



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 34 OF 2017

SWALEH MBARAK.....APPLICANT

VERSUS

SIMON GICHUKI GICHARA (Legal representative of the estate of

HARUN GICHARA GICHUKI (Deceased).....1ST RESPONDENT

SALIM S.O. ATHEF.....2ND RESPONDENT

RULING

[NOTICE OF MOTION DATED 12TH JULY, 2017]

1. The Applicant, Swaleh Mbarak, has brought his notice of motion dated 12th July, 2017 under Order 42 Rule 6, Order 22 rules 22 and 24, and Order 51 Rule 1 of the Civil Procedure Rules, 2010 (CPR); sections 1A, 1B, 3A and 3B of the Civil Procedure Act, Cap. 21; and all other enabling provisions of the law. Simon Gichuki Gichara, the legal representative of the estate of Harun Gichara Gichuki – deceased is the 1st Respondent whereas Salim S.O. Athef is the 2nd Respondent.

2. Through the application, the Applicant seeks orders as follows:

“1. THAT this application be certified as urgent.

2. THAT service of this application upon the Respondents be dispensed with in the first instance.

3. THAT this Honourable Court does order a stay of execution of the Decree issued in MALINDI C.M.C.C. NUMBER 328 OF 2012 - Mutua Kinyao (Legal Representative of the Estate of KELVIN MUTUKU MUTUA – Deceased) - versus – Swaleh Mbarak and Salim S.O. Athef and MALINDI C.M.C.C. NUMBER 329 OF 2012 – Simon Gichuki Gichara (Legal Representative of the Estate of Harun Gichara Gichuki – Deceased) –versus – Swaleh Mbarak and Salim S.O. Athef pending the interpartes hearing of this application.

4. THAT this Honourable Court does order a stay of execution of the Decree issued in MALINDI C.M.C.C. NUMBER 328 OF 2012 – Mutua Kinyao (Legal Representative of the Estate of KELVIN MUTUKU MUTUA – Deceased) – versus – Swaleh Mbarak and Salim S.O. Athef and MALINDI C.M.C.C. NUMBER 329 OF 2012 – Simon Gichuki Gichara (Legal

Representative of the Estate of Harun Gichara Gichuki – Deceased) – versus – Swaleh Mbarak and Salim S.O. Athef pending the interpartes hearing and determination of this application and any other proceedings in this matter.

5. THAT this Honourable Court be pleased to allow the Applicant to file the intended Civil Appeals being H.C.C.A. NOS. 22 AND 28 OF 2016 MALINDI Swaleh Mbarak – versus – Mutua Kinyao (Legal Representative of the estate of KELIN MUTUKU MUTUA – Deceased) and Simon Gichuki Gichara (Legal Represented of the estate of Harun Gichara Gichuki – Deceased) out of time.

6. THAT this Honourable Court does order a stay of execution of the order issued on 17th March, 2016 in MALINDI C.M.C.C. NUMBER 328 OF 2012 – Mutua Kinyao (Legal Representative of the estate of KELVIN MUTUKU MUTUA – Deceased) – versus – Swaleh Mbarak and Salim S.O. Athef and MALINDI C.M.C.C. NUMBER 329 OF 2012 – Simon Gichuki Gichara (Legal Representative of the Estate of Harun Gichara Gichuki – Deceased) - versus- Swaleh Mbarak and Salim S.O. Athef pending the hearing and determination of the civil appeal.

7. THAT costs of this Application be in the cause.”

3. From the grounds on the face of the application and the supporting affidavit sworn by the Applicant, Swaleh Mbarak, on the date of the application, his case is that after judgements were entered against him in Malindi CMCC No. 328 of 2012 and Malindi CMCC No. 329 of 2012 he moved to this court in Malindi H.C. Misc. Application No. 18 of 2016 and successfully sought and obtained stay and leave to appeal out of time. He later proceeded to file Malindi H.C.C.A. No. 22 of 2016 and Malindi H.C.C.A. No. 28 of 2016 which were struck out, in a ruling delivered on 19th June, 2017, on the basis that they had been filed out of time. It is the Applicant's case that in striking out the appeals, this Court (Chitembwe, J) observed that the appeals raised triable issues and more so on the question of liability. The Applicant therefore fears that unless the orders sought are granted the respondents may proceed to execute the judgements in which the trial court had awarded over Kshs.3,000,000 to the respondents. He therefore urges this court to grant him the prayers sought.

