



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 859 OF 2014

JACINTA NJERI KIMANI.....RESPONDENT

VERSUS

1. CATHERINE MACHARIA

2. BENSON CHEGE.....APPLICANTS

RULING

1. Before me is a Notice of Motion dated 15th December, 2014 expressed to be brought under Order 42 Rule 6, Order 22 Rule 22 Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010 and Sections 3 and 3A of the Civil Procedure Act. The Applicants seek the following prayers:-
 - a. *that the Applicants be granted leave to appeal out of time against the judgment/decree of Hon. Onchuru in Thika CMCC No. 289 of 2013 delivered on 12th November, 2014;*
 - b. *stay of execution of the judgment/decree obtainable pending full hearing and determination of the Defendants' appeal to be filed at the High Court of Kenya at Nairobi;*
 - c. *that the memorandum of appeal annexed be deemed as duly filed on payment of the requisite charges.*
2. The application is premised on the grounds on the face of the application and the Supporting Affidavit of Erastus Mwaniki sworn on 15th December, 2014. He averred that judgment had been scheduled for delivery on 5th November, 2014 but that the advocate in conduct of the matter was informed that the judgment was not ready; that on perusal of court record on 11th December, 2014, the Advocate learnt that the judgment was delivered on 12th November, 2014 in his absence; that the interim stay of execution granted by the court lapsed on 12th December, 2014. It was contended that the Respondent is of unknown physical whereabouts and means and the Applicants are apprehensive that if the decretal amount, which is substantial, is paid to her, she would be in no position whatsoever to refund the same if the intended appeal succeeds. The deponent avers that the Applicants are ready and willing to furnish security and that this appeal has high chances of succeeding.
3. The application was opposed through the Respondent's Replying Affidavit sworn on 14th January, 2015 and Grounds of Opposition of the same date. The Respondent averred that; the Applicants have not tendered reasons why the appeal was not filed from 18th November, 2014 when their Advocates were notified of it; that the Applicants have not sworn an affidavit stating that they were aggrieved by the judgment; that the Applicants could not be aggrieved by the judgment since they are insured and their interests protected by Directline Assurance Company Limited; that since there is no appeal yet filed, the Applicants cannot seek stay of execution under the quoted

- provisions; that the Applicants have not demonstrated good and sufficient cause for not filing the appeal within time as envisaged in the law; that no material evidence has been placed before this court to demonstrate that the Applicants will suffer substantial loss if the order for stay of execution is not granted; that the Respondent is a business woman who is financially stable as has been demonstrated by her ability to pay for her medical bills and that she is capable of refunding the decretal sum if the appeal succeeds and that the decree is a money decree and she should be allowed to enjoy the fruits of a judgment she had lawfully obtained.
4. The grounds of opposition were that; the application is misconceived bad in law and an abuse of court process; that the application is brought under wrong provisions of the law; that since there is no appeal, stay of execution cannot be granted; that the affidavit of Erastus Mwaniki should be expunged as it is contrary to Order 19 rule 3 (1) of the Civil Procedure Rules and that the Applicants have not demonstrated any loss that will be suffered if stay is denied.
 5. The application was canvassed by way of oral submissions by the parties' counsel. Mr. Kusala learned counsel for the Applicants submitted that there was no notice for delivery of judgment; that it is upon perusal of the court file that it was discovered that judgment had been delivered, that attempts were made to file the matter at Muranga High Court but that court was not sitting. He expressed the Applicants' offer to furnish security for the performance of the decree.
 6. Mr. Kisia, Learned Counsel for the Respondent referred the court to a letter dated 17th November, 2014 informing the Applicants of the judgment and stated that there was no sufficient cause why the appeal was not filed in time. He contended that Section 79 G of the Civil Procedure Act had not been invoked; that since there is no appeal, no stay of execution can issue; that there is no indication of any substantial loss to be suffered but rather depositions by counsel and that the affidavit should be expunged from the record as it was made contrary to the law.
 7. The application was premised on **Order 42 rule 6** of the **Civil Procedure Rules** which specifies the circumstances under which this court may order a stay of execution of a decree or order pending an appeal. **Rule 6(2)** lays down the conditions which an applicant must satisfy which are that he/she stands to suffer substantial loss if stay is not granted and that the application had been filed without unreasonable delay. In addition, the applicant must show that he/she is willing to offer such security as may be ordered by the court for the performance of the decree or order appealed.
 8. I have considered the Respondent's objection that Section 79 G of the Civil Procedure Act was not invoked. To my mind, that is a technical objection bearing in mind the provisions of Article 159 2 (d) of the Constitution and Sections 1A and 1B of the Civil Procedure Act. The courts are under a duty to determine substantive justice rather than technicality. I say so because prayer Number 2 of the application put the Respondent on notice as to what the Applicant was seeking. In any event, there is no evidence what prejudice the Respondent suffered by the failure to cite Section 79 G on the Notice of Motion as one of the provisions under which the application was made.
 9. The power to extend time is discretionary and cannot be exercised whimsically but rather on sound reasons. The onus to give the reasons is on the Applicant. In **Fakir Mohamed v Joseph Mugambi & 2 others Civil Appl. No. 332/04 (ur)**; it was held that:-

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika ... M’Ethare ... & Attorney ... General Civil application. NAI. 8/2000 (ur) and Murai v. Wainaina (No. 4) [1982] KLR 38.”

