



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KERICHO

MISCELLANEOUS CIVIL APPLICATION NO.31 OF 2016

JOSHUA NGENO.....APPLICANT

VRS

NEDDY CHEPNGENO (Suing as the administratrix and/or personal

representative of the Estate of

ROY KIPKIRUI (Deceased).....1ST RESPONDENT

OKETCH ISAAC.....2ND RESPONDENT

RULING

1. In the application dated 18th July 2016 expressed to be brought under the provisions of sections 3, 3A, 75, 78,79G and 95 of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules, and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law, the applicant seeks the following orders:

- 1. That this application be certified as urgent and service be dispensed with in the first instance.***
- 2. That this Honourable court be pleased to grant a stay of execution of the judgment and decree dated 1st March, 2016 in Kericho CM CC No.404 of 2014 pending the hearing and determination of this application.***
- 3. That this honourable court be pleased to grant leave to the applicant to appeal out of time against the whole of the judgment and decree of Hon. G. M. A. Ong'ondo (SPM) dated 1st March 2016 in Kericho CM CC No.404 of 2014.***
- 4. That the said leave do operate as a stay of all proceedings.***
- 5. That the costs of this application be provided for.***

2. The application is based on the following grounds:

- 1. That the proposed appellant/applicant was unaware of the delivery of judgment as the same was to have been delivered on 9th January 2016 on which date the same was not ready and no subsequent dates for judgment were given and none could be established despite all due***

diligence.

2. That it was not until the 1st respondent served notices of a declaratory suit against the applicant's insurer that the applicant became aware that judgment had been delivered without notice.

3. That by the time the applicant could give sufficient instructions to his counsel to appeal, the time allowed to file an appeal had run out.

4. That soon thereafter applicant requested the court for certified copies of the proceedings and judgment for purposes of appeal.

5. That the 1st respondent is likely to execute the decree herein at any time.

6. That it is in the interests of justice that the applicant be allowed to appeal the judgment of the Hon. G. M. A. Ong'ondo (SPM) dated 1st March, 2016 out of the prescribed time.

7. That the respondents will not be prejudiced if the said leave is granted.

8. That there has been no inordinate delay in bringing this application.

3. In his affidavit in support of the application, the applicant states that judgment in Kericho CMCC No.404 of 2014 was scheduled to be delivered on 9th February, 2016 but was not ready, and no subsequent date for judgment was given. He later came to learn through his insurers that judgment had been delivered on 1st March, 2016 without notice to him or his Advocates on record. He avers that he was dissatisfied with the judgment but by the time he gave his Advocates instructions to file an appeal, the time for filing an appeal had expired, which renders the present application necessary. He also states that he has applied for typed copies of the proceedings and judgment for purposes of lodging an appeal. He has annexed his draft memorandum of appeal to his affidavit.

4. Learned Counsel for the applicant, Mr. Langat, submitted that the applicant was seeking leave to file an appeal out of time against the judgment and decree dated 1st March, 2016 in Kericho CMCC No.404 of 2014. He reiterated the averments by the applicant with respect to the non-delivery of the judgment in the case as scheduled and its delivery without notice to him, and that he only found out after summons in respect of a declaratory suit were served on the applicant's insurers.

5. Mr. Langat submitted that under section 79 G of the Civil Procedure Act, the Court is empowered to enlarge time. His prayer was that the Court should allow the applicant to ventilate his appeal in the interests of justice.

6. The 1st respondent opposed the application and filed an affidavit in opposition, the date of which is incomplete but appears to have been 25th July 2016. Submissions were made on her behalf by her learned Counsel, Mr. Rono, which largely mirror the averments contained in her affidavit in response to the application.

7. The 1st respondent takes the position that the application is unmerited as the applicant became aware of the entry of judgment on 26th May, 2016. In her view, there is no explanation why this application was filed on 18th July 2016.

8. The 1st respondent further notes that the applicant has indicated that judgment in the matter was to be delivered on 9th February, 2016, on which date the court then indicated that judgment would be delivered on 23rd February, 2016, but the applicants were not in court when the judgment date was given. Had they been diligent, they would have known when judgment would be delivered.

9. He noted further that the applicant was asking that the grant of leave to file an appeal out of time do operate as a stay under the provisions of Order 42 rule 6 without having demonstrated that he has satisfied the conditions for grant of stay. Mr. Rono submitted that the applicant had not demonstrated that he would suffer substantial loss, had not offered security, nor had he demonstrated that his appeal is arguable or that the appeal has been made without delay. He therefore prayed that the second prayer in the application should be disallowed.

