

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CIVIL APPLICATION NO. 15 OF 2015

(Bing an application for extension of time to the appeal in respect to Karatina SPMCC No. 202 of 2010, Mary Wamaitha Ruiru vs Gladys Wamuyu Ngira)

GLADYS WAMUYU NGIRA.....APPLICANT

VERSUS

MARY WAMAITHA RUIRU.....RESPONDENT

RULING

By an amended notice of motion filed on 9th October 2015, the applicant herein acting in person moved this court under the provisions of Order 51 Rule 1, Order 50 Rule 5, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and Section 79 G of the Civil Procedure Act[1] seeking two substantive orders, namely:-

- i. *That this honourable Court may be pleased to grant the applicant extension of time to appeal against the judgement and orders of Hon. S. Mwayuli R.M. in CMCC No. 202 of 2010 delivered on 5th November 2014.*
- ii. *That pending the hearing and final determination of this application and the intended appeal, there be stay of all proceedings including taxation in Karatina PMMCC No 202 of 2010 costs of this application do abide the outcome of the intended appeal.*

The grounds relied on are that judgement was delivered on 5th November 2014, the applicant applied for typed certified proceedings on 10th November 2014 and that the same were supplied upon her on 17th March 2015 together with a certificate of delay. The applicant also states that the intended appeal has overwhelming chances of success and that in the event of execution proceeding, the applicant will suffer injustice as this may prejudice the appeal.

The firm of **Mercy Kabethi & Co** filed grounds of objection on 12th October 2015 in which they stated that the application is mis-conceived, fatally defective, an afterthought and an abuse of the court process, that the application is a delaying tactic and the intended appeal has no chances of success, that the application has no merits and called for its dismissal with costs.

On 16th November 2015 the applicant appeared in person before me and in the presence of counsel for the Respondent **Miss Kabethi**, the applicant asked that she be allowed to submit in writing, a position that was supported by the Respondents' counsel. Both parties were given a time frame within which to file their submissions and a mention date was fixed for 14th December 2012.

On 25th November 2015 the respondent filed her submissions and when the matter came for mention before me on 14th December 2015 the firm of **A. J. Kariuki & Co** advocates had come on record for the respondent and Mr. Kariuki and Counsel for the Respondent asked for 14 days to file their submissions and a further mention date was granted for 28th January 2016. However, on the said date only counsel for the applicant attended court and counsel for the respondent had not filed their submissions as directed by the court and the court granted a ruling date for the application.

It is important to clarify that it was not necessary an applicant to wait for the proceedings in order to file an appeal. It is possible to file the appeal in time without the proceedings and compile the record later once the proceedings become available. That way, an applicant would be able to avoid an intended appeal being barred.

The applicant obtained a certificate of delay on 17th March 2015 but did not file the appeal in time. The applicant states that the delay in filing the appeal was because she was **not** supplied with the proceedings and certificate of delay in time. This explanation is rather perplexing. To my understanding, if the certificate of delay and proceedings were supplied on 17th March 2015, then the applicant had 30 days from the said date to file the appeal. The present application was filed on 9 October 2015. No explanation has been given as to why the appeal was not filed within 30 days from the date the certificate of delay was issued. Section 79G of the Civil Procedure Act^[2] it provides:-

“79G: 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 a good and sufficient cause for not filing the appeal in time”.

The provisions of the above section are clear. Calculating the period from the date the certificate of delay was issued, the thirty days lapsed on 17th April 2015. The present application was filed on 9th October 2015. The period between 17th April 2015 and 9th October 2015 has not been explained. No explanation has been offered as to why the period in question has not been accounted for or why the applicant could not file the appeal within the stipulated period. To me, it was absolutely necessary for the applicant to account for the said period or give a good and sufficient cause for not filing the appeal within the stipulated period in order to satisfy the court that she had good and sufficient reason as provided for in the above proviso.

Other than demonstrating a good and sufficient cause as explained above, an applicant in an application of this nature is required to show that there are grounds of appeal which merit serious judicial consideration. In practice judges and courts are probably not as reluctant to grant extensions of time as the authorities may suggest.

The Supreme Court of Uganda in the case of *G.M. Combined (U) Ltd vs A.K. Detergents (U) Ltd*^[3] following a Court of Appeal decision in *Degeya Trading Stores (U) Ltd vs Uganda Revenue Authority*^[4] alluded to the principle to be applied in applications of this nature where their Lordships stated:-

“An applicant seeking leave to appeal must show either that his intended appeal has reasonable chance of success or that he has arguable grounds of appeal and has not been guilty of dilatory conduct”.

Consideration will usually be given to the merits of the appeal before declining to grant an extension of time. The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out.

The term used in the above quoted authority is *“reasonable chances of success or arguable grounds of appeal and must not be guilty of dilatory conduct”* As explained above the applicant has been guilty of dilatory conduct in that there has been inordinate delay in filing the appeal and also the present application and the said delay has not been explained. I have carefully studied the judgments of the lower court and the draft grounds of appeal. I do not think the appeal has reasonable chances of success.

