



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS APPLICATION NO. 682 OF 2014

KEAN TRANSPORTERS LIMITED
KENNETH GIKONYO MUNGAI.....APPLICANTS

VERSUS

**ANASTACIA WANGECI NJOGU (*as administrator of the*
Estate of Charles Njogu Ngugi).....RESPONDENT**

R U L I N G

1. Before me is a Notice of Motion dated 9th October, 2014 seeking the following orders:
 - a. **That the Applicants be granted leave and the court to enlarge time for purposes of filing an appeal out of time.**
 - b. **That there be a stay of execution of the judgment entered in the Chief Magistrate's Court CMCC No. 4397 of 2011 against the Applicants on 27th August, 2014 pending hearing and determination of the intended appeal.**
 - c. **That the court be pleased to grant the orders of stay sought subject to any condition as the court may deem fit.**
 - d. **Costs of the application be provided for.**
2. The application is based on the grounds on the body of the application and the supporting affidavit of Paul Kariba sworn on 9th October, 2014. He stated that the reason for delay was due to failure to locate the court file in the lower court registry to enable a thorough review and analysis of the judgment as the case file was under lock and key in the magistrate's chambers. That this frustrated attempts of perusing the judgment and forming a legal opinion on the same; that there is no order of stay of execution in place and the Applicants are apprehensive that the Respondent may move to execute the judgment before the appeal is filed. That the Applicants will suffer loss if execution proceeds and the intended appeal succeeds as the decretal amount will be beyond reach of the Respondent because the Respondent is a lady of straw. That if stay orders are not granted, the appeal will be rendered nugatory and that the Applicants are ready to comply with any such conditions as to security as may ordered by the court.
3. The application was opposed through the Replying Affidavit of the Respondent sworn on 21st January,

2015. She contended that the judgment was read in the presence of counsel for both parties; that it is after the lapse of thirty (30) days stay granted by the trial court that her advocates wrote to the Applicants' advocates seeking settlement of decretal sum that the Applicant rushed to file this application, that the application is in the premises an afterthought. The Respondent contended that the Applicants did not require proceedings or documents from the court file to file the present application. That the decree in CMCC No. 960 of 2011 involving Samuel Kago Mungai who was travelling together with the Respondent's husband at the material time was settled without any question therefore the Applicant cannot selectively fault evidence on liability in this case.

4. The application was canvassed by way of oral submissions. Mr. Deya learned counsel for the Applicants submitted that the delay was occasioned by the file being in the magistrate's chambers and they needed to peruse the same to understand the rationale of the judgment and properly advise the Applicants. He cited **Leosila Mutiso v. Rose Hellen Mwangi C.A. No 251 of 1997** stating that the principles guiding a court in allowing an application such as the instant one are; unfettered discretion; length of delay i.e. thirty days after the date of judgment taking the Applicant to 27th September, 2014. He stated that they came to court on 9th October, 2014 which was timeous. On chances of success he referred the court to the draft memorandum of appeal and submitted that the appeal is arguable. On the degree of prejudice, he submitted that the Applicant was willing to furnish security as shall be required.

5. Mr. Gichachi learned counsel for the Respondent reiterated the averments in the Replying Affidavit and submitted that the reasons advanced for the delay was not plausible.

6. I have considered the Affidavits on a record, the submissions of Learned Counsel and the authorities cited. This is an application for leave to file an appeal out of time and for stay of execution. Section 79G of the Civil Procedure Act, CAP 21, provides as follows with regard to the time for filing of appeals:-

“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.”

7. The power to extend time is discretionary and cannot be exercised on whimsically rather it is to be granted 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)** the court held: -

“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 in the above case the Court of Appeal was considering Rule 4 of the Court of Appeal Rules, the Principles applicable therein are applicable in this court Under Section 79G of the Civil Procedure Act.

8. Although the said discretion is further boosted by Sections 1A and 1B of the Civil Procedure Act, this does not eliminate the established principles and precedent in the exercise of the discretion of court. in

City Chemist (NBI) & 2 Others v. Oriental Commercial Bank Ltd Civil Appl. NAI. 302 of 2008(ur):
the Court of Appeal delivered itself on this thus: -

“That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”

9. In the case at hand, the Defendant should have filed this application by 27th September, 2014. That is to say, there was a delay of about eleven (11) days. Delay was discussed in **Agip (Kenya) Ltd. v. Highlands Tyres Limited (2001) KLR 630**, as follows: -

“Delay is a matter to be decided on the circumstances of each case where a reason for the delay is offered. The court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit”.

In Civil Suit No 223 of 2002, Trust Bank (In Liquidation) v Kiprono Kittony & 2 Others it was observed that disputes cause anxiety, and to allow for the same to be extended for a long period of time would be prejudicial to the other party if not justified. However, as was determined in **Waljee’s (Uganda) Ltd v Ranji Punjabhai Bugerere Tea Estates Ltd (1971) EA 188**, no prejudice would be so great that would not be adequately compensated for an award in costs. Since both parties’ counsels were present at the time of delivery of judgment, it was not very necessary for the Applicant to obtain the proceedings before filing the Memorandum of Appeal. I am alive to the fact that the Applicant was only jolted by the letter demanding settlement of the decretal sum. Be that as it may. Consider the circumstances of this case, the Respondent does not stand to suffer loss that cannot be compensated in costs. I will grant leave but order that the costs of the application in the sum of Ksh.3,000/- be paid within 14 days. The Memorandum of Appeal should be filed and served within 14 days of the date hereof.

10. As regards stay of execution, the principles are settled. That the application should be made timeously, that the Applicant must show that it will suffer substantial loss if the stay is not granted and finally there must be security or the due performance of the decree. On the first principle, the application was not made timeously. The same was made after 41 days of the date of judgment. On substantial loss, the applicant swore that if it pays the sum of Ksh.1,271,300/- the Respondent being a lady of straw may not be able to refund the same if the appeal succeeds. Since the Respondent did not deny this averment, I am satisfied that the Applicant may suffer substantial loss.

11. As regards security, the applicant has offered to abide by any condition that may be set by the court. Looking at the circumstances of this case, I am inclined to grant the stay sought in prayer 4 of the motion on condition that the Applicant deposits a sum of **Ksh.1,407,278/60** in an interest earning account in the joint names of the Counsels for the parties herein. Such deposit to be effected within 21 days of the date hereof. The Memorandum of Appeal be filed and served within 14 days.

Dated, Signed and Delivered at Nairobi this 20th day of February, 2015

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A MABEYA

JUDGE

