



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO 11 OF 2015

FRED KISANG NAIBEL..... APPLICANT

VERSUS

PATRICK MORARA.....RESPONDENT

RULING

The Application

Judgment was delivered against the Applicant on 28th August 2014 for Kshs 3,657,646/= in Machakos CMCC No 98 of 2011. On 28th January 2015 the Applicant filed a Notice of Motion in this Court dated 27th January 2015. The Applicant is seeking the following substantive orders therein:

1. That there be stay of execution of the judgment delivered in Machakos CMCC No 98 of 2011 on the 28th August 2014 pending the hearing and determination of the Applicant's intended appeal.
2. The Applicant be granted leave to lodge an appeal against the said judgment out of time.

The application is premised on the grounds that the Applicant is aggrieved by the judgment of the trial Court as the amount awarded was excessive, and intends to lodge an appeal. However, that the time to lodge the appeal lapsed, and failure to lodge the said appeal in time was not willful but due to an oversight on the part of the Applicant's Advocates. The Applicant in his supporting affidavit sworn on 27th January 2015 and further affidavit sworn on 19th October 2015 averred that he relocated to Eldoret in September 2014, and was not aware of the judgment until January 2015 when he went to make inquiries on the same from his advocates. Further, that a letter dated 4th September 2014 sent to him by his advocates was sent to his previous address and he did not receive it. He annexed a copy of the said letter which was advising him to appeal the judgment

He stated that he is willing to furnish security and was ready to deposit the entire decretal sum in an interest earning account in the joint names of the Advocates on record. He contended that this offer was made to, and accepted by the Respondents in a letter dated 22nd September 2015 which he also attached.

The Applicant's learned counsel, Morara Apiemi & Nyangito Advocates, filed written submissions dated 9th December 2016 and urged that section 79 G of the Civil Procedure Act grants this Court the power to admit an appeal out of time if sufficient cause is shown. While relying on the decisions in **Gichohi Susana vs Philip Muchoki & Another, Nairobi H.C. Misc. 127 of 2015** and **Edward Kamau & Another vs Hanna Mukui Gichuki & Another, High Court Misc. Application No 78 of 2015** it was contended that the Applicants had given satisfactory cause of the 4 months delay in filing their

application and they have a constitutional right to bring their appeal. Lastly, it was argued that the decretal sum is colossal, and relying on the decision in **Daisal Amin Janmohammed T/A Dunyia Fowarders vs Swami Trading Co. Ltd Mombasa HCCA No 65 of 2013**, that the Respondent had not placed any evidence before the Court to demonstrate his capacity to refund the decretal sum, in the event that the same is paid to him and the appeal succeeds

The Response

The Respondent opposed the Applicant's application in a replying affidavit he swore on 4th February 2015, Further Affidavit sworn on 23rd November 2015, and in written submissions dated 15th September 2016 filed in Court by his learned counsel, Nchogu, Omwanza & Nyasimi Advocates. According to the Respondent, the Applicant's application does not raise any substantive grounds for stay, and he sought to have the decretal sum released to his Advocates or deposited in Court should the Court grant a stay .

Further, that the Applicants herein seeks to appeal on the judgment, yet they have failed an appeal. It is further alleged that the application is seeking to frustrate the Respondent given that judgment was entered by consent on liability and the Applicant is yet to pay any amount which they think is fair and justifiable.

The Respondent also denied that there was an agreement to compromise the application through depositing the decretal sum in a joint account of the Advocates or in Court. The Respondents version of events is that that the Applicant's Advocates responded to the Respondent's Advocate's letter dated 22nd September 2015 in a letter dated 29th September 2015 from the Respondent's Advocates seeking to be indulged as they sought confirmation of settlement from their client. The Respondent attached copies of letters from the Applicant's Advocates dated 15th September 2015 and 29th September 2015.

The Respondent's learned counsel submitted, relying on Order 42 Rule 6 of the Civil Procedure Rules and the decision in **Antoine Ndiaye vs African Virtual University (2015) e KLR**, as follows. That that the Applicant had not stated nor alleged any substantial loss that he might suffer if the order of stay is not issued; the delay in filing the present application was inordinately long and unreasonable; and that the Applicant has not offered to pay any sum to alleviate the suffering of the Respondent.

Lastly, it was urged that leave to appeal out of time under section 79G of the Civil Procedure Act can only be granted if the said appeal is already filed and if satisfactory explanation is given for the delay. Reliance was placed on the decisions in **Gerald M'Limbire vs Joseph Kangangi, (2009) e KLR** and **Aviation Cargo Support Limited vs St. Mark Freight Services Ltd, (2014) e KLR** in this regard.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. The preliminary issue to be determined is whether this application is competently before this Court for want of an appeal already filed in Court. If the application is found to be competent, I will then proceed to examine the two remaining substantive issues which are whether the Court should exercise its discretion in favour of the Applicant and grant leave to appeal out of time, and if so, whether the judgment delivered in Machakos CMCC No 98 of 2011 on the 28th August 2014 should be stayed pending the hearing of the appeal.

