



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

MISCELLANEOUS CIVIL APPLICATION NO. 48 OF 2016

MUSIC COPYRIGHT SOCIETY OF KENYA.....1ST DEFENDANT/APPLICANT

DANIEL ANJWANG.....2ND DEFENDANT/APPLICANT

MILKA CHEPTOO.....3RD DEFENDANT/APPLICANT

-VERSUS-

RICHARD CHERUIYOT TANUI.....1ST PLAINTIFF/RESPONDENT

NYAMIRA LUXURY EXPRESS.....2ND PLAINTIFF/RESPONDENT

THE ATTORNEY GENERAL.....1ST INTERESTED PARTY

RULING

1. Before me is a Notice of Motion brought under Order Sections 3A, 79G, 95 of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules. It seeks extension of time to file an appeal out of time and stay of execution pending appeal.

2. The chief grounds relied on are:-

“a)

b) THAT Applicants are dissatisfied with the judgment delivered on 16th March, 2017 by Hon. R. M. Kitagwa and seek leave to appeal out of time.

c)

d) THAT the Applicants stand to suffer substantial and irreparable loss and damages as there is a likelihood that the Defendants/Applicants will be made to pay the sum awarded to the 1st and 2nd Respondents.

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

f) THAT the Applicants have a strong arguable appeal which has a high chance of success.

g) THAT the Defendants/Applicants are apprehensive that the 1st and 2nd Respondents may

levy execution against the Applicants.”

3. The grounds are expanded in the supporting affidavit of **Merit Simiyu** who describes himself as the CEO of the 1st Applicant and his co-Applicants as employees of the 1st Applicant.

4. The Respondents filed an affidavit in opposition to the Motion in which they counter the material in the Applicants’ affidavit and the grounds. In particular the Respondents assert that no evidence of restructuring of the 1st Applicant, stated to be the reason for delay, has been proffered.

5. That the appeal intended is frivolous and no offer of security has been made. That at any rate, no attempt has been made to execute the judgment. The parties canvassed the application orally on 25/7/2017. The arguments rehashed the material contained in the respective affidavits and therefore need not be restated here.

6. I have considered the material canvassed in respect of the Motion. Section 79G of the Civil Procedure Act provides that:

“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 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.”

7. The court’s discretion under the provision 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 **Niazsons (K) Ltd -Vs-China Road and Bridge Corporation (Kenya) [2000] eKLR**. See also **Mwangi -Vs- Kenya Airways Ltd [2003] KLR 486**).

8. 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.”

9. Recently in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2015] eKLR** the Supreme Court outlined principles to be applied where extension of time is sought. The court stated:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

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 time, 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 respondents 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.”

10. The delay herein is over 6 months. The delay has been blamed on restructuring in the Applicant body. Although no evidence is tendered, I am conscious that the right of appeal ought to be allowed without too many impediments in order to facilitate the Applicant to vent issues raised in the appeal. 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*”. Looking at the draft memorandum of appeal, I cannot say it is frivolous as it seems to raise some serious issues. I do therefore grant leave to the Applicant to file an appeal within 14 days of today’s date.

11. With regard to the prayer for stay pending appeal the wording of Order 42 Rule 6 (1) of the Civil Procedure Rules leaves no doubt 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 court which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given.

12. 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 stay of execution pending appeal.

13. 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**).

14. The prayer for stay pending intended appeal is rejected. Nonetheless the court orders that the status quo be maintained pending the filing of the memorandum of appeal by the Applicant. Costs are awarded to the Respondents.

Delivered and signed at Naivasha this 17th day of October, 2017.

In the presence of:-

Mr. Amolo holding brief for Mr. Andolo for the 1st to 3rd Applicants

Miss Kithinji holding brief for Mr. Gachiengo for the Respondents

Court Assistant – Barasa

C. MEOLI

JUDGE