REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 385 OF 2015

MONICAH A.S. OUGO ……..1ST APPLICANT

LEBUNEEI DIVERSITY……..2ND APPLICANT

VERSUS

DR. SAMSON ROBERT MISANGO……..RESPONDENT

RULING

This ruling determines the applicant's application dated 7th September 2015 brought by way of Notice of Motion and filed on 8th September 2015.

The application is brought under the provisions of Sections 1A, 1B, 3A, 63(e) and 89 of the Civil Procedure Act, Order 51 Rule 1 and Order 50 Rule 6 of the Civil Procedure Rules and all enabling provisions of the law. The applicant's Monicah A.A. Ougo and Lebuneei Diversity seek from this court orders:

1. Spent
2. That status quo on execution of decree issued in Milimani RM's CC 2229/2012 be maintained and Fantasy Auctioneers be restrained from taking possession of the 2nd applicant's movable assets pending the hearing and determination of this application
3. That leave be granted extending time for the filing of an appeal challenging the said decision of the subordinate court.
4. Costs of the application
5. Any other relief that the court may deem fit to grant.

The application is predicated on the grounds on the face of the notice of motion among them, that failure to file appeal in time was inadvertent and attributable mistake of counsel who did not advise the applicants of the fact of judgment which failure is profoundly regretted. That unless this court intervenes the applicants shall suffer irredeemably. That it is in the interest of justice to grant the reliefs sought.

The application is further supported by three affidavits. In the affidavit sworn by the 1st applicant Monicah Machani, she deposes that she is the landlord on premises on LR No. Nairobi/Block/72/543 and the 2nd applicant is her agents, which fact was known to the respondent Dr Samson Robert Misango and that she learnt of judgment in CMCC 2229/2012 on 7TH April 2015 when auctioneers proclaimed

its moveable assets on 1st September 2015 in a tenancy dispute and that she intends to appeal against the said entire decision. Further, that her failure to file the appeal in time was not deliberate as she was not advised by her advocate. The deponent avers that they have a strong appeal with good chances of success as shown by the annexed draft.

Further, that if execution is levied they will suffer irreparable prejudice and that the respondent shall not suffer any prejudice which cannot be remedied by costs.

In the affidavit of Ezekiel Mutai Kihenya it is deposed that he is the Managing Director of the 2nd applicant and the rest of the depositions are similar to the ones deposed by the 1st applicant.

The application is also supported by the affidavit of miller Wanjala Bwire, advocate for the applicants who deposes that the matter was previously handled by his colleague in the same firm Mr Syphurine Mayende. Further, that the suit in the lower court was heard on 5th March 2015 where the respondent and 1st applicant testified but that the court declined to allow the 2nd applicant to testify and directed the advocate to appeal if he wished and Mr Mayende retired to formulate grounds of appeal but changed his mind, opting to appeal against entire judgment should the judgment be unfavorable.

Further, that the judgment was delivered on 7th April 2015 but they inadvertently did not know of the said date. The rest of the depositions are similar to those deposed by the 1st applicant.

The respondent Dr. Samson Robert Misango filed his grounds of opposition on 14th September 2015 contending that the applicant ought to deposit kshs 238,000 as security; and that mistake of an advocate is not a ground to grant the orders sought.

The application was canvassed on 14th September 2015 by way of oral submissions. Mr Miller Bwire advocate for the applicants submitted, reiterating the contents of the application, grounds and the three supporting affidavits one sworn by himself the other by the Monicah Machani and the last one by Ezekiel Mutai Kethenya all whose depositions I have high lightened above.

Mr Bwire emphasized that failure to appeal against the ruling disallowing the 2nd applicant to testify was an error on their advocate's part whereas delay in filing appeal against final judgment was occasioned by his office and an inadvertent mistake not intentional and that since the applicant deserve an opportunity to be heard, mistake by their counsel should not prejudice a client and as their advocates, they apologize for the mistake. He also submitted that the applicants were ready to furnish security.

Professor Wangai opposed the application relying on the grounds of opposition and urging the court to order that kshs 238,500 decretal sum be deposited in court within 10 days to dispose of the issue of execution .

On the matter of enlargement of time, counsel for the respondent submitted that the intended appeal relates to the order declining to allow the 2nd applicant to testify and on the final judgment. He submitted that the applicant was given 30 days to appeal but the advocate decided not to appeal, which fact came before judgment. In his view, it is an abuse of the court process to combine the two decisions together and that no appeal lies against the ruling and further, that the intended appeal has no merit. Professor Wangai submitted that mistake of an advocate is not a ground of appeal but reason for delay in filing an appeal within the prescribed period and that the client has a remedy against the advocate's professional negligence.

