



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISC. CIVIL APPLICATION NO. 436 OF 2006

IN THE MATTER OF: THE LAW REFORM ACT CAP 26 LAWS OF KENYA

**IN THE MATTER OF: THE KENYA CIVIL PROCEDURE
ACT CAP 21 LAWS OF KENYA**

IN THE MATTER OF: THE COMPANIES ACT CAP 486 LAWS OF KENYA

IN THE MATTER OF: JUDICIAL REVIEW PROCEEDINGS

BETWEEN

STEPHEN MWANIKI KABUE1ST APPLICANT

ONESMUS KIEME KAROKI 2ND APPLICANT

DAVID MAINA NGURU..... 3RD APPLICANT

JOHN MAINA KAMURU..... 4TH APPLICANT

VERSUS

THE REGISTRAR OF COMPANIES.....RESPONDENT

INTERESTED PARTIES

PETER GATAWA MUTHOGA

JOHN MWANGI MUKIRI

JULIUS MUHIA MACHARIA

STEPHEN MWANGI GITHINJI

CYRUS MAINA KIHUGA

GEOFFREY MWANGI

STEPHEN KAMAU MUCHERU

RULING

1. By a Notice of Motion dated 11th July, 2012 expressed to be brought under section 1A, 3, 3A, 63(e) of the *Civil Procedure Act*, Order 50 Rule 6 of the *Civil Procedure Rules* and all enabling provisions of the law, applicant herein seek the following orders:

1. That this application be certified urgent and the same be heard exparte in the first instance.

2. That this Honourable Court be pleased to extend time within which the applicants should file a memorandum of appeal and the memorandum of appeal annexed hereto and marked "A" be deemed as filed upon payment of the requisite court fees.

3. That this Honourable Court be pleased to grant a stay of proceedings in this matter and specifically stay of the bill of costs filed by the interested parties herein pending hearing and final determination of this application or until further orders of this Honourable Court.

4. That this Honourable Court be pleased to grant a stay of proceedings in this matter and specifically stay of the bill of costs filed by the interested parties herein pending hearing and final determination of the appeal filed against the judgment of this Honourable Court pronounced on the 19th January 2012 or until further orders of this Honourable Court.

5. That this Honourable Court be pleased to grant any other order suitable in the circumstances.

6. That the costs of this application be provided for.

2. The application was supported by an affidavit sworn by **Magdalene N. Waiganjo**, the plaintiffs' advocate on 12th July, 2012.
3. According to the deponent, judgment in this case was pronounced on 19th January 2012 in which the case for the applicants was disallowed. However, the applicants were not satisfied with the judgment so delivered and opted to appeal. Accordingly, a Notice of Appeal. However, inadvertently time for filing a memorandum of appeal lapsed due to the fact that the deponent had a sick child whom she was taking care of at home and was hospitalized for sometime with the child as a result of which she not in the office for a long time. Her staff was however not aware that time had lapsed for filing the appeal and it was only after the notice for taxation was served that it came to her attention that the memorandum had not been filed.
4. According to her it was not intentional that time lapsed without filing the memorandum of appeal. Since the respondents have moved to have the bill of costs taxed the applicants are exposed without any form of protection whatsoever hence it would not be fair to let the respondents proceed with taxing the bill filed when they know well that the applicants have moved to appeal.
5. There was a further supporting affidavit sworn by the same deponent on 22nd July, 2013 which was in substance the same as the supporting affidavit.
6. In support of their case the applicant submitted while reiterating the contents of the said affidavits that they will suffer irreparable loss if the stay as sought is not granted as they will be compelled to proceed with the proceedings in spite of the pending appeal and once the bill of costs is taxed it would be very hard to undo the proceedings and reverse everything.

INTERESTED PARTIES' CASE

7. In opposition to the application, the interested parties filed grounds of opposition in which they contended that the application was frivolous, vexatious, an after thought and an abuse of the court process and further that the same was bad in law, incompetent and misconceived.

