



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANOUS CIVIL APPLICATION NO 272 OF 2015

ROBERT MBUVI NGUTA.....1ST APPLICANT

POGHISIO SAMUEL.....2ND APPLICANT

VERSUS

JOSPHAT NDAMBUKI KITUU.....RESPONDENT

RULING

The Application

The application before the court for determination is a Notice of Motion dated 16th December 2015. The 1st and 2nd Applicants are seeking the following orders therein:

1. THAT they be granted leave to appeal out of time against the judgment of the Honourable T. O. Okello, Senior Principal Magistrate, delivered on 4th November 2015 in SPMCC No. 9 of 2014 Kangundo. and to file the annexed Memorandum of Appeal .
2. THAT pending the lodging, hearing and determination of the proposed Appeal, there be a stay of execution of the decree and costs in SPMCC No. 9 of 2014 Kangundo.

The application is premised on the grounds that the final judgment herein was delivered on 4th November 2015 against the Applicants in SPMCC No. 9 of 2014 and execution is imminent, given that only a stay of execution of 45 days was granted by the lower court. Further, that the statutory thirty days for filing an appeal lapsed on or about the 4th of December 2015, and that unfortunately, the legal officer in charge of the matter was on leave at the time the notification of entry and outcome of the judgment was sent to the Applicants' insurer, and no other officer had access to her files.

The Applicants averred that unless the orders sought are granted the Applicants will suffer irreparable loss and damage, as the Respondent is of unknown means; and if the decretal sum is paid to the Respondent, the Respondent will, in all probability, be unable to retribute the same if the Appeal filed is successful. Lastly, it was stated that there has been no inordinate delay in filing the application, and that the Applicants are ready and willing to comply with such orders as this Court shall issue with respect to security for the due performance of orders as may ultimately be binding on them.

The Applicants relied on an affidavit sworn on 17th December 2015 by Brenda Rao, a legal officer with UAP Provincial Insurance Company Ltd. The deponent confirmed that she is the Legal Officer in charge of the matter, and that their Advocate sent to her the notification and entry of the judgment by mail so

that an informed decision could be made as to whether or not an appeal should be lodged. Further, that she was on leave at the time the said notification was sent and had no access to the office mail during the said leave. In addition, that no other legal officer could access her files, and that by the time she was able to access the said notification and obtain sufficient instructions with regards to the proposed appeal, the time allowed to file the Appeal had run out.

The deponent reiterated that the Applicants are desirous of pursuing the intended appeal against the judgment in SPMCC No. 9 of 2014 Kangundo, and are willing to comply with such orders as this Court shall issue with respect to security for the due performance by the Applicants for orders as may ultimately be binding on them. Further, that the Applicants' insurer is a company of repute and has means to pay the decretal sum and the costs that may be ordered by this Court if the Appeal does not succeed, and only prays for the stay of execution in order to facilitate the determination of the issues raised in the proposed Appeal.

The Applicants' learned counsel, L.M Kambuni & Associates, filed written submissions dated 11th February 2016, and urged that their application is not incompetent or frivolous as Order 42 Rule 6 of the Civil Procedure Rules gives them standing to apply for stay pending the determination of the appeal, and that they have met the requirements espoused in the said rules. Further, that section 79G of the Civil Procedure Act affords them the competence to appeal out of time and they have good and sufficient cause for filing the appeal out of time through their explanation for the delay. Reliance was also placed on their annexed draft memorandum of appeal to show that their intended appeal raises triable issues.

The Applicants further submitted that they filed the application 13 days after the statutory 30 days for filing an appeal had lapsed, and cited the decision in **Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & Another, (2014) e KLR** for the position that the concern is not how much time has lapsed, but whether or not even with the delay, justice can be done. It was submitted in this regard the Respondent had not filed any affidavit to show what prejudice he will suffer, while the Applicants' access to justice will be impeded if their application is dismissed.

The Response

The Respondent opposed the Applicants' application in Grounds of Opposition he filed dated 13th January 2016. It was stated therein that the Applicants' application is frivolous, incompetent, incurably defective, an abuse of the court process and has been brought after inordinate delay.

Further, that the Applicants have not shown good grounds to warrant the granting of the orders sought, especially granting of leave to file appeal out of time, and that the application is brought solely with the aim of frustrating the process of execution. Lastly, that the provisions of section 79G of the Civil Procedure Rules are clear on the time for lodging of appeal, and the application has no merit.

These grounds were reiterated by the Respondent's learned counsel, Mutunga & Company Advocates, in submissions dated 24th February 2016 that they filed in Court. The counsel submitted that the Applicants did not state what made them not lodge their appeal on time, and that they did not give any reason for the basis of their assumption that the Respondent cannot refund the sum of Kshs 927,190/=.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. The first issue to be determined is whether this Court should exercise its discretion in favour of the Applicants and grant leave to appeal out of time. If so, the Court will then proceed to consider the second issue which is whether the judgment and decree issued in Kangundo SPMCC No. 9 of 2014 should be stayed pending the hearing of the appeal.

On the first issue, the law as regards the filing of appeals in the High Court is found in section 79G of the Civil Procedure Act which provides as follows:

“ 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.”

The grant of leave to file an appeal out of time is a matter of judicial discretion, which principle was espoused in the case of Machira & Company Advocates V Mwangi & Another, (2002) e KLR and expounded in Kenya Shell Ltd Vs Kobil Petroleum Ltd, (2006) 2 EA 132. The Supreme Court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat – vs – IEBC & 7 Others, (2014) eKLR laid down the applicable principles for extension of time for filing an appeal as follows:

- 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, 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 respondent 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.

The Applicants’ main reason for the delay in filing his appeal is that the instructing party, who was the legal officer of the Applicants’ insurance company, was on leave when the judgment was delivered and when notification of the same was sent to her. This reason coupled with the fact that this application was filed thirteen days after the lapse of the statutory period to appeal, which delay is not inordinate, is in my view good and sufficient reason to exercise discretion in favour of the Applicants.

Lastly, as submitted by the Applicants, the Respondent has not shown what prejudice he will suffer other than stating the process of execution will be frustrated. The delay in execution is not in itself a prejudice, and in any event can be adequately mitigated by provision of adequate security by the Applicants.

Coming to the second issue, stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

“6.(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 to 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 for stay of execution shall be made under subrule (1) unless—

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

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

In the present application, the decision in the lower Court was delivered on 4th November 2015 while the current application was filed on 17th December 2015. The delay in filing the application after expiry of the applicable statutory deadline for filing appeals has however been explained, and the Court has found the same not to have been inordinate in the foregoing.

On the fulfillment of the second condition, the Applicants have argued that the Respondent may not be able to reconstitute them in the event that the decretal sum is paid to him and their appeal is successful, as his credit worthiness is unknown. The Respondent did not confirm that he is credit worthy or has means by which he can refund the decretal sum, and in the absence of such affirmation I find that the loss of the decretal sum is indeed a substantial loss that the Applicants risk suffering. Lastly, on the third condition, the Applicants did affirm that they are willing to furnish security for satisfaction of the decree.

Accordingly, the orders that commend themselves to me arising from the foregoing is that the Applicants' Notice of Motion dated 16th December 2015 is allowed on the following terms:

1. The Applicants be and are hereby granted leave to file their appeal out of time within 30 days from the date of this ruling
2. There shall be a stay of execution of the judgment and decree in Kangundo SPMCC No. 9 of 2014 pending the hearing and determination of this appeal, on condition that the Applicants shall deposit the decretal sum in Court within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.
3. The costs of the Applicant's Notice of Motion shall follow the appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 20th day of June 2016.

P. NYAMWEYA

JUDGE