In a rejoinder, Mr Bwire submitted that the lower court proceeded to write a judgment even after telling the parties to appeal against its ruling. He further submitted that the draft Memorandum of Appeal sets out grounds of appeal. Further, that they had conceded mistake which should not deny their clients the right to be heard.

I have carefully considered the application by the applicant, grounds thereof , supporting affidavits, grounds of opposition and submissions by both counsels for the parties in favour of and against the application.

The issue for determination in my view, is whether the applicants have satisfied the conditions for grant of-

a. Enlargement of time within which to file appeal against

i. Ruling declining to allow the 2nd respondent to testify on 23rd May 2015.
ii. The judgment delivered on 7th April 2015.

b. Stay of execution of decree in the lower court pending hearing and determination of the intended appeal.

On whether this court should enlarge time within which to file an appeal from the ruling and the judgment, first and foremost, is that the applicants were granted leave by the lower court to file an appeal against a ruling of the trial court, but they did not. That being so, then they squandered their opportunity which lapsed and they cannot be heard to be seeking leave of this court to enlarge time. The issue is not about enlargement of time. If that were the case, then such enlargement would have been sought before the court that made the order. That particular order was only appealable with leave of that court and the court did grant such leave but the applicants never utilized the leave given. So, they cannot seek enlargement from this court at this stage.

On the second limb of enlargement of time within which to file an appeal from the judgment of the trial court, the relevant applicable law is Section 79G, of the Civil Procedure Act which provides:

> ***" Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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 preparation and delivery to the appeal 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."***

The supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others (2014) e KLR** laid down seven principles for a court to be guided by in considering extension of time for filing an appeal, while acknowledging that the discretion to extend time lies with the court seized of the matter and that it is incumbent upon the applicant to sufficiently explain the reasons for the delay if any, in making the application for extension of time, and whether there are exterminating circumstances that can enable the court to exercise its discretion in favour of the applicant. The principles are:

1. Extension of time 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:
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
5. Whether there will be any prejudice suffered by the respondent if the extension is granted:
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

Section 79G of the Civil Procedure Act contemplates a situation where a party had a right of appeal but did not, for good reasons, exercise that right within the statutory stipulated period and therefore seeks out the court's leave to enable them exercise that right, despite the time lapse.

Applying the Nicholas Kiptoo case principles to this case; as to whether the application was filed without unreasonable delay, and or whether the delay has been explained to the satisfaction of the court, the record shows that judgment was delivered on 7th April 2015. The application was filed on 8th September 2015 after the decree holder in CM CC 2229/2012 had put in motion the process of executing decree to recover decretal sum of kshs 192,355. The delay was of 4 months from the date of judgment in the lower court.

The case in the lower court proceeded to hearing interpartes with all parties thereto being ably represented by advocates, what is given as reasons for failure to file an appeal within time is some verbose imprecise statement replicated all over in the certificate of urgency, grounds and supporting affidavit that:-

> ***" Failure to file the Memorandum of Appeal in time was inadvertent, since the last proceeding on 23rd May 2015, when the court declined the application for the 2nd applicant to be heard in court, the counsel acting and appearing for the applicants on record was given 30 days to appeal the rejection to hear a party, and in the stated scheme of events he sought to frame issues for appeal but decided against it instead opting to have the matter concluded so that in event of unfavourable judgment an appeal may be cumulative on all issues. Regrettably counsel, sat awaiting for occasion or notice of judgment but he did not receive any. Instead it is the applicants who informed counsel of the event of judgment when they were proclaimed on 1st September 2015. Failure to file the Memorandum of Appeal in time is therefore attributed to mistake of counsel representing the applicants then, for not advising the applicants of the fact of judgment and is profoundly regretted".***

What I gather from the above lengthy factual statement of the applicants is that the advocates for the applicants did not attend court on the judgment day after the last date of hearing of the case. Further, that the said advocates therefore expected to be served with notice of judgment. Third, that they did not bother to establish on their own accord from the court, whether or not judgment had been delivered, 5 months down the line and last, the applicants too did not make any inquiries as to the position of their case from their erstwhile advocates.

In my view, the delay in filing this application is unreasonable. The applicants together with their advocates went to slumber after the matter was heard. There is no reason why the applicants did not bother or at all for 5 months, to make any enquiries from their advocates on the position of their case. Further, there is no admission by the advocates that they advised their clients to go and wait for communication on their case, and never to make any inquiry.