Although the court was considering Rule 4 of the Court of Appeal Rules, I am of the view that the principles applicable under that rule can be applicable under S 79 G of the Civil Procedure Act.

10. Section 79G of the Civil Procedure Act, CAP 21, Laws of Kenya provides:

“79 G 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.”

11. In the case at hand, judgment was delivered on 12th November, 2014 and time for filing the appeal run out on 11th December 2014. As at that time, no appeal had been filed. The Applicants' Advocates only realised on that day that judgment had been delivered 30 days previously. It is not denied that the Judgment was delivered without notice to the parties in breach of the clear provisions of Order 21 rule 4 of the Civil Procedure Rules. The present application was filed on 19th December, 2014, barely eight (8) days later. The Applicants have explained the difficulties they had in filing the application in Murang'a. They had to come this court.
12. In my view, the Applicants have shown sufficient cause for not having filed the appeal within time. I am aware of the letter dated 17th November, 2014 which was sent by the Respondents Advocates to the Applicants Advocates and received on the following day. However, considering that the period between 18/11/14 and 19/12/14 is approximately 30 days which is the period allowed for filing appeals. I am not satisfied that the delay was inordinate. In any event, the Applicants Advocates had to read the judgment and make a decision whether it was advisable for the Applicants to appeal against the same or not. Accordingly, I will grant the leave sought to file the appeal out of time.
13. As regards stay of execution, the application was filed timeously in view of what I have stated in the preceding paragraphs.
14. On substantial loss, it was averred on oath that the amount is substantial; that if the same is paid out, the Respondent is a person of straw and whose whereabouts and means is unknown and the Applicants will not be able to recover the same. The answer to this was two fold; that the deponent of the Affidavit was not competent to depone as to the Applicants suffering substantial loss and that the Respondent was a business woman of substance who would be able to refund the decretal amount.
15. I agree with the Respondent's Counsel that the deponent of the Supporting Affidavit would not be competent to swear as to the Applicant's substantial loss. I have however, looked at what he has deponed to at paragraph 10 of the Supporting Affidavit. He states:-

“10. THAT the Plaintiff is a woman of unknown physical whereabouts and means and the Applicants are reasonably apprehensive that if the Decretal amount, which is substantive, is paid over to the Respondent, the said Respondent would be in no position whatsoever to refund the same if the intended Appeal is successful.”

16. To my mind, this is the paragraph that depones to substantial loss. It states that if the monies is paid over to the Respondent, it will be irrecoverable. The deponent did not state directly of the Applicant's suffering substantial loss, but his averment leaves that inference. I am therefore unable to hold that the Affidavit is incompetent.
17. As to whether the Affidavit is in breach of Order 19 Rule 3 of the Civil Procedure Rules, the procedure as I know it is for the opposing party to refer the specific offending paragraphs of the Affidavit and invite the court to strike them out. This the Respondent did not. I am therefore hesitant to hold that the Supporting Affidavit is wholesomely in breach of the provisions of Order 19 Rule 3 of the Civil Procedure Rules.
18. I have always held the view that once an applicant in an application for stay depones that, for whatever reason, he/she believes the Respondent is a person of straw and that if the decretal sum is paid over and the appeal succeeds, he will be lost of that money, he would have discharged his burden on the principle of substantial loss. The burden then shifts to the Respondent to rebut the

same. This is so because, the personal finances and ability of a Respondent to refund a decretal amount is in the sole and exclusive personal knowledge of the Respondent.

19. In the present case, the applicants contended that the Respondent was a person of no known physical whereabouts and means and that she was therefore a woman of straw. In answer, she stated that she is a business woman capable of refunding the sum on the basis of her ability to have paid for her medical expenses. She did not deny that she is a person of unknown physical whereabouts. It was expected of her to give her physical address and the assets she owns at the very least. To my mind, her sweeping statement that she is a business woman without producing any evidence of the business she carries is not enough. There was no evidence to show that she paid the medical costs she referred to or the amount of such medical costs that she had paid. In the circumstances, I am satisfied that the second principle has been satisfied.

20. As regards security, the Applicant undertook to give such security as shall be necessary for the performance of the decree. The upshot of it is that I am satisfied that the application is meritorious.

21. Accordingly, I allow the application on the following terms:-

- a. Leave is granted to the Applicant to file and serve an Appeal out of time. The Memorandum of Appeal to be filed and served within 14 days of the date of this ruling.
- b. A stay of execution of the decree in Thika CMCC No. 289 of 2013 is hereby issued until the hearing and determination of the appeal on condition that the Applicant deposits a sum of KShs.320,346/= as security.
- c. The said sum of KShs.320,346/= be deposited in an interest bearing account in the joint names of the Advocates on record for the parties at KCB High Court Branch, Nairobi within 21 days of the date of the ruling in default the stay shall lapse.
- d. The costs of the application to abide the outcome of the Appeal.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 27th day of February, 2015

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A MABEYA