed after the time had lapsed. In the interest of justice I find this to be excusable.

Stay of execution

The law on Stay of execution pending Appeal is well settled in Order 42 Rule 6 of the Civil Procedure

Rules 2010. It provides that no order for stay of execution shall be made under rule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and 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

From the above, it is clear that stay of execution is not absolute. The above requirements must be considered. First, an Applicant must demonstrate how they would suffer substantial loss if stay is not granted. In ***Pan African Insurance Company (U) Ltd V International Air Transport Association Misc Appl. No. 86 of 2006***, the Court sharply pointed out; **“An applicant should go further to lay the basis upon which Court can make a finding that the Applicant will suffer substantial loss as alleged. The Applicant should go beyond the vague and general assertion of substantial loss in the event a stay is not granted.**

Undoubtedly, the Applicant must go to the specifics of substantial loss. In this case, the Applicant has stated that the appeal will be rendered nugatory as the Suit property shall have been lost. That it shall have to be carted away and sold to satisfy the decree and that the respondent may not be in a position to return the decretal sum in the event that the Appeal is successful. In his Replying Affidavit, the Respondent has not indicated any prejudice he will suffer if the stay orders are granted. Furthermore, he has not refuted the assertion that he would be unable to refund the decretal sum if the appeal succeeds.

The second limb on granting of stay is the issue of the Security. By dint of Order 42 of the Civil Procedure Rules, the Applicant must be willing to deposit security as the Court may direct. It has been deponed that the Appellant is ready to offer security for due performance of the decree and abide with any condition the Court may set. An offer has been made for issuance of a bank guarantee or performance bond from a reputable insurance company.

I find no reasons to deny the Applicant stay Orders as prayed for in the Application. There would be no prejudice to be suffered by the Respondent. Equally, the applicant is willing to deposit security as the court may direct. Accordingly, I proceed to grant a conditional stay and order the Applicant to deposit the whole decretal sum in a joint account in the names of both advocates pending the hearing of the intended appeal. The money to be deposited within 30 days failing which the stay shall automatically lapse. The applicant is also granted leave to file appeal out of time. The same to be filed within 14 days from today

Dated, signed and delivered at Nairobi this 29th day of June, 2017.

.....

L. NJUGUNA

JUDGE

In the presence of

..... ***for the Applicant/Appellant.***

..... ***for the Respondent.***