It was the primary duty of the applicants to constantly get in touch with their advocates after the case was heard and concluded, to know the outcome and way forward.

I am fortified on this point by the decision in the case of **Savings & Loans Limited V Susan Wanjiru Muritu Nairobi Milimani HCC 397/2002** where Kimaru J expressed himself thus:

> ***" Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel for the litigant on account of such advocate's failure to attend court. <u>It is the duty of the litigant to constantly check with the advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be</u>***

prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a traversity of justice for the court to exercise its discretion in favour of such a litigant". Emphasis added.

I fully agree with the above holding and add that it is not sufficient for a party to simply blame the advocate but must show tangible steps taken by him or her following up the progress of his or her matter. From the applicants' own supporting affidavits, it is clear that they knew how the case progressed to hearing wherein the 2nd applicant was denied leave to testify and leave granted to him to lodge an appeal, which appeal was never filed. The matter was then slated for judgment on 7th April 2015. No explanation is given why there was no attendance on the part of the applicants or their advocates for judgment. There is a cloud of doubt as to why there was no attendance. The explanation that the defendant's/applicant's counsel expected a notice of judgment to be served on them cannot be accepted by this court, as no notice of judgment was required where the judgment date was admittedly given in court after the full hearing and the case defended.

Secondly, as the matter proceeded to hearing interpartes, the requirement for notice of entry of judgment is not available to the applicants. The requirement for notice of entry of judgment is only where judgment in default of appearance or defence has been entered against the defendant, and execution has to be effected, by payment, attachment or eviction. Such notice of ten days must be given to the defendant and served personally or at the address of service and a copy of the notice filed with the first application for execution.

That is not the case here, where it is acknowledged that the suit in the subordinate court proceeded to hearing interpartes.

In the Court of Appeal decision of **Aviation Cargo Support Ltd V St Mark Freight Services Ltd CAPP 98/2013,** the Court of Appeal in determining an application to file and serve a record of appeal out of time stated:

" The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the court to exercise its discretion in favour of an applicant, the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to court as soon as was practicable.

In the normal vissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time."

The above principle of law no doubt agrees with the 7 principles set out in the Nicholas Kiptoo arap Salat case (supra). Notwithstanding the above valid principles of law, courts have also over time adopted the principle of the rule of law and exercised latitude in their interpretation of the rules so as to facilitate just determination of disputes on merit and thus facilitate access to justice to ensure that deserving litigants are not shut out of the judgment seat and this court is no exception.

In other words, in as much as delay defeats equity, the power to enlarge time being a discretionary one, that discretion is slowly being taken over by the rule of law that a party who wishes to challenge the decision of the subordinate court before the High Court should not be prohibited by a delay. Further, that notwithstanding the unexplained inordinate delay, the court should consider whether justice can still be served in the circumstances of the case. The court must thus take into account the

principle of proportionality and see where the scales of justice lie. The law is now trite that the business of the court, so far as possible, is to do justice between the parties and not to render nugatory that ultimate end of justice. The court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice (see **Suleiman V Amboseli Resort Ltd (2004) 2 KLR 589.**

In addition, the right of appeal is a constitutional right which is the cornerstone of the rule of law. To deny a party that right would in essence be denying them access to justice which is guaranteed under Article 48 of the Constitution and also a denial of the right to a fair hearing as espoused in Article 50(1) of the Constitution, which latter right cannot be limited.

In **Branco Arabe Espanol V Bank of Uganda (1999) 2 EA 22,** the court held:-

> ***" The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessary debar a litigant from the pursuant of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely, the hearing and determination of disputes, should be fostered rather than hindered."***

Further in **Phillip Keipto Chemwolo & Another V Augustine Kubende (1986) KLR 495,** the Court of Appeal was clear that:

> ***" It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case determined on its merits."***

This is not to say that in every case, a mistake of advocate would be a ground for allowing an applicant's application.

In this case, I find both the applicants and their advocates did not act diligently. Nonetheless, they have demonstrated the clearest intention to challenge the decision of the subordinate court. The advocate has owned up and apologized to the court for their lack of vigilance in this matter. In their view, the intended appeal has overwhelming chances of success. Albeit this court cannot at this stage determine the merits of the intended appeal, but from the annexed Memorandum of Appeal, I can tell that the intended appeal is not frivolous or an abuse of court process. It is for those reasons, upon balancing out the scales of justice, to accord the applicants an opportunity to ventilate their grievances at the appellate level that I would grant extension of time within which an appeal should have been filed.

Furthermore, in my view, no prejudice will be occasioned to the respondent if the leave sought is granted, and which prejudice if any can be compensated by an award of costs.

In addition, this court does not find any reason why the respondent did not execute decree from April 2015 when judgment was entered and had to wait until 1st September 2015 to proclaim. There is no evidence that a decree of the lower court was ever extracted and served to the respondent's counsel for approval before it was signed and sealed by the court for execution as required by order 21 Rule 8 of the Civil Procedure Rules which provide in material:-

1. ***"……***
2. ***Any party in a suit in the High Court may prepare a draft decree and submit it or the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay, and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.***
3. ***If no approval of or disagreement with the draft decree is received within seven days…….***
4. ***……***
5. ***The provisions of Sub Rules 2,3,4 shall apply to a subordinate court and reference to***

Registrar and Judge in the Sub Rules shall refer to Magistrate."

I have cited the above provisions to indicate that had the decree been extracted and exchanged in good time with the applicants counsels, then the applicants would have been awaken much earlier. That omission can nonetheless be cured by extraction of a fresh decree for approval by both parties.

In the end, I allow the prayer seeking for extension of time to file an appeal out of time. Such time is extended by 15 days from the date hereof and in default, the order herein lapses.

On the prayer for stay of execution pending appeal as intended, the applicable provisions are Order 42 Rule 6 of the Civil Procedure Rules. There are three conditions therein that must be fulfilled by the applicants to warrant the exercise of the court's discretionary power to order for stay of execution of decree pending appeal. These are:-

i. That the court is satisfied that substantial loss may result to an applicant unless the order is made and
ii. The application has been made without unreasonable delay;
iii. 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.

The burden of proving that substantial loss may result if order of stay is refused lies on the party who alleges (**see Halsbury's Laws of England Vol. 17 paragraph 14; Feisal Amin Jan Mohammed T/A Dunya Forwarders V Shami Trading Company Ltd(2014) e KLR.**

The claim herein is monetary. There is no deposition by the applicants that if the money is paid out and the appeal if successful, then the respondents will not be in a position to refund the same thereby rendering the appeal nugatory.

The applicants simply stated that they are willing to deposit security. The respondent's counsel, professor Kiama Wangai, too commenced from the premises that the sums due must be deposited in court before stay of execution can be considered.

I have seen the copies of warrants of attachment issued to Fantasy Auctioneers. They claim a sum of kshs 192,355.20. The auctioneers also demand a sum of kshs 46,235 as their changes. It has not been contended that the amount is colossal or that the applicants are in any form of financial hardship to raise that money. What is contested is the attachment and sale of the 2nd applicant's moveable assets when, as is alleged, he was only an agent of the 1st applicant, who was the disclosed principal. In other words, the 1st applicant would rather have her movables attached than that of the 2nd applicant in satisfaction of decree which nonetheless is being challenged.

The second condition is that the application must have been brought within reasonable time. In this case, as I have already pronounced myself on the issue of delay, I will not repeat it here as it is trite that the application was not filed without unreasonable delay.

As to the deposit of security, the applicants have conceded to that condition as the court may order. It is therefore left in the discretion of the court to determine whether sufficient cause is shown for the order of stay of execution to be granted pending appeal.

In this case, as the prayer for stay was not seriously contested by the respondent who only sought the depositing of the money in court, I will exercise my discretion and grant stay of execution of decree in the lower court pending filing, hearing and determination of the intended appeal conditional upon the applicants depositing in court a sum of kshs 300,000/- as security for the due performance of decree. The said sums shall be deposited within 21 days from the date hereof and in default execution to proceed as appropriate.

The upshot of all the above is that the application is allowed on both limbs. As the applicant came to

court after an inordinate delay, costs of the application shall be borne by the applicants to be agreed upon or taxed and paid before the intended appeal is set down for hearing in default, execution to issue for recovery.

Dated, signed and delivered in open court this 22nd day of September 2015

R.E. ABURILI

JUDGE

22/9/2015

22.9.2015

Coram R.E. Aburili J

C/A Adline

Mr Mayende holding for Bwire for the applicant

Professor Wangai for respondent

Court – Ruling read and delivered in open court as scheduled.

Court – Ruling to be typed expeditiously.

R.E. ABURILI

JUDGE

22/9/2015