



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE MISC APPL. NO. 237 OF 2016

KENNEDY ONGERE1ST APPLICANT

JOSEPH WAMBUGU.....2ND APPLICANT

VERSUS

ANTONY KINYANJUI KARIUKI.....1ST RESPONDENT

MICHAEL MBOYANO.....2ND RESPONDENT

KENYA BUS SERVICES MANAGEMENT.....3RD RESPONDENT

RULING

1. The Application dated 8th June, 2016 principally seeks orders that the time within which to file an appeal be extended and that leave be granted to the Applicants to lodge a memorandum of appeal out of time against the judgment and decree entered against the Applicants by Honourable D. W. Mburu, senior Principal Magistrate in Milimani CMCC No. 2480 of 2014 on 8th April, 2016. Secondly, that the judgment and decree in Milimani CMCC 2480 of 2014 be stayed pending the hearing and determination of the intended appeal.

2. It is stated in the two affidavits in support that judgment was delivered against the Applicants on a 20% liability basis. Judgment was entered for Ksh.323,305/= plus costs and interest. That the Applicants were aggrieved by the said judgment and instructed their advocates to appeal. The delay in filing the appeal is blamed on the Applicants' advocates inadvertence in obtaining a copy of the judgment in time. It is the Applicants' contention that if the orders sought are not allowed, they stand to suffer substantial loss as there is a likelihood that the decretal sum will not be recovered. The Applicants' are ready to furnish security for the due performance of the decree.

3. The application is opposed. According to the replying affidavit, the Applicants agreed to pay 20% of the claim. The 1st Respondent, Antony Kinyanjui Kariuki, is willing to deposit in court a bank guarantee for the sum of Kshs.323,305/= in the event that the appeal is successful.

4. The appeal was canvassed by copy of written submissions which I have duly considered.

5. The proviso to section 79G of the Civil Procedure Act stipulates as follows:

“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.”

6. The judgment of the Lower Court was delivered on 8th April, 2016. The application under consideration was filed on 9th June, 2016. Section 79 G of the Civil Procedure Act provides for the filing of appeals from the Subordinate Courts to the High Court within a period of 30 days. The Applicant was therefore late by about two months. The delay was not inordinate and has been explained. As stated by the court of Appeal in the case of **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR**, while quoting the case of **Belinda Murai & 9 others v Amos Wainaina [1979] eKLR** where Madan, J.A. (as he then was) stated as follows:

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel.”

The Court of Appeal further quoted the case of **Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103 at 1040** where Apalo, J.A. (as he then was), posited as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake had been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

7. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“No order for stay of execution 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 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.”

8. On the issue of substantial Loss, the Applicants have expressed their fear that the decretal sum may not be refunded in the event that the appeal is successful. As stated by the Court of Appeal in the case of **Kenya Shell Limited vs. Kibiru (1986) KLR**:

“Substantial loss in its various forms, is the cornerstone of the jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

9. The Respondents’ position is that they are ready, able and willing to guarantee the refund by way of a bank guarantee. The Respondents have however not exhibited any statements from their said bank or demonstrated in any other way that they are capable of refunding the decretal sum. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UIR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another**:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

10. To balance the interest of both parties, I allow the application on condition that the Applicants deposit the decretal sum in an interest earning joint account of the counsels for both parties or in court within 30 days from the date hereof. Costs to the Respondent.

Dated, signed and delivered at Nairobi this 19th day of Oct., 2016

B THURANIRA JADEN

JUDGE