The applicant also seeks orders that the judgement of the lower court be stayed pending the hearing and

determination of the intended appeal. Order 42 Rule 6 (1) & (2) provides as follows:-

(1) *No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

(2) *No order of stay shall be made under sub 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*

I now proceed to discuss the considerations for granting applications for stay pending appeal. The Court of appeal in the case of *Butt vs Rent Restriction Tribunal*^[5] (**Madan, Miller and Porter JJA**) while considering an application of this nature had this to say:-

i. *The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

ii. *The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*

iii. *A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.*

iv. *The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

It is clear from the wording of Order 42 Rule 6 (1), for an applicant to succeed in an application of this nature, he must satisfy the above conditions, namely; (a) *Substantial loss may result to the applicant unless the order is made;* (b) *The application has been made without undue delay;* (c) *such security as to costs has been given by the applicant.*

The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted.^[6] What constitutes substantial loss was broadly discussed by **Gikonyo J** in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto*^[7] where it was held *inter alia* that:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

*The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein vs. Chesoni**,^[8]the issue of substantial loss is the*

cornerstone of both jurisdiction of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

In my view, the application before me was filed after a long delay which has not been accounted for.

Regarding substantial loss, the applicant has not explained either in the affidavit or the grounds in support of the application that she will suffer substantial loss nor has it been shown that she may not recover the money if paid to the respondent. In *Equity Bank Ltd vs Taiga Adams Company Ltd*,^[9] the court stated as follows:-

“In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse-as/he is a person of no means. Here, no such allegation is established by the appellants.”

In *Elena D.Korir vs Kenyatta University*^[10] Justice Nzioki Wamakau had this to say:-

*“the application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another vs Thornton & Turpin Ltd*^[11] where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.”*

*In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo vs Straman EA Ltd*^[12] as follows:-*

“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.

On whether or not the application was brought without undue delay, I have already observed that in my view a delay of over 5 months is inordinate. Unreasonable delay depends on the circumstances of each case. In *Jaber Mohsen Ali & Another vs Priscillah Boit & Another*^[13] the court held:-

*“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgement could be unreasonable delay depending on the judgement of the court and any order given thereafter. In the case of **Christopher** Kendagor vs Christopher Kipkorir,^[14] the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, application ought to have come before expiry of the period given to vacate the land”*

I find that there has not been inordinate delay in filing the application before me.

Apart from proof of substantial loss the applicant is enjoined to provide security.^[15] The applicant has not made any proposals in this respect. There is therefore no offer of security coming from the applicant in satisfaction of the said requirement. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay.^[16] The offer for security must come from the applicant as a price for stay. See *Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others*.^[17]

In the above cited case of *Equity Bank Ltd vs Taiga Adams Company Ltd*^[18] it was held that:-

“.....of even greater impact is the fact that an applicant has not offered security at all, and this

is one of the mandatory tenets under which the application is brought.....let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in **Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others.**[\[19\]](#)

The importance of complying with the said requirement in my view was well emphasised in *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)*[\[20\]](#) where it was held that:-

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

Having carefully considered the application before me and the law, I am persuaded that the applicant has not satisfied the conditions stipulated under Order 42 Rule 6.

I am fortified in my finding by the following excerpt from *Halsburys Laws of England*[\[21\]](#) wherein the learned writers observe that:-

“The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue.”

In the case of *Global Tours and Travels Ltd*[\[22\]](#) it was held that:-

“.....Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.” (Underlining provided)

The judgement sought to be appealed against is a money decree. In considering whether a money decree or a liquidated claim would render the success of the an appeal nugatory, the court of appeal in the case of *Kenya Hotel Properties Ltd vs. Willesden Properties Ltd*[\[23\]](#) had this to say:-

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not in a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant./ However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all.”

Having fully considered the facts of this case, the arguments submitted by both parties and the relevant law and authorities, I am persuaded that the position adopted in the above cited case of *Butt vs Rent Restriction Tribunal*^[24] (**Madan, Miller and Porter JJA**) while considering an application of this nature is good law, that is; **(i)** *The discretion of the court should be exercised in such a way as not to prevent an appeal.***(ii)** *The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.* **(iii)** *A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.* **(v)** *The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

Guided by the numerous authorities cited herein I am persuaded that the applicant has not made a good case to warrant the court to exercise its discretion and grant the orders sought. The upshot is that applying the above principles, I hereby dismiss the application dated 7th October 2015 with costs to the Respondent.

Orders accordingly

Dated at **Nyeri** this **16th** day of **February** 2016

John M. Mativo

Judge

[1] Cap 21, Laws of Kenya

[2] Cap 21, Laws of Kenya

[3] *Civil Appeal No. 23 of 1994*

[4] *Civil Application No. 16 of 1996*

[5] *Civil App No. NAI 6 of 1979*

[6] See *Gikonyo J in HCC NO. 28 of 2014, Trans world & Accessories (K) Ltd vs Commissioner of Investigations & Enforcement*

[7] *HC Misc No. 42 of 2012 OR {2012} eKLR*

[8] *{2002} 1 KLR 867*

[9] *{2006}eKLR*

[10] *{2012}eKLR*

[11] *{1993} KLR 365*

[12] *{2013}eKLR*

[13] High Court ELC No. 200 of 2012 or {2014} eKLR

[14] HC ELC 919 of 2012, Eldoret

[15] See judgement in Republic vs Commissioner for Investigations & Enforcement, Misc App no 51 of 2015 (NBI),

[16] Ibid

[17] Civil Appeal No. 291 of 1997

[18] Supra note 6

[19] Supra note 14

[20] {2002} KLR 63

[21] 4th Edition, Vol 37 pages 330-332

[22] WC No. 43 of 200 (UR)

[23] Civil Application number NAI 322 of 2006 (UR)

[24] Civil App No. NAI 6 of 1979