REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

MISCELLANEOUS CIVIL APPLICATION NO. 2 OF 2015

SHADRACK WAMBUA MUTUKU……..……...1ST APPLICANT

MUNUNGA KIANDA FARMERS CO. LTD……..2ND APPLICANT

-VERSUS-

MERCY NTIBUKA MUNGANIA…..……..RESPONDENT

R U L I N G

1. The applicants Notice of Motion filed on 22/1/2015 seeks several prayers, number 3 and 4 of which are relevant for purposes of this ruling. Prayer 3 and 4 seek:-

> **THAT this Honourable Court be pleased to grant leave to the Applicants to file an appeal out of time against the judgment of Hon. Esther K. Kimilu delivered on 14th October, 2014 in Naivasha CMCC No. 981 of 2012.**
>
> **THAT further and in the alternative this court do grant stay of execution of the judgment delivered on 14th October, 2014 in Naivasha CMCC No. 981 of 2012 all consequential orders pending the hearing and determination of the intended appeal.**

2. The Application is brought under Section 3A, 79G and 95 of Civil Procedure Act. The grounds upon which the application is based are:

> **(a) THAT the Applicants and their insurers were not notified of the judgment in time to enable them lodge an appeal within time.**
>
> **(b) THAT advocates previously on record failed to file an appeal as instructed.**
>
> **(c) THAT the Applicants wishes to ventilate their grievance against the judgment of the lower court by way of appeal which they believe has high chances of success.**
>
> **(d) THAT the period within which the appeal should be filed has expired and there is need to extend the same.**
>
> **(e) THAT applicants are likely to suffer irreparable harm if the decree or judgment is executed against them.**

The grounds are expanded in the affidavit sworn by Ruth Monyangi in support of the application.

3. In response to the Notice of Motion the Respondent filed grounds of opposition. Thereon the Respondent cited laches and the failure on the part of the Applicant to offer security. They also take issue with the omission by the applicants to invoke the court's jurisdiction for granting stay of execution.

4. By consent of the parties the application was canvassed by way of written submissions. Basing their submissions on the dicta in **Wasike –V- Swala [1984] KLR 591**, the applicants submitted that the delay in filing an appeal was caused by their previous lawyers and was not inordinate; that the intended appeal has merit and that no prejudice will be occasioned to the Respondent who, is at any rate a beneficiary of extended time, as her suit was filed out of time.

5. For their part, the Respondents emphasize delay on the part of the Applicants even after the late notification of the judgment from their advocate then on record. It is the Respondent's view that the delay is inordinate. They further contend that the prayer for stay of execution is not available in the application as the jurisdiction of the court was not invoked and neither did the Applicants demonstrate that their case comes within the conditions set out under Order 42 Rule 6 (2) of the Civil Procedure Rules. The Respondent contend that the appeal is motivated by the extraneous purpose of negotiating downwards the sum awarded to them, as stated in the annextures to the applicant's affidavit.

6. I have considered the materials canvassed by the parties with regard to the application before me. Firstly, I agree with the Respondent that the Applicant has neither invoked the provisions of Order 42 Rule 6 of Civil Procedure Rules in the body of the Notice of Motion, nor have they placed any material in their affidavit and submissions to that end.

7. A party who desires that the court grants a stay of execution pending appeal is obligated to satisfy the requirements of Order 42 Rule 6 (2) of the Civil Procedure Rules which states:-

> **"No order for stay of execution shall be made under sub rule (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.**

Prayer 4 of the Notice of Motion therefore is not only hanging, in a legal sense, but also lacks a factual basis. It cannot succeed.

8. On the prayer for extension of time Section 79G of the Civil Procedures Act states as follows:

> **"Every appeal from a subordinate court of 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 time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."**

9. Under the provision the applicant seeking extension of time must satisfy the court *"that he had good and sufficient cause for not filing the appeal in time."* In this case the applicants are blaming their advocates for giving late notice (on 14/11/2014) of the lower court judgment delivered on the 14/10/2014 (See annexture **RM1**). It is not clear though when this letter was received by the applicants and why it took over a fortnight to give instructions on 2/12/2014 for the filing of the appeal. Annexture **RM1** dated 14/11/2014 clearly indicates that the plaintiff's advocate's enclosed letter, presumably demanding

payment consequent to judgment was dated 12th November 2014.

On what basis did the deponent to the affidavit conclude that judgment was given on 14/11/2014, and when did she make a discovery to the contrary?

10. When eventually instructions were given to file an appeal, it was for the stated purpose of "negotiating quantum and liability downwards." It would seem that the instructions were not followed but the affidavit is vague on the date of the discovery of the default by the applicant. Excluding the Christmas period, the application was brought over 60 days since the judgment or 30 days since the lapse of any stay that may have held in the lower court. In the circumstances of the case, the delay cannot be said to be inordinate. Secondly the reasons for the delay clearly lay with the late communication by the applicants' previous advocate. The main requirement is that an applicant demonstrates "good and sufficient cause" for not filing the appeal in time.

11. The authorities cited by the applicant (**Wasike –Vs- Swala, Kimaru –Vs- Rukungu [1984] KLR 393)** were concerned with the application of Rule 4 of the Court of Appeal Rules which has been amended over time. The current rule is almost in similar terms as Section 95 of Civil Procedures Act. The authorities therefore provide useful guiding principles for the consideration of an application brought under Section 79G and 95 of the Civil Procedure Act. These principles include the consideration whether delay has been inordinate and whether the extension of time will occasion prejudice upon the Respondent and possibly whether the intended appeal is arguable.

9. The above principles were reiterated in **Mwangi –Vs- Kenya Airways Ltd [2003] KLR 486** where the Court of Appeal held:-

> **"Matters which the Court takes into account in deciding whether or not to grant extension of time are:-**
>
> **(a) the length of delay**
>
> **(b) the reason for the delay**
>
> **(c) possibly, the chances of the appeal succeeding if the application is granted; and**
>
> **(d) the degree of prejudice to the respondent if the application is granted."**

With regard to (c) the Court qualified that this is not a mandatory requirement but merely "something for a "possible" consideration."

12. In **Bagajo –Vs- Christian's Children Fund Inc. [2004] 2 KLR 73** the court emphasized that in exercising its discretion relating to extension of time, *"the court's primary concern should be to do justice to the parties."* With regard to the intended appeal, I would agree with Respondent's submission that the statement contained in the Applicant's annexture **RM3** appears to suggest that the appeal is a cynical attempt to force the Respondent to accept a lower quantum. However the draft memorandum of appeal and the submissions raise a critical issue with regard to the validity of the lower court order allowing the Respondents' suit to be filed out of time.

13. While it is not mandatory that the applicant should demonstrate an arguable appeal, or one with good chances of success, it is my view that such a fundamental question cannot be ignored by this court in exercising its discretion.The main interest is to do justice to the parties, and notwithstanding the delay, it is my considered view that justice can still be done between the parties. (**See Ivita –Vs- Kyumbu [1984] KLR 441)**. The Respondent will not be unduly prejudiced as she can be adequately compensated through costs.

14. I do therefore grant the application in terms of prayer 3 of the Notice of Motion and direct that the applicants do file their appeal within 14 days of today's date. The Respondent is awarded the costs of the application.

Delivered and signed at Naivasha this 17th day of March, 2015.

In the presence of:

For Plaintiff/Applicant

For Defendant/Respondent

Court Assistant Stephen

C. W. MEOLI

JUDGE