



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 28 OF 2015**

**LAWI NYATENG.....APPELLANT**

**VERSUS**

**ARNOLD WILLIAM OMULANDO..... RESPONDENT**

**RULING**

By notice of Motion dated 27<sup>th</sup> January 2015 filed in court on the 28<sup>th</sup> day of January 2015, the applicant **LAWI NYATENG** seeks from this court orders:

1. Spent
2. Spent
3. That pending the hearing and determination of the appeal herein, there be stay of execution of the lower court's judgment issued in CMCC 2284/2009 on 10<sup>th</sup> November, 2014.
4. That leave be granted to the appellant to file the appeal out of time and the appeal filed herein be deemed as duly filed.
5. That costs be in the cause.

The application is predicated on the grounds:

- a. The appellant's goods were proclaimed on 23<sup>rd</sup> January 2015 and may be carted away on lapse of 7 days.
- b. The appellant /his advocate was never notified of the judgment date of 10th November 2014.
- c. The appellant has an appeal with overwhelming chances of success in that the alleged agreement of sale of land was not in writing.
- d. It is in the interest of justice that the appeal (sic) be allowed.

The said application is supported by the affidavit sworn by the applicant Lawi Nyateng sworn on 27<sup>th</sup> January 2015 and some annexures.

In the supporting affidavit, the applicant deposes that he was the defendant in CMCC 2284/2009 and that after the suit was heard, and his testimony taken, he was notified by his advocate M/S M.A Abong'o & co. Advocates that judgment would be delivered on notice but that he never heard from his said advocates until 23<sup>rd</sup> January 2015 when he was called by his son to the effect that there were auctioneers in his house in Nairobi. When he travelled to Nairobi he found that M/S Moran Auctioneers had proclaimed his household goods and motor vehicle registration No. KAA 486V allegedly for kshs 395,218 as shown by an annexed copy LN1.

The applicant deposes that he then immediately contacted his advocates who informed him that they were never notified of the said judgment date upon which he proceeded to court and requested for handwritten copy of judgment annexed hereto as LN2, which shows that it was delivered in the absence of parties advocates and also deposes that his advocate was never served with ten days notice confirming the entry of judgment.

Further, it is deposed that the intended appeal has overwhelming chances of success in that there was no evidence of a sale of land agreement in writing; there was no evidence to prove payment of purchase price of kshs 160,000 and the trial magistrate never appreciated the fact that the applicant was not and had never been the owner of the suit land.

The applicant therefore contends that if stay is not granted, he stands to suffer irreparable loss as the respondent's monetary status is not known and that the respondent only produced receipts for 4,700/- being registration fees to **Kwa Ndege Self Help Group** and not kshs 80,000/- as alleged. Further, that he should be allowed to file his appeal out of time as his advocates did not know when the judgment was delivered hence the delay which is not unreasonable. The applicant also deposes that he is not employed hence he cannot raise the decretal sum of kshs 395,218.000 and that it is in the interest of justice that the application be allowed.

The respondent opposed the application and filed a replying affidavit sworn by himself **Arnold William Omulando** on 4<sup>th</sup> February 2015. The respondent contends that the application is incompetent, factually defective, unsustainable, smacks the malice and the applicant's second attempt at wasting precious judicial time. The respondent deposes that after the case in the lower court wherein he was the plaintiff was heard, the matter was mentioned on 10<sup>th</sup> June 2014 wherein the court directed that judgment would be delivered on 11<sup>th</sup> July 2014 and the respondent's advocates were also directed to serve a notice on the applicant's advocates as the latter had failed to attend court, as shown by annexure AWO1 copy of judgment notice received by the applicant's advocates on 13<sup>th</sup> June 2014 for 11<sup>th</sup> July 2014.

The respondent also deposes that when his counsel attended court on 10<sup>th</sup> July 2014, the judgment was not ready hence it was set for 10<sup>th</sup> November 2014 as shown by annexure AWO2 copy of judgment notice from court and copied to the applicant's advocates then on record.