10. The 1st respondent further submitted that, as deposed in her affidavit, she had not issued instructions for execution against the applicants, and there is therefore no threat of execution.

11. Finally, Mr. Rono submitted that the 1st respondent had filed a declaratory suit against the applicant's insurer, a demonstration of the fact that the 1st respondent did not intend to execute against the applicant. The applicant's insurer had entered appearance in the declaratory suit and filed a defence, and had also entered into negotiations with Counsel for the 1st respondent on the terms of settlement of the 1st respondent's claim.

12. His submission was that under section 10 of the Insurance (Motor Vehicles third Party Risks) Act, the applicant's insurer is under a duty to pay the judgment sum. It had issued instructions for the defence of the suit in the lower court, and had also entered into negotiations with the counsel for the 1st respondent. In Mr. Rono's view, therefore, the Court was being asked to enter into an academic exercise.

13. Finally, Counsel submitted that the Court was being asked to exercise discretion to allow the applicant to file an appeal out of time. Counsel relied on the decision in **Nick Salat vs. IEBC, Appln No.16 of 2014** to submit that extension of time is not a guarantee but is available at the discretion of the court. The party seeking extension must lay a basis acceptable to the court, which in the view of Counsel for the 1st respondent, had not been done in this case. Further, the applicant had not explained the delay between the 26th of May, 2016, when he learnt that judgment had been delivered, and the 18th July 2016 when this application was filed. The 1st respondent therefore prayed that the application be dismissed as it lacked merit and was an abuse of the court process.

14. The 2nd respondent did not participate in these proceedings.

15. I have considered the pleadings and submissions of the parties in this matter. The issues for determination are whether the Court should issue orders of stay of execution of the judgment and decree of the lower court made in favour of the 1st respondent and extend time for the applicant to file his appeal.

16. I will address myself first to the question whether this court should grant an order for stay of execution of the decree sought to be appealed from. Order 42 rule 6 of the Civil Procedure Act 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 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—

b. 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.

17. The applicant is under a duty to demonstrate two things to the court. First, that substantial loss may result if the orders of stay are not granted and secondly, that the application for stay has been filed without unreasonable delay.

18. With respect to the second point, the applicant learnt of the delivery of the judgment on the 26th of May 2016, when a declaratory suit was filed against his insurer. He did not file the application for stay, or indeed take any action in the matter, until almost two months later. He has not explained the delay in filing the application, contenting himself with the statement that by the time he gave instructions to his Advocate, the time for filing the appeal had expired.

19. In my view, the period taken was long, and there is no explanation given to justify it. However, it cannot be described as so inordinately long as to disentitle the applicant of orders of stay should he meet the second condition imposed under Order 42 Rule 6.

20. To warrant the exercise of discretionary powers of the court to stay execution against him, the applicant must show that substantial loss would result if stay is not granted. The question is whether he has shown that any loss, let alone substantial loss, would result if the orders that he seeks are not granted.

21. The applicant has not addressed himself to this limb of the Order 42 Rule 6 requirements. He has also not responded to the averment by the 1st respondent that no execution against him has been set in motion, or that the 1st respondent and his insurer are in the process of negotiating a settlement following the institution of a declaratory suit against the insurer. In the circumstances, it is my finding that the applicant has not satisfied the requirements of Order 42 Rule 6 to warrant the exercise of discretion in his favour.

22. The applicant has sought extension of time to enable him file his appeal against the decision of the lower court out of time. He has relied on the provisions of 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.

23. Whether or not to extend time to file an appeal is, like the power to grant a stay of execution, within the discretion of the Court. In the case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)**, the Court expressed the following view:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.”

24. As the court observed earlier on in this ruling, the delay by the applicant in filing his application, though long, is not so long as to be termed inordinate, if one accepts his averments that he only came to know that a decision has been made against him when the declaratory suit was served on his insurers. In the circumstances, it is my view that the applicant should be given an opportunity to lodge his appeal, should he so wish, against the decision of the lower court.

25. The upshot of my findings above is that the application partially succeeds. I have not been satisfied that there is a basis for granting the stay of execution pending appeal as prayed by the applicant, and therefore prayers 2 and 4 of the application dated 18th July, 2016 fail. I will however, grant the applicant prayer 3 of the application. The applicant is granted an extension of thirty (30) days from the date hereof to file his appeal against the decision in Kericho CMCC No.404 of 2014.

26. However, the 1st respondent shall have the costs of this application.

27. It is so ordered.

Dated, signed and delivered at Kericho this 14th day of October, 2016.

MUMBI NGUGI

JUDGE