8. It was submitted that there was no evidence that the deponent to the supporting affidavit had a sick child and was hospitalized for the said period hence this application is an afterthought. According to the interested parties the applicant does not due to the delay deserve the orders sought.
9. I have considered the foregoing.
10. The first issue I wish to deal with is whether this Court has jurisdiction to grant the orders sought. Although the same has not been raised this Court can only proceed to determine the application if it is satisfied that it has jurisdiction to grant the orders sought.
11. I have considered the provisions relied upon by the applicant in this application and in my view none of them empowers this Court to extend time within which an appeal can be filed to the Court of Appeal.
12. The **Civil Procedure Act** is expressed to be an Act of Parliament to make provision for procedure in civil courts. However under section 1(2) of the said Act it only applies to proceedings in the High Court and, subject to the **Magistrate's Courts Act**, to proceedings in subordinate courts. Where there is a special procedure prescribed by or under any other law, section 3 of the **Civil Procedure Act** provides that that special procedure is to be adopted. It therefore follows that unless certain provisions are incorporated by or imported into the **Appellate Jurisdiction Act**, the **Civil Procedure Act** is not the statute that regulates the procedure in the Court of Appeal. Even if this was not the position it is clear that enlargement of time under Order 50 Rule 6 of the **Civil Procedure Rules** is permitted only in cases where the limited time is fixed by the rules or summary notice or by order of the Court the definition of the Court being the High Court or subordinate courts.
13. The time limited for filing a memorandum of appeal is provided for under rule 82 of the **Court of Appeal Rules** and due to its centrality in the instant application it is worth reproducing in full. The said rule provides:

(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—

(a) a memorandum of appeal, in quadruplicate;

(b) the record of appeal, in quadruplicate;

(c) the prescribed fee; and

(d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.

(3) The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.

14. It is now well settled principle of law based on **Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992** that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.
15. Where a memorandum of appeal is not filed within the stipulated period the intending appellant may move the Court of Appeal under Rule 4 of the **Court of Appeal Rules** for extension of time within which to file a memorandum of appeal. The said rule provides:

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

16. “Court” is described under Rule 2 of the ***Court of Appeal Rules*** as meaning the “*Court of Appeal and includes a division thereof and a single judge exercising any power vested in him sitting alone*”. It follows that under Rule 4 aforesaid only the Court of Appeal can extend time.
17. A distinction must therefore be made between an application made for extension of time to file a Notice of Appeal out of time and where what is sought is extension of time to file a memorandum of appeal out of time. With respect to the former, section 7 of the ***Appellate Jurisdiction Act*** provides:

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.

18. It is clear that the High Court’s powers under section 7 aforesaid is limited to three instances and these are giving notice of intention to appeal from a judgment of the High Court and for making an application for leave to appeal or for a certificate that the case is fit for appeal. Nowhere is it mentioned that the High Court may extend time limited under rule 82(2) of the ***Court of Appeal Rules***.
19. Accordingly, it is my view and I so hold that the only provision under which time limited under Rule 82(2) may be extended is under Rule 4 of the said Rules or perhaps by invoking the provisions of sections 3A and 3B of the ***Appellate Jurisdiction Act***. In both instances, however, the jurisdiction is conferred upon the Court of Appeal and not the High Court.
20. With respect to the prayer for stay, it is clear that what the applicants are seeking is a stay of proceedings. This must be so because the applicants intend to appeal against a decision of this Court disallowing the application for judicial review. As there is no positive order against him capable of being executed, save for costs, it is doubtful whether the court would be amenable to grant a stay of execution as opposed to proceedings in such circumstances. See **Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63.**
21. The only order capable of being executed is the order for costs. However the said costs are yet to be taxed and the applicant will have to satisfy the principles under Order 42 rule 6(2) of the ***Civil Procedure Rules***. These principles are that the court must be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and 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. Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent have to be considered. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

22. It is the law that it is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* should remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Limited vs. Kibiru & Another [1986] KLR 410.**
23. In this case, there is no allegation at all that the respondent will be unable to repay the decretal sum if the same is paid over to the respondent. In fact the applicant cannot make such allegation since the costs are yet to be taxed.
24. With respect to the application for stay of proceedings I can do no better than to reproduce the Court of Appeal holding in **David Morton Silverstein vs. Atsango Chesoni Civil Application No. Nai. 189 of 2001[2002] 1 KLR 867; [2002] 1 EA 296** where the Court cited **Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another Civil Application No NAI 50 of 2001** and held:
- “... The onus of satisfying us on the second condition, that unless stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless...These remarks aptly apply to the application before us. What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory”.**
25. Similarly, it is my view that if the applicants’ appeal is allowed, the order dismissing their application will be reversed and the matter will be heard de novo. Accordingly, I am not convinced that it will be hard to undo the proceedings as contended on behalf of the applicants.
26. It must now be clear that the Notice of Motion dated 11th July, 2012 lacks merit.

ORDER

27. It follows that the said Motion is dismissed with costs to the interested parties.

Dated at Nairobi this 4th day of April 2014

G V ODUNGA

JUDGE

Delivered in the presence of Miss Simiyu for the Mrs Waiganjo for the Applicant