



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 151 OF 2015

URBANUS K. WAMBUA..... APPLICANT

VERSUS

BRIGGITTA NDILA MUSAU.....RESPONDENT

RULING

The Application

Judgment was delivered against the Applicant on 30th June 2015 for Kshs 300,000/= in Makindu SRMCC No 85 of 2011. On 29th September 2015 the Applicant filed a Notice of Motion in this Court dated 28th September 2015 seeking the following substantive orders therein:

1. That the Applicant be granted leave to appeal out of time against the whole judgment of the Senior Resident Magistrates Court in Makindu SRMCC 85 of 2011 delivered on 30.06.2015.
2. That the memorandum of Appeal he annexed hereto be deemed duly filed and served upon the payment of the requisite fees.
3. That this Court be pleased to grant orders of stay of execution of the judgment, decree and all consequential orders issued in Makindu PMCC No. 85 of 2011 pending hearing and determination of the appeal.

The application is premised on the grounds that the Applicant is aggrieved by the findings of the trial Court as the amount awarded was excessive, and intends to lodge an appeal. However, that there was a delay on the Applicant's part in giving instructions to their counsel to institute an appeal due to the Applicant having been previously represented by a different firm of advocates, and did not know of the delivery of judgment until only recently.

The Applicant in his supporting affidavit sworn on 28th September 2015 averred that the failure of his former counsel to inform him of the outcome of his case should not be visited up on him, and that if stay is not granted the applicants will suffer substantial loss as the Respondent may not be able to repay the judgment sum if the appeal succeeds. He stated that he is willing to give such security for the performance of the decree that the Court may order.

The Applicant's learned counsel, O.N & Makau Advocates, filed written submissions dated 18th September 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 **Peter Waweru Mwenja vs Kiarie Shoe Stores Limited, (2014) eKLR** and **Teresia Wangari Ndungu vs Paul Kamau**

Mwaniki, (2014) eKLR, he contended that favorable exercise of discretion in allowing the appeal to be filed out of time will only help meet the ends of justice, for reasons that unless the Applicant is allowed to appeal the decision of the VAT Tribunal, it will suffer irredeemably as it will be forced to pay the disputed taxes yet it has been denied the opportunity to exercise the right of appeal. On the other hand, the Respondent will not suffer any prejudice if the applicant is allowed to appeal the decision of the VAT Tribunal.

Further, that the delay in filing the Appeal was not inordinate, and failure to file the appeal within time was inadvertent and excusable, and that the Applicant's appeal is not frivolous but arguable with overwhelming chances of success.

Reliance was also placed on Order 42 Rule (2) of the Civil Procedure Rules for the position that the Respondent has not adduced any evidence to prove that he would be in a position to refund the judgment sum to the applicant should he lose the appeal. It was urged that the burden of proof is upon the Respondent to prove that he is in such position as was held in the case of **ABN Amro Bank, N.V. vs Le Monde Foods Limited, Civil Application No. Nai 15 of 2002**

Further, that It is sufficient under for the Applicant to aver that he is willing to comply with the court's orders as to security as was stated in the case of **Recoda Freight & Logistic Ltd vs Elishana Angote Okeyo, [2015]eKLR**. Lastly, that the Applicant's appeal has a high chance of success, and the basis of the appeal was detailed out.

The Response

The Respondent opposed the Applicant's application in a replying affidavit he swore on 1st December 2015, and in written submissions dated 22nd September 2016 filed in Court by his learned counsel, Moses Odawa & Company Advocates. According to the Respondent, the Applicant participated in the hearing, and was represented by the law firm of Kasyoka & Company Advocates and a competent Advocate in Makindu Senior Principal Magistrate Court Case No. 85 of 2011, which was in court for more than 4 years with numerous delays and adjournments occasioned by the Applicant. Further, that the judgment was delivered in the presence of the Applicant and there is thus no valid reason for the delay in filing the appeal.

It was argued that the Applicant is guilty of laches, and that his application is an abuse of court process, and a further attempt to defeat and frustrate the Respondents interest and keep her off the fruits of her judgment. Lastly, that the Applicant has not set out any substantial loss he may suffer in repaying the money which was advanced to him by the Respondent over 6 years ago, or that the intended appeal is arguable as it is evident that the Appellant was advanced and received the money.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. The two issues to be determined 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 Makindu SRMCC No 85 of 2011 on 30th June 2015 should be stayed pending the hearing of the appeal.

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 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 30th June 2016, which was when time effectively started to run for purposes of filing the appeal, for reasons that they were not informed of the same by their former advocates on record. I note that the Respondent disputes this averment and states that the Applicant was in Court on the material day, but did not provide any evidence of this fact. This Court therefore finds this reason for the delay to be credible, as the mistakes of an advocate should not in the interests of justice, be visited upon his client.

In addition, I note that the instant application was eventually filed on 29th September 2015, and I do not find the delay of four months in filing the application inordinate. I will therefore allow the Applicant's prayer for leave to appeal out of time for the foregoing reasons.

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 filling the application not to have been inordinate in the foregoing. On the fulfillment of the second condition, the Applicant has argued that the Respondent has not shown his ability to refund the said sum if the appeal succeeds. The Respondent countered this argument by stating that the Applicant was duly advanced the money that is in dispute. He however did not address the issue of his ability to repay the said sums if the Applicant's appeal succeeds. Lastly, on the third condition, the Applicant did affirm that he is willing to furnish security for satisfaction of the decree.

Accordingly, the orders that commend themselves to me arising from the foregoing, is that the Applicant's Notice of Motion dated 28th September 2015 is allowed on the following terms:

1. The Applicant be and is hereby granted leave to file and serve his appeal out of time within 14 days from the date of this ruling.
2. There shall be a stay of execution of the judgment and decree in Makindu SRMCC No 85 of 2011 and all consequential orders arising therefrom pending the hearing and determination of the Applicant's appeal, only on condition that the Applicant shall deposit 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 15th day of December 2016.

P. NYAMWEYA

JUDGE