The respondent deposes that he accordingly attended court on 10th November 2014 as his advocate was indisposed wherein judgment was delivered as scheduled after the court noted that both parties advocates had been served. The respondent also deposes that the applicant's affidavit at paragraphs 4 and 14 are contradictory and that judgment was never delivered exparte since the parties were notified of the judgment.

The respondent further deposes that he proved his case in the subordinate court to the required standard. The respondent contends that the 77 days delay is inordinate and the intended appeal is hopeless and that there will be great prejudice accessioned to the respondent if the orders sought are granted.

Further, it is deposed that no stay of execution can be granted if the applicant does not deposit the decretal sum in court. He urged the court to dismiss the applicant's application with costs.

The parties advocates agreed to dispose of the application by way of written submission. The applicant filed his on 16<sup>th</sup> March 2015 whereas the respondent file his on 20<sup>th</sup> May 2015 .

This court is therefore called upon to determine the application as filed and urged by the parties. In their written submissions, the applicant reiterates what is contained in his submission, the affidavit and grounds in support thereof together with the annexures.

On the applicable law, It is submitted on behalf of the applicant that the application is grounded on order 42 Rule 6 and other grounds which case law has added. In his view, the application for stay can be granted in the discretion of the court. He relied on the case of **Butt vs Rent Restriction Tribunal**

Madan, Miller & Porter, JJ.A cited in **Julius Gatete Ihomba v Wells Fargo Ltd (2013) e KLR** that :

- a. The power of the court to grant or refuse an application for stay of execution is a discretionary power. This discretion should be exercised in such a way as not to prevent an appeal being rendered nugatory.
- b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
- c. A judge should not refuse stay if there are good grounds for granting it merely may become available to the applicant at the end of the proceedings.
- d. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements.

The applicant also relied on **Kenya Power and Lighting Company Ltd vs Esther Wanjiku Wokabi (2014) e KLR** which emphasize that the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rule are guidelines for the court to use as beacons in exercising its unfettered discretion in deciding whether or not to grant stay, depending on the circumstances of each case.

The applicant also cited **Global Tours & Travels Ltd** winding up cause 43/2000 Ringera J citing **Kenya Power and Lighting Company vs Esther Wanjiku (supra)**, that whether or not to grant stay is a matter of judicial discretion to be exercised in the interest of justice and if so on what terms, considering the pros and cons, the need for expeditions disposal of cases, the prima facie merits of the intended appeal- not necessarily one that must succeed but whether its an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.

The applicant also relied on the Supreme Court decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji & Others SC App 5/2014** where the SC set out 2 principles applicable in application for stay thus:

- i. The appeal or intended appeal is arguable and not frivolous and
- ii. Unless the order of stay is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

Further reliance was made on the case of **Chris Munga N Bichange v Richard Nyagaka Tongi & 2 Others Kisumu CAPP 39/2013** where it was stated that in law, one arguable point suffices for the finding that the appeal filed or intended appeal is arguable. The applicant's counsel then laid out 4 principles flowing from the decisions he had cited, as guiding this court on the application for granting of stay of execution pending appeal.

- a. Whether the application before court was made expeditiously.
- b. Whether the applicant's appeal or intended appeal is arguable and not frivolous.
- c. Whether the applicant is likely to suffer substantial loss unless the orders sought for stay of execution are granted.
- d. Whether the intended appeal shall be rendered nugatory unless the orders of stay of execution are granted or whether the application was made without unreasonable delay,

It was submitted on behalf of the applicant that the applicant filed this application immediately after learning of judgment as delivered on 4<sup>th</sup> November 2014 and that he had not been notified of the date of judgment hence he filed Notice of Appeal dated 27<sup>th</sup> January 2015 and Memorandum of Appeal dated 28<sup>th</sup> January 2015.

On whether the applicant is likely to suffer substantial harm if orders sought are not granted, the applicant submits that he is a private citizen with a good standing in society who had not been informed by his previous advocates of the events transpiring in this case. He relied on the decision of **Caltex Ltd v Kenya Airports Authority (2005) e KLR** and **Pithon Waweru Maina v Thuka Mugiria (1982-1988) 1KAR 171** that he should not be punished for his advocate's mistake unless an

injustice would be occasioned to the other party, urging the court not to allow mistakes of his former advocate to be visited on him.