4. The 1st Respondent opposed the application through a replying affidavit sworn by his counsel, Geoffrey Kilonzo, on 20th July, 2017 and a further replying affidavit sworn by the same advocate on 1st August, 2017.

5. The 1st Respondent opposes the application on the ground that the same is frivolous, vexatious, bad in law, meritless, an abuse of the court process and is meant to circumvent the judgement of this court in civil appeals number 22 of 2016 and 28 of 2016. Other grounds upon which the application is opposed are that the same is *res judicata*; does not deserve the discretion of the court; and that the Applicant is adopting a procedure unknown in law. It is the 1st Respondent's case that the Applicant had filed a similar application which was allowed but he failed to pay him Kshs.200,000 as directed or file the appeals within the time that was granted to him.

6. The advocates for the parties filed and exchanged written submissions and asked the court to rely on the same in determining this application.

7. The Applicant commenced his submissions by stating that he was condemned unheard by the trial court and hence the need to stay execution of the orders of that court. Further, that although he had engaged an advocate in the matters before the trial court, he was never involved nor participated in the proceedings. He only learned that the cases had been concluded when he was arrested on 16th March, 2016 for failing to pay the decretal amount.

8. The Applicant contends that he was aggrieved by the judgements, decrees and orders of the trial court and had moved to this court to appeal against them. His case is that this court had indeed noted that his

appeals raised triable issues although it had been filed out of time.

9. It is the Applicant's case that Order 42 Rule 6(2) CPR authorizes the court to stay execution upon an applicant meeting the conditions set therein. Referring to the Court of Appeal decision in **Halai & another v Thornton & Turpin (1963) Ltd, [1990] KLR 365** as cited by J.B. Havelock, J in **Anne Njeri Mwangi v Muzaffer Musafee Essajee & another [2014] eKLR**, counsel for the Applicant submitted that the court's discretion is only fettered by three conditions namely:

“Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.”

10. Counsel for the Applicant cited the decisions in the cases of **Antione Ndianye v Arican Virtual University, Nairobi H.C. Civil Suit No. 422 of 2016** and **James Wangalwa & another v Agnes Naliaka Cheseto, Bungoma H.C. Misc. No. 42 of 2011** as providing guidance on what will amount to a substantial loss.

11. According to the Applicant's counsel, the Applicant has no means to satisfy the decretal amount of over Kshs.3 million awarded in the two cases. It is the Applicant's case that he has suffered unprocedural and embarrassing arrest. It is the Applicant's averment that he only learned about the proceedings after he was arrested. He reasserts the allegation that he never participated in the proceedings before the trial court as his advocate breached the trust he had bestowed on him.

12. It is the Applicant's case that he has met the conditions for grant of stay pending appeal.

13. Turning to the question as to whether he should be granted an opportunity to lodge an appeal out of time, the Applicant contends that he has an arguable appeal as was noted by Chitembwe, J in the judgement striking out his appeal.

14. As for his application for stay of execution, the Applicant relies on the decision of the Supreme Court in **Gatirau Peter Munya Kithinji & 2 others, Application No. 5 of 2014; [2014] eKLR** as to the principles that should guide the court in deciding whether to stay execution. In the case, the Supreme Court stated that:

“[87] The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

[88] These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted.”

15. On his part, the 1st Respondent points to the history of the matter in order to drive the point home that this application is frivolous, vexatious, malicious, unmerited and an abuse of the court process. It is the 1st Respondent's case that the Applicant had filed a similar application seeking leave to appeal out of time and the application was indeed granted. That the appeals emanating therefrom had been struck out as the

Applicant had not met the conditions given to him by the court. It is his case therefore that a similar application subjects him to double jeopardy and is an abuse of the court process.

16. According to the 1st Respondent, the Applicant has not even paid costs for the appeals that were struck out.

17. It is the 1st Respondent's case that this application is indeed *res-judicata*.

18. According to the 1st Respondent, the Applicant's prayer for leave to file appeals No. 22 of 2016 and 28 of 2016 out of time is untenable as those appeals were struck out and this particular prayer only shows that the application is frivolous and vexatious.

19. The 1st Respondent contends that the Applicant has never been condemned unheard. His view is that the Applicant failed to meet the conditions granted to him.

20. It is the 1st Respondent's position that at this stage the court cannot look at the merits of the intended appeal but can only consider whether the Applicant deserves the discretionary relief sought to appeal out of time. On the invocation of the inherent powers of this court, the 1st Respondent asserts that the inherent jurisdiction of the court cannot be invoked to abuse and/or subvert clear court orders or procedures.

21. In my view, the question for the determination of this court is whether the orders sought by the Applicant should be granted in the circumstances of this case.

22. In the case of **Stanley Kaharo Mwangi & 2 others v Kanyamwi Trading Company Ltd [2015] eKLR**, the Court of Appeal quoting its decision in **Fakir Mohammed v Joseph Mugambi & 2 others, Civil Application No. NAI 332 of 2004** (unreported) outlined some of the factors guiding the enlargement of time for filing an appeal as follows:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors.”

23. Applying the law to the facts of this case, can one say that the Applicant is deserving of this court's discretion to enlarge time for filing an appeal? In his judgement dated 21st May, 2017 Chitembwe, J in striking out the Appellant's two appeals stated that:

“Before the appeals were filed, the appellant filed High Court Miscellaneous Application Number 18 of 2016 seeking leave to appeal out of time and stay of execution orders. In my ruling of 14.6.2016, I allowed the appellant to file the appeals within 14 days. In Civil Appeal number 28 of 2016, the appeal was filed on 8.8.2016. The memorandum of appeal is dated 18th June, 2016. As for Civil Appeal number 22 of 2016, the memorandum of appeal is dated 18th June, 2016 and was filed on 20.7.2016. It is clear to me that the court gave the appellant 14 days to file the appeals but the appeals were not filed within the permitted period. There is no evidence that the 14 day period was extended by the court or that the appellant applied to have the time extended. The payment receipts are dated 20.7.2016 and 3.8.2016. Those are the dates when the appeals were filed.

Given the above scenario, it is evident that the appeals were filed outside the extended time of

14 days from 14th June, 2016....

Although I am convinced that the appeal on liability raises triable issue, this court cannot close its eyes on the fact that the appeals were filed out of time. Nothing could have been easier than for counsel for the appellant to seek extension of the 14 days granted by this court. That being the case, I do find that there are no appeals to be determined by this court. I do proceed and struck out the appeals with costs to the respondents.”

24. It is thus clear that the Applicant had been given an opportunity to file his appeals out of time. He was granted fourteen days to do so. He filed one appeal 36 days after the grant of leave. The second appeal was filed almost 50 days after the grant of leave.

25. In the application before me, the Applicant has not mentioned why he did not comply with the earlier orders enlarging time for filing appeals for him. On what basis will I then exercise my discretion? He is the one who bears the responsibility of convincing the court that he had good and sufficient cause for not filing the appeals within the time that had been given to him by the court. He has instead opted to say nothing.

26. Looking at the application before me in its entirety, I get the impression that the Applicant is one litigant who does not appreciate the importance of complying with court orders. He ignores statutory and court timelines with impunity.

27. He may indeed have an arguable appeal with high chances of success but that is not the only factor to consider in deciding whether to enlarge time for filing an appeal. The court must have a global picture of all the factors in play in a particular matter before deciding whether to exercise discretion in favour of an applicant. In the case at hand, the majority of the factors clearly points to the fact that the Applicant is not a serious litigant. Granting him the orders sought will be highly prejudicial to the 1st Respondent who is in possession of decrees he cannot execute because of the Applicant's indolence.

28. In conclusion, I find that the Applicant has not convinced this court to exercise discretion in his favour to enlarge time for filing appeals. This particular prayer having failed, the other prayers collapse with it. The consequence is that the application dated 12th July, 2017, is therefore dismissed with costs to the 1st Respondent.

Dated, signed and delivered at Malindi this 30th day of November, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT