



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HCA 23 OF 2017

PETER NJERI.....1ST APPELLANT

MUTHEE DANIEL NDENA.....2ND APPELLANT

-VERSUS-

SYLVESTER GACHOKA.....RESPONDENT

(Being an Appeal from the Judgment of Hon. F. Muguongo, Resident Magistrate, Nakuru, delivered on 19th December, 2016)

RULING

1. The application before me seeks orders that:-

i. Spent.

ii. THAT leave be granted to appeal out of time against the whole judgment and decree in Nakuru CMCC 1090 of 2014 by Honourable F. Muguongo, Resident Magistrate delivered on 19th December 2016; and that the Memorandum of Appeal dated 25th February 2017 and filed on 2nd May 2017 be and is hereby deemed as filed and served upon the respondent within the prescribed time.

iii. THAT this honourable court be pleased to grant stay of execution of decree/judgment entered against the applicant on 19th December 2016 in Nakuru CMCC 1090 of 2014 pending the hearing and determination of the application.

iv. THAT the honourable court be pleased to grant stay of execution of decree/judgment entered against the applicant on 19th December 2016 in CMCC 1090 of 2014 pending the hearing and determination of the appeal.

v. THAT the honourable court do make such further orders that may be appropriate in the interest of justice.

vi. THAT the costs of the application be abide the outcome of the appeal.

2. The application is brought on the grounds that the applicants were desirous of appealing the whole judgment and that both the time for appeal and the temporary stay of execution granted by the trial court had lapsed.

3. The supporting affidavit is sworn by one **Wanjiru Njuguna** advocate on record for the applicants. She makes averments explaining the circumstances of the delay. She deposes at paragraph 3 that the 30 day stay of execution lapsed on 11th February 2017 and that the applicants were now exposed to execution. On the proposed appeal, she deposes at paragraph 8 that the appeal was meritorious and would be rendered nugatory if the stay was not granted.

4. The application is opposed by the respondent. In his Replying Affidavit sworn on 15th March 2017, he deposes that the application was frivolous and an abuse of the process of court and should be dismissed forthwith; that there was no justification to warrant the exercise of discretion in favour of the applicants; and, that there has been unreasonable delay on the part of the applicants.

5. The application is expressed to be brought under **Order 22 Rule 22**. There is however no decree extracted and served upon the applicant in this case. What the applicant has displayed is a demand letter (WNI) from the advocate for the respondent. Be that as it may **Order 42 Rule 2** sets out the conditions under which stay may be granted. An applicant must show that substantial loss may result if the order is not made; that the application is made without unreasonable delay; and that he is willing to provide security for due performance of such decree as may ultimately be binding on him. See **Halan & Another –Vs- Thornton & Turpin Limited (1990) KLR**.

Extension of time for filing appeal

6. For the prayer on extension of time to appeal, the application is premised on **Section 79 (G)** of the **Civil Procedure Act**. The Section provides a timeline of 30 days with a proviso 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.”***

7. For the court to grant an extension of time however it must consider the length of delay, the reason for the delay, the chances of the appeal succeeding and whether the respondent would suffer prejudice as a result of the order of extension. See **Mwangi V Kenya Airways Ltd (2003) KLR 486**.

8. In the present application, according to the applicants’ submission, the judgment was delivered on 19th December 2016, when the applicants were granted a 30 days stay. The stay lapsed on 11th February 2017 and they filed the appeal on 3rd March 2017 making a delay of 20 days. These dates have not been controverted by the respondent either in the Replying Affidavit or in the submissions. I find that a delay of 20 days cannot be considered inordinate. The excuse for the delay has been given as slow decision making by the applicants’ decision making organs. While I find such an excuse unreasonable their counsel has demonstrated that they acted speedily upon receipt of instructions by the applicant by expeditiously filing the present application and memorandum of appeal.

9. I have considered the rival submissions on the likely prejudice to be suffered by the respondent if time extension were granted. While I appreciate that the respondent will suffer delay in reaping the fruit of the judgment, I do not consider that the same cannot be compensated. I consider it fair to the parties to have the matter decided effectually on appeal. I would therefore grant the applicants time extension to file their appeal out of time. I am persuaded by the authority of **Banco Arabe Espanol V Bank of Uganda (1999) 2 EA 22** cited to me by the applicant where the court stated:-

“...the administration of justice should normally require that the substance of all disputes 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 lack of adherence to rules renders the appeal process difficult and in operative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered.”

10. Turning now to the orders for stay of execution, I must consider whether the applicant has met the conditions under **Order 42 Rule 6 (2)**. The respondent has submitted that this court can only entertain such a prayer once the applicant has first sought it in the court appealed from. Order 42 R 6 (i) however

allows the court to which an appeal is made to consider an application for stay. The application, therefore is properly before this court and I shall proceed to consider whether it has been brought timeously; whether the applicant will suffer substantial loss; and whether the applicant was ready to offer the security.

11. I have already found by considering the timelines submitted by the applicant and not opposed by the respondent that the application has been brought timeously. I need not say more here. On whether the applicant shall suffer substantial loss, the respondent has submitted that the application for stay would only serve to deny the respondent the fruit of the judgment. The applicant's submission on the other hand is that the delay would be compensated by interest on the decretal amount.

12. Having considered the law and submissions aforesaid, I am persuaded that the applicant would suffer loss if the order was not granted. He would meet the decretal sum and if he were successful in the appeal, the said money would already be paid out occasioning him loss and a tedious process of recovery from the respondent. However I am persuaded by the holding of the court in **Machira Vs East African Standard 2002 KLR 63** where it was held:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or mention of the so far successful party is to flirt with one party as crocodile tears are shed for the other, contrary to said principle for the exercise of a juridical discretion. The courts must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in court, which is to do justice in accordance with the law and to prevent abuse of the court process.”

13. I am of the view that part of the decretal amount ought to be released to respondent.

14. In the final analysis, I make the following orders:-

i. The applicant be and is hereby granted leave to file an appeal out of time and the Memorandum of appeal dated 24th February 2017 be and is hereby deemed filed upon payment of the requisite court fees

ii. Stay of execution pending appeal is granted on condition that the applicant releases part damages being Kshs.100,000/= to the respondent (plaintiff) within 30 days. The balance of the decretal sum and costs be deposited in court within 30 days.

iii. The stay order shall automatically lapse if the conditions above are not met.

Orders accordingly.

Ruling delivered, dated and signed in open court this...27th ..day of ...July..2017

R. LAGAT KORIR

JUDGE

In the presence of:

C/A Emojong

Mr. Ndichu for appellant

Mr. Murunga for respondent