



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MISC. APPLICATION NO. 616 OF 2014**

**ANTHONY MAINA MUNYU .....1<sup>ST</sup> APPLICANT**

**JAMES MAINA MWANGI .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**GERALD NJUGUNA MBUGUA .....RESPONDENT**

**R U L I N G**

By an application of notice of motion dated 16<sup>th</sup> September 2014 filed on 16<sup>th</sup> September 2014 supported by the affidavit of Catherine Makau sworn on 16<sup>th</sup> September, 2014 which application was filed under certificate of urgency, the applicants Antony Maina Munyu and James Maina Mwangi seek from this court orders stay of execution pending appeal and secondly, leave to file an appeal against the ruling of the Honourable T.S. Nchoe delivered on 5<sup>th</sup> February 2014, plus costs of the application.

The application is based on the grounds that the ruling complained of was delivered in their absence hence they were unable to file an appeal within the stipulated period of time and that the court did not notify them of the said ruling. Secondly, that they are aggrieved by the said ruling and desire to appeal against it and delay in filing the application herein is not willful. That the intended appeal is notorious with a likelihood of success and that they are bound to suffer irreparable prejudice unless the orders sought are granted and that the respondents will not be prejudiced if the application is allowed.

Finally, that it is in the interest of justice that the application be allowed. In the affidavit of Catherine Makau advocate in support of the application, she depones that on 1<sup>st</sup> August 2013 the applicants applied to set aside both interlocutory judgment and final judgment before Hon. T. Nchoe in NRB CMCC 6800 of 2010 and upon the hearing, a ruling was set for 29<sup>th</sup> January 2014 but that on attending court on the scheduled date, they were informed that the ruling was not ready and that the same would be delivered on notice and it was not until 22<sup>nd</sup> August 2014 when they learnt of the outcome, dismissal of their application, upon receipt of a letter from the respondent's advocate with an accompanying decree. Further, that upon perusal of the court file, the advocates for the applicants found no formal proof proceedings and the judgment in the court file so they sought the applicants insured's instructions and they were instructed to apply for leave to appeal out of time. Further, she depones that as it was not the

applicant's fault, they should not be made to suffer irreparable loss and damage. She further depones that the intended appeal is meritorious.

The application was opposed by the respondent Gerald Njuguna Mbugua who filed replying affidavit sworn by Gachoka Mwangi Advocate on 22<sup>nd</sup> September 2014 urging the court to dismiss the applicants' application for being scandalous, an afterthought and embarrassing; that the applicants are guilty of laches and delay, the application amounts to abuse of court process; allowing it will highly prejudