



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCALLENIOUS APPLICATION NO. 787 OF 2014

**LUCY NJERI & ANOTHER (the legal and personal representative of the estate
of the late DAVID MURIITHI KIRUGU.....PLAINTIFF**

VERSUS

VEHICLE & EQUIPMENT LEASING LIMITED.....DEFENDANT

RULING

1. This ruling is on the notice of motion dated 4th November, 2014 seeking the following orders:-

i. that this court be pleased to grant an order allowing the Defendant to lodge an appeal out of time and the same be filed and served within 14 days from the date of the order to be made herein or such other period as the court shall deem fit.

ii. that this court be pleased to grant an order staying the execution of the decree herein pending appeal

2. The application is based on the grounds set out in the body of the application and the supporting affidavit of Kiingati Ndirangu. He attributed the delay in filing this application to his venture out of Kenya and annexed a visa in that regard. He stated that the Plaintiff shall not be prejudiced in a manner that cannot be compensated by costs.

3. The Plaintiffs filed a replying affidavit sworn by the 1st Plaintiff in response thereto. She contended that particulars of the travel was not stated and that the passport indicated that Mr. Kiingati was away between 1st September, 2014 to 11th September, 2014 thereby he was in the country a day after the judgment. It was contended that Mr. Kiingati filed an appeal in the sister file to the one the appeal arises from PMCC No. 263 of 2011 and want court to believe that his firm could not do the same to the case herein. It was stated that there was not proof that proceedings were requested for, that the Plaintiff is unable to raise the decretal sum and that the memorandum of appeal does not have overwhelming chances of success.

4. It was submitted on behalf of the Defendant that the delay of 48 days was unavoidable since its advocate had travelled abroad and acted expeditiously upon his return. **Eldoret Steel Mills Company Ltd v. Anthony Shilewa Kaida (2013) eKLR, African Airlines International Ltd v. Eastern & Southern Trade and Development Bank (2003) EA 2, Muli v. Kituku (2004) 1 EA 178 and Bamanya v. Zaver (2002) 2EA 325** were cited to demonstrate that the reason of delay ought to be put into consideration in determining such an application. On the issue of loss the Defendant's position was that the Plaintiff is a vagrant who cannot refund the decretal sum and that if the orders sought are not granted,

the Defendant's appeal shall be rendered nugatory. The Plaintiffs on the other hand reiterated the averments in the affidavit.

5. This application is premised on **Order 42 rule 6** of the **Civil Procedure Rules** which specifies the circumstances under this court may order stay of execution of a decree or order pending an appeal. **Rule 6(2)** lays down the conditions which an applicant must satisfy in order to deserve orders of stay of execution pending appeal. The applicant must satisfy the court that he/she stands to suffer substantial loss if stay is not granted and that the application had been filed without unreasonable delay. The applicant must also show that he/she is willing to offer such security as may be ordered by the court. The power to extend time is discretionary and cannot be exercised on whim rather it is to be granted on sound reasons. The onus to give the reasons is on the Applicant. **Fakir Mohamed v Joseph Mugambi & 2 others Civil Appl. No. 332/04 (ur):-**

“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.”

6. 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. Judgment was delivered on 10th September, 2014, and in view of the proviso of Section 79 G, the Applicant is out of time. However, I find that the application was made timeously as a delay of three (3) months cannot prejudice the Respondent in a manner that cannot be compensated in costs.

8. The second issue is whether the Applicants have demonstrated that they stand to suffer substantial loss. The Appellant alleged that the Respondent is unable to refund the decretal sum since she is a vagrant. On this point **See the case of Rose Mbithe Ndeti v. Mathew Kyalo Mbobu Civil Appeal No. 86 of 2008** where the Respondent rebutted not being a man of straw and proved his financial capability. In this case, there is no such rebuttal from the Respondent. Where an Applicant alleges that the Respondent is a man of straw, the burden to prove otherwise shifts to the Respondent. See the Court of Appeal’s decision in the case of **ILRAD v. Kinyua(1990) KLR 403 at Page** where it was held as follows:-

“We have considered what Mr. Sehimi has said. However, we must “observe that the onus was upon the respondent to rebut by evidence that the claim that the intended appeal if successful would be rendered nugatory on account of his(respondent’s) alleged impecunity”.

In the circumstances I find that the Appellant has established that it will suffer irreparable loss.

9. On the issue of leave to appeal, I have scrutinised the passport. The Appellant's advocate was travelled back on 11th September, 2014 that is a day after the judgment had been delivered. This court takes judicial notice that advocates act on instructions. Having just come from abroad, the advocate must have

needed time to acclimatise. Even if I am wrong on this point, as I have held earlier in this ruling, that delay can be compensated in costs.

10. The Applicant herein has not indicated willingness to deposit security which is a requirement that ought to be satisfied. I shall make orders on security binding the Appellant. In view of the foregoing I make the following orders.

- a. The Applicant is given leave of 10 days to file an appeal out of time.
- b. I also grant an order for stay pending the hearing and determination of the intended appeal.
- c. The Applicant to deposit the decretal sum of ksh.1,345,65/= in a joint interest earning account in the names of learned advocates within 60 days from the date of this order

Dated, Signed and Delivered in open court this 22nd day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant