



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANOUS CIVIL APPLICATION NO 12 OF 2016

SAID MOHAMED t/a BULBUL TRADERS.....1ST APPLICANT

PURITY W. KAMAU.....2ND APPLICANT

VERSUS

EMILY WAVINYA MUTUA.....RESPONDENT

RULING

The Application

The application before the court for determination is a Notice of Motion dated 21st January 2016. The 1st and 2nd Applicants are seeking the following orders therein:

1. That this Court grants the Applicants leave to file appeals against the lower court judgment out of time.
2. That the attached Memorandum of Appeal be deemed as duly filed upon payment of court fees.
3. That there be stay of execution of the decree herein pending the hearing and determination of the intended appeal against the judgment and order of the Honourable Magistrate.

The application is premised on the grounds that the Applicants have an arguable appeal, good and sufficient cause for not filing the appeal in time, and that the delay in filing the appeal is not inordinate. Further, that the Applicant will suffer substantial loss, be denied justice, and their constitutional rights infringed if leave to appeal out of time is not granted, and their intended appeal will be rendered nugatory if the decree is executed.

The Applicants averred that they are ready to make an undertaking on security, and abide by conditions which the Court may set pending the hearing and determination of the appeal. Lastly, it was alleged that the Respondent may not be able to refund the decretal amount in the likely event that the intended appeal is successful.

The Applicant relied on an affidavit sworn on 21st January 2016 by Caren Nada Jaguga, a legal officer at Fidelity Shield Insurance Company Ltd, which company insured the Applicants against the claim which is the subject matter of this suit, and has been handling the claim on their behalf. The deponent averred that judgment in this matter was entered in favour of the Respondent with a decretal sum of Kshs 1,199,492/=.

According to the deponent, the matter in the trial Court came up for submissions on 27th November, 2014 and a mention date was given for 29th January 2015 to enable plaintiff file their submissions. Further, that after submissions were filed, judgment was to be given on notice from the court, and the matter remained dormant for over one year. However, that the Applicants learnt from their advocates that judgment was entered on 30th October 2015, after the said Advocates received a letter from the Respondent's Advocates dated 6th January 2016. The Applicants by an email dated 19th January, 2016 instructed their Advocates to appeal, but that time to lodge an appeal had already lapsed by the time they were advised of the judgment.

The Applicant's learned counsel, Wangari Muchemi & Company Advocates, filed written submissions dated 6th March 2016 and urged that they had given a plausible explanation as to why their appeal was not lodged within the stipulated time, and has met the threshold for granting leave out of time as held in **Abraham Mwangi vs Ahmed Ibrahim in Mombasa HCCA No. 82 of 2012**. It was also reiterated that they would suffer substantial loss if no stay order is granted, as their properties would be sold to satisfy the decree of the trial Court, and that they are willing to offer security for due performance of the decree.

The Response

The Respondent opposed the Applicant's application in a replying affidavit sworn on 3rd February 2016 by Jennifer Kilonzo, her Advocate on record. It was deponed therein that the Applicants have failed and/or neglected to follow due process before proceeding to this Court. The deponent stated that judgment in Civil Suit No. CMCC No. 1339 of 2010 was to be delivered on 2/4/2015 but was postponed three times to 17/4/2016, when the parties were informed that it will be delivered on notice. Further, that on 19th October 2015, the Respondent received a notice regarding the delivery of judgment and attended Court on 30th October 2015 when the judgment was read. However, that the Applicants' Advocates did not attend court, nor did they give any reasonable explanation for not following up on the matter.

According to the Respondent, the Applicants' Advocate has to date neglected and/or failed to apply for certified copies of the proceedings and judgment in CMCC No. 1339 of 2010. Further, that the Applicants herein seeks to appeal on the judgment, yet they have failed and/or neglected to establish the decretal sum awarded on 30th October 2015, and have not furnished this Court with reasonable grounds as to why they should be granted leave to Appeal out of time nor sufficient reasons for a stay of execution. It is further alleged that the application is seeking to deny the Respondent her justly awarded damages in CMCC No. 1330 of 2010.

Kivuitu Maundu & Company Advocates, the Respondent's learned counsel, reiterated these averments in submissions dated 15th March 2016 that they filed in Court. The counsel relied on section 65 and 79B of the Civil Procedure Act for the position that the Applicants' Memorandum of Appeal on record has no chance of succeeding.

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 decree issued in Civil Suit No. CMCC NO. 1339 of 2010 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 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 they were not aware that the judgment in the lower court was delivered on 30th October 2015, which was when time effectively started to run for purposes of filing the appeal. I note that the Respondent does admit that the judgment delivery was postponed severally and eventually delivered on notice. This gives credence to the Applicants’ argument that they were not aware of the date of delivery of the judgment in the trial Court. This Court therefore finds this reason for the delay to be credible and reasonable.

In addition, I note that the instant application was eventually filed on 21st January 2016, and I do not find the delay in filing the application inordinate given that the letter from the Respondent’s Advocates dated 6th January 2016 that was attached to the Applicants’ supporting affidavit and marked Annexure “CNJ2” was received by the Applicants’ Advocates on 11th January 2016, which is the evidence on record as to when they became aware of the judgment by the trial Court.

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 30th October 2015 while the current application was filed on 21st January 2016. The delay in filing the application 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 they risk their properties being attached and sold in satisfaction of the decree. Lastly, on the third condition, the Applicants did affirm that they are willing to furnish security for satisfaction of the decree. I also note that the Respondent in her submissions was not averse to the decretal sum being deposited in an interest earning account in the joint names of the Applicants' and Respondent's Advocates.

Accordingly, the orders that commend themselves to me arising from the foregoing is that the Applicants' Notice of Motion dated 21st January 2016 is allowed on the following terms:

1. The Applicant be and are hereby granted leave to file their appeals out of time within 30 days from the date of this ruling

2. There shall be a stay of execution of the decree in Machakos CMCC NO. 1339 of 2010 pending the hearing and determination of this appeal, only on condition that the Applicants shall deposit the decretal sum in a joint interest earning account in the joint names of the Applicants' and Respondent's Advocate within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.

3. The costs of the Appellant's Notice of Motion shall follow the appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 8th day of June 2016.

P. NYAMWEYA

JUDGE