On the preliminary 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 operative time when the appeal must be filed within time is at the time of admission of appeal. This court has on many occasions decided on this preliminary issue and has pronounced itself that an appeal which is filed out of time can be validated by an application for leave to validate the appeal, and that *when a party wished to obtain leave to file an appeal out of time such a party must file the appeal then must seek leave to admit that appeal out of time, and that this is the appropriate interpretation of the proviso to Section 79G of the Civil Procedure Act.* See in this regard the decisions by Okwengu J. (as she then was) in **Michael Kinyanjui Mbuthia vs John Kamau Nganga, HCC 322/2008**, Wendoh J. in **Richard Ngetich & another vs Francis Vozena Kidiga, HCCA 75/2012**; and Kasango J. in **Asma Ali Mohamed vs Fatime Mwinyi Juma HCCA 75/2014 (Mombasa)**

Anyara Emukule J in **Gerald M'limbine v Joseph Kangangi, (2009) e KLR** held as follows in this regard:-

“ My understanding of the proviso to Section 79G is that an applicant seeking an appeal to be admitted out of time must in effect file such an appeal and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a nonexistent appeal out of the statutory period. To do so would actually be an abuse of the court's process which under Section 79B”

Section 79B of the Civil Procedure Act gives power to a judge of the High Court to summarily dismiss an appeal from the subordinate Court after perusing it.

I am in agreement that the correct legal position as regards section 79G of the Civil Procedure Act is that an Applicant must file an appeal before or contemporaneously with the filing of an application for leave to appeal out of time, I still must establish if there was an appeal filed at the time of the filing of the instant application. The Applicant did attach what they described as a copy of the draft Memorandum of Appeal as annexure “FNK2” to his supporting affidavit. After perusal of the said annexure, I observed that it is stamped as having been filed on 28th January 2015, and is titled “Memorandum of Appeal”. It is not indicated to be a draft. It can thus be argued that there was an appeal filed at the time of the filing of the application herein on 28th January 2015, and I find that the instant application is to this extent competently before this Court.

Coming to the first substantive issue, 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 vs 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 28th August 2014, which was when time effectively started to run for purposes of filing the appeal. I note that the Applicant gave the reason of his moving to Eldoret, and provided a letter sent to him by his Advocates dated 4th September 2014 advising him to appeal, which he claimed was sent to his former address. I however note that the letter is sent to an address in Eldoret, which is the town the Applicant states he relocated to. This Court therefore finds this reason for the delay not credible.

In addition, I note that the instant application was eventually filed on 28th January 2015, and I do find the delay in filing the application of four months inordinate given that the Respondent's Advocates provided evidence of various letters it wrote to the Applicant's Advocates and Insurers notifying of the judgment and intention to execute dated 29th August 2014, 7th November 2014 and 10th December 2014 that the Respondent attached to his replying affidavit as Annexures "PM2" "PM2" and "PM2" and which are all shown to have been received by the Applicants' Advocates and Insurer.

However, because of the prejudice that is likely to be caused to the Applicant because of the substantial amount he has been found liable to pay, and in the interests of substantive justice, I will allow his prayer for leave to appeal out of time. The observations made in the foregoing will however come to play in my determination of the prayer for stay of execution.

On 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, this Court has found the delay in filing the application to have been inordinate in the foregoing. On the fulfillment of the second condition, the Applicants have argued that the decretal amount of Kshs 3,657,646/= is colossal and the Respondent has not shown his ability to refund the said sum if the appeal succeeds. The Respondents counter this argument by stating that the Applicant did admit liability and should therefore show good faith by paying some amount of the decretal sum. I note in this regard that the Applicant did not contest the averment that they did admit liability in the trial Court.

Lastly, on the third condition, the Applicants did affirm that they are willing to furnish security for satisfaction of the decree. I also note in this regard that the Respondent's Advocate, in their letter dated 22nd September 2014 that was attached to the Applicant's Further Affidavit as Annexure "FKN", were in agreement with the Respondent that the decretal sum plus interest be deposited in a joint interest earning account in the names of the respective advocates for the Applicant and Respondent, and that the instant application in that event be allowed.

The Respondent also provided a letter written on a "without prejudice" basis by the Applicant's Advocate dated 29th September 2014 in which they were to seek confirmation from the Applicant on the proposal in the above- cited Respondent's letter of 22nd September 2014. The said letter was attached to the Respondent's Further Affidavit as Annexure "PM6". Even though no such confirmation was given by the Applicant as argued by the Respondent, it is my view that the Applicant has now confirmed that he is willing to give such security in this application. It is also notable in this regard that the letter by the Respondent's Advocate dated 22nd September 2014 was not written on a "without prejudice" basis and can therefore be taken to signify the position of the Respondent.

Accordingly, the orders that commend themselves to me arising from the foregoing is that the Applicant's Notice of Motion dated 27th January 2015 is allowed on the following terms:

1. The Applicant be and is hereby granted leave to file his appeal 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 98 of 2011 pending the hearing and determination of the Applicant's appeal, only on condition that the Applicant shall pay to the Respondent Kshs 1 million (Kshs 1,000,000/=), and deposit the balance of the decretal sum in an interest earning account in the joint names of the Applicants' and Respondent's Advocate on record within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.
3. The Applicant shall meet the costs of the Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 17th day of November 2016.

P. NYAMWEYA

JUDGE