The applicant also maintained that his appeal is arguable and not frivolous as the purported agreement was not in writing yet it involved a disposition in land. He relied on Section 3(3) of the Law of Contract Act and the case of **Hanington Malingi Janji v Katana Pekeshe & 7 Others (2013) e KRL ; Patrick Tarsan Matu & Another v Nassim Shariff Nassir Abdulla & 2 Others (2009) e KRL and Margaret Karema v James Muthuri M'Mungania (2011) e KLR.**

The applicant also submitted that the applicant had not proved in the lower court that the respondent had paid any money to the applicant hence the special damages claimed was not proved.

On whether the intended appeal will be rendered nugatory if stay is not granted, the applicant contended that indeed the appeal shall be rendered nugatory because of errors of omissions by the court below and his advocates and that he will suffer grievous injustice pecuniary loss, mental anguish and distress.

In opposition, the respondent submits that the application by the applicant is merely intended to scuttle execution as the applicant's advocates were duly served with judgment notice as annexed to the replying affidavit. the respondent maintained that the applicant does not deserve leave to file an appeal out of time as the application had been brought with undue delay and no reasons have been advanced for the delay.

Further, that he would be prejudiced if the orders sought are granted. In addition, it is submitted that the intended appeal has no chances of success. He relied on the cases of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, CA Nairobi 255/97 VR cited in Niazsons (K) Limited v China Road and Bridge Corporation (K) (200) e KLR .**

The respondent submitted that the reason for the delay is not genuine as the appellant actively participated in the suit and therefore cannot hide behind his advocate's mistake yet there was a notice served on all parties for the date of judgment.

On stay pending the intended appeal, it is submitted by the respondent that the applicant had not satisfied the conditions for granting of such orders as stipulated under Order 42 Rule 6(2) of the Civil Procedure Rules. He relied on **Osero & co. Advocates v Easy Properties Ltd (2014) e KLR and Jason Ngumba Kagu v Inatra Africa Insurance Co. Ltd (2014) e KLR.** The respondent contends that the application was filed after 3 months from date of judgment hence there was delay.

Secondly, that no substantial loss would be suffered by the applicant if stay is not granted as it is a money decree and that the respondent is not a pauper hence if paid the money he would be in a position to reimburse the same, further, that the applicant cannot purport to be unable to pay the decretal sum yet he chose to be litigant and therefore if he cannot deposit security for due performance of decree, the discretion of this court should not be exercised in his favour .

I have carefully considered the applicant's application, the affidavit evidence and submissions by both parties hereto. In my view, there are only two issues for determination namely:

1. Whether the applicant is entitled to grant o extension of the period within which he should have filed his appeal.
2. Whether the applicant is entitled to the orders of stay of execution of decree pending appeal.

On issue No. 1 the law applicable for application for leave to appeal out of the statutory period is Section 79G of the Civil Procedure Act which stipulates that an appeal from the subordinate court to the High Court shall be lodged within 30 days from the date of the decision with a proviso for extension of such period. The relevant provision states:

***“ Every appeal from a subordinate court to the High court shall be filed within a period of thirty days from the date of 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.”***

Under the proviso, 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 Supreme Court in the case of **Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others SC APP. 16 of 2014** laid down about 7 principles that a court should consider in the exercise of its discretion to extend time:-

- a. It 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;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. In the exercise of the discretion to extend time the court should consider case to case basis.
- d. A reasonable reason for the delay should be offered to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the responders if the extension is granted.
- f. If the application has been brought without undue delay.
- g. In certain cases, like election petitions, public interest should be considered for extending time.

The question is, has the applicant shown good and sufficient cause for not filing the appeal in time?

The applicant contends that his advocate and himself were not present when judgment was delivered and that they did not receive any notice of judgment.

The respondent on the other hand maintains that the applicants were aware of the judgment date as they had been notified.

I have examined the handwritten copy of the judgment delivered on 10<sup>th</sup> November 2014 and it shows that the judgment was delivered in the absence of parties and the court noted **”despite notice on 31<sup>st</sup> November 2014.”**

The respondent annexed copy of judgment notice dated 6<sup>th</sup> June 2014 served on the applicant’s former advocates M/A Abongo & Co Advocates on 13<sup>th</sup> June 2014 notifying them that judgment would be delivered on 11<sup>th</sup> July 2014 at 2.30 pm . He also annexed another notice from court dated 3<sup>rd</sup> November 2014 addressed to both parties advocates indicating that the judgment would be delivered on 10<sup>th</sup> November 2014 at 2.30pm

Regrettably, there is no evidence to show that notice of judgment date by the court was served upon the applicant’s advocates. The process server of the court received it on 4<sup>th</sup> November 2014 and effected service upon the respondent’s advocates on 4<sup>th</sup> November 2014 but there is no corresponding evidence that the applicant’s advocates were served. Therefore, albeit the trial magistrate delivered judgment on 10<sup>th</sup> November 2014 believing that both parties advocates had been notified, what is reflected is that there was no service and if there was such service upon the applicant’s, nothing prevented the respondent from annexing a copy of notice duly served and or received by the applicant’s advocates. It was, in my view, therefore, trite that the applicant was not aware of the judgment date, the same having aborted on 11<sup>th</sup> July 2014 as per the earlier notice.

Based on the above factual finding, I am inclined to find that there was sufficient cause for the applicant not to file an appeal within the 30 days statutory period.

Furthermore, the right of appeal is a Constitutional right and must be respected. No party should be

barred from ventilating their grievances exhaustively as such denial would undoubtedly deny them access to justice.

I also find that the intended appeal is arguable and as has been held severally, an arguable appeal is not necessarily one that must succeed. (See **Dennis Mogambi Mongare V Attorney General & 3 Others CA 265/2011**). The applicant contends that the trial magistrate failed to take into account the provisions of Section 3(3) of the Contract Act that an agreement respecting an interest in land must be in writing and witnessed. It is not for this court to attempt to delve into the merits of the intended appeal as that would prejudice the parties and embarrass the trial court but what is trite is that the above contention alone rises a triable issue between the parties.

Accordingly, I am satisfied that albeit this application was filed on 28<sup>th</sup> January 2015 about 2 ½ months from 10<sup>th</sup> November, 2014 when judgment was delivered in the lower court, the delay has been explained and is not inordinate.

I must mention that there was no necessity for server of 10 days notice of entry if judgment as the suit had proceeded to hearing interpartes.

In the end, I grant the applicant extension of time within which to file an appeal against judgment and decree made on 10<sup>th</sup> November 2014 by the trial court in CMCC 2284/2009 and direct that such Memorandum of Appeal shall be filed and serve within 21 days from the date hereof in default, leave granted lapses.

On the second issue of whether the applicant has satisfied the court on the conditions for stay pending appeal, the 1<sup>st</sup> condition, in my view, has been complied with. There is no contrary evidence that judgment was delivered on 10<sup>th</sup> November 2014 and that the applicant only learnt of the same on 23<sup>rd</sup> January 2015 when he was alerted by his son that auctioneers were in the process of attaching his goods upon which he contacted his former counsels on record who informed him that they had not been served with a judgment notice. The application for leave and stay with a draft Memorandum of Appeal were simultaneously filed on 28<sup>th</sup> January 2015.

In my view, there was no delay in filing the application from date of discovery of judgment. Time begins to run from the date of delivery of judgment yes but in special circumstances where a party was not made aware of such judgment, they cannot be blamed for the delay when the application was timeously filed upon discovery of the said judgment.

On whether the applicant shall suffer substantial loss if stay is declined and that should the appeal succeed, it will be rendered nugatory, the applicant states that he has an arguable appeal with overwhelming chances of success and that the monetary status of the respondent is unknown and that he would lose his household goods.

The claim is monetary and it has not been demonstrated that there will be any loss leave alone substantial loss to be suffered if the money is paid out and the appeal succeeds then it will be rendered nugatory. In addition, there has not been any evidence adduced to prove the impecuniosity of the respondent such that should the money be released to him and the appeal succeeds, then he shall not be in a position to refund the same; notwithstanding the fact that the respondent has not sworn an affidavit of means. What the applicant has deposed strongly is that he is not employed and that he cannot raise the decretal sum of kshs 395,218,000.

