



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIVASHA

CIVIL MISCELLANEOUS APPLICATION NO. 41 OF 2015

H.YOUNG & CO. (EA) LTD.....APPLICANT

-VERSUS-

SAMSON OKOTH ORENGO.....RESPONDENT

RULING

1. Before me is an application filed on 26/6/2015 under Section 65 (i) b, 79G of the Civil Procedure Acts and Order 42 Rule 6 (1) (2) and 7 of the Civil Procedure Rules. Prayers 1 & 2 are spent. Prayers 3 & 4 seek:

“3. That this court be pleased to extend the time for filing and lodging an appeal/memorandum of appeal in the matter.

4. That subsequent to prayer 3 above this court be pleased to grant an order for stay of execution of the judgment/decree herein pending the final hearing and determination of the appeal to be filed.”

2. The application is supported by the two affidavits sworn by Audrey Namwakira the corporate affairs officer with the Applicant Company. In a nutshell the two parties were litigants in **Naivasha CMCC 206 of 2014 Samson Okoth –Vs- H. Young & Co. EA Ltd.**

3. Judgment in favour of the Plaintiff in the lower court was given on 21st May 2015 for the sum of Shs 2,367,290/= . The Applicants herein applied for a copy of the judgment by a letter dated 28th May 2015 but received at the registry on 10th June 2015. It is claimed that the delay in obtaining a copy of the judgment prevented timely filing of the appeal.

4. The Applicant contends that the intended appeal as reflected in the draft memorandum of appeal is meritorious and the Respondent will not be prejudiced. With regard to the prayer for stay of execution the applicant points out that the execution has commenced and that there is no evidence at all that the Respondent would be able to refund the decretal sum should the appeal succeed. The Applicants express a willingness to furnish security for the performance of the decree.

5. For his part, the Respondent opposed the application through a Replying Affidavit. In brief, the Respondent contends that the Applicant had sufficient notice of the judgment of the lower court and indeed had a copy thereof in their possession by 26/5/2015; that they were indolent as demonstrated by their failure to file an appeal on time. He disputes that the appeal is likely to be rendered nugatory if stay

is not granted, and argues, with regard to the leave to appeal that he stands to suffer prejudice.

6. During the oral arguments, parties took cue from their respective affidavits. Mr. Wahome for the Applicant relied on the case of **Anne Mukami Muchiri –Vs- David Kariuki Mundia [2006] eKLR** regarding the exercise of the discretion of the court under Section 79G of the Civil Procedure Act. He stated that the Applicant had given a reasonable explanation.

7. Ms Amboko for the Respondents opposed the application and argued that no “good cause” as contemplated under Section 79G has been demonstrated.

8. I have considered all the material placed before me with regard to the application. Section 79G empowers the court to enlarge the time for filing an appeal if the court is satisfied that good cause has been shown by a party. Section 79G states:-

“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. In the case of **Anne Mukami Muchiri, Okwengu J** (as she then was) referred to the authority of **Leo Sila Mutiso –Vs- Rose Hellen Wangari (Nbi) Civil Appeal No. 255 of 1997** as follows:-

“It is now well settled that the decision whether or not to extend the time for filing appeal is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of delay, second the reason for delay, thirdly (possibly) the chances of the appeal succeeding; and fourthly the degree of prejudice to the Respondent if the application is granted.” [See also **Mwangi –Vs- Kenya Airways Ltd [2003] KLR 486**].

10. In **Bagajo –Vs- Christian Children’s Fund Inc. [2004] KLR 73** the court emphasised that while exercising this discretion, **“the court’s primary concern should be to do justice to the parties.”** In my considered view the delay of less than ten days was not inordinate and has been reasonably explained. The memorandum of appeal does not, reflect flippant but patently arguable grounds of appeal. The Respondent may have to wait a little longer to enjoy the fruits of his judgment but I do not think he will be unduly prejudiced. I do therefore allow prayer 3 of the application.

11. With regard to prayer 4 it is doubtful whether the same is tenable in the absence of an appeal. Although Order 42 Rule 6 (1) of the Civil Procedure Rules does not expressly state that the existence of an appeal is a condition precedent to the exercise of the court’s jurisdiction under Order 42 Rule 6 (1) this can be inferred from the rules; and from order 42 Rule 6 (4) of the Civil Procedure Rules which states that an appeal is deemed as filed in the Court of Appeal when notice of appeal has been given.

12. Order 42 Rule 6 (6) of the Civil Procedure Rules states:-

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

13. As I recently stated in **Jihan Freighters Limited –Vs- Veronica Wanjiru Gikonyo (Suing as the administrator of the estate of the late SAMUEL NDUNG’U GIKONYO)**:-

“It would seem that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1)

or 6 (6) of the Civil Procedure Rules must be preceded by the filing of an appeal, or compliance with the procedure for filing appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the Civil Procedure Rules). Until the Memorandum of Appeal is filed, the court may be acting in *vacuo* by granting stay of execution pending appeal.

I am fortified on this position by the pronouncement of the Court of Appeal in the case of Equity Bank -Vs- Westlink MBO Limited [2013] eKLR. Commenting on Rule 5 (2) (b) of the Court of Appeal Rules which is substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules and on Order 42 Rule 6 (6) of Civil Procedure Rules, the Court of Appeal left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also Balози Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR).”

14. In view of the foregoing I decline to entertain the prayer for stay of execution pending the appeal intended to be filed. In the interest of justice however I will order that status quo be maintained during the 7 days hereby allowed for the filing of the appeal pursuant to leave granted. The costs of the application are awarded to the Respondent in any event.

Delivered and signed at Naivasha this 30th day of July 2015.

In the presence of:

Mr. Mwambiri for Applicant

Ms Amboko for Respondent

Court Assistant Stephen

C. W. MEOLI

JUDGE