In **Butt vs Rent Restriction Tribunal and Another Nairobi CA 6/79** the Court of Appeal stated that the purpose of stay of execution pending appeal is to prevent the appeal, if successful, from being rendered nugatory.

In as much as I have found that the appeal, on the face of it, is not frivolous, nonetheless, there is no proof of substantial loss.

On whether the applicant has offered any security for the due performance of decree, it is noted that there is no such offer and what the applicant deposes is that he is unemployed and therefore cannot raise the decretal sum.

Security for due performance of decree is one of the inextricable conditions for stay grant of execution of decree pending appeal. The applicant rushed to this court with an application for stay upon learning that his motor vehicle KAA 486V Pickup and KBG 974L Toyota among other household items had been proclaimed as per the proclamation notice dated 23<sup>rd</sup> January 2015.

He does not mention that he is willing to offer any other alternative security for the due of performance of decree. I therefore find that the applicant has not fulfilled all the 3 conditions for granting of stay of execution of decree pending appeal.

Stay of execution pending appeal is not a matter of right, even if loss would result if execution were to be declined. Nevertheless, the respondent did not controvert the applicant's depositions by way of an affidavit that he was a person of unknown means and that should the amount be paid to him he shall be unable to refund it should the appeal herein succeed thereby rendering the appeal nugatory.

I wholly concur with Honourable Kasango J in **Kenya Orient Insurance Co. Ltd V Paul Mathenge Gichuki CA 40/2014 (2014)** e KLR that when an applicant pleads that the respondent is not possessed of means to refund the decretal sum if the appeal succeeded, the burden of proof immediately shifts to the respondent to prove that he has the capacity to refund the decretal sum if the pending appeal was determined in the applicant's favour. See also **ABN Amro Bank N v Le Monde Foods Ltd CA Nairobi 15/2002**.

The respondent did not depose as to his financial means by way of an affidavit. What his advocate endeavored to explain in submissions was that the application was not instituted and or prosecuted by a pauper as a pauper application and that the applicant was duly represented in the lower court by advocates and in this application and the appeal as intended and has infact hired Senior counsel to represent him and that he chose to be a litigant hence he cannot state that he is unable to pay the sums due.

In my view, that is not a factor to be taken into account in determining what substantial loss is and the submission is diversionary from the core legal principles.

The respondent failed to discharge the evidential burden of his financial means which burden shifted to him to prove that he had income or property that would enable him refund the money in the event that the appeal succeeds.

On the issue of security for the due performance of decree, order 42 Rule 62(b) of the Civil Procedure Rules is clear that it is the court that should decide in its discretion what kind of security if any an applicant should provide for the due performance of decree depending on the circumstances of each case, and if the applicant fails to provide any security or undertaking as may be ordered by the court, then he would not be entitled to a stay as a stay is not a matter of right for a party.

In the circumstances of this case, the applicant did not lay any ground that would disentitle the court to order for security for the due performance of decree in as much as he stated that he is unemployed .

As I have stated earlier, there were 2 motor vehicles in running conditions proclaimed. Being unemployed is not being a person of no means to deposit security. The decretal sum must also be secured to protect the interests of a successful litigant in the court of the first instance.

For the above reasons, I exercise my discretion and order that there shall be stay of execution of decree in Milimani CMCC 2284 OF 2009 pending hearing and determination of the intended appeal conditional upon the applicant depositing the whole decretal sum into both advocates joint interest earning account with a reputable financial institution within 45 days from the date hereof and

in default, the stay herein lapses.

The intended appeal to be filed and served within 21 days from the date hereof.

Costs of this application shall be to the respondent.

**Dated signed and delivered in open court at Nairobi this 31<sup>st</sup> day of July 2015.**

**R.E. ABURILI**

**JUDGE**

31.7.2015

Coram R.E. Aburili J

C.A Samuel

Mr Malinzi for applicant

No appearance for respondent

COURT- Ruling read and delivered in open court as scheduled.

**R.E. ABURILI**

**JUDGE**

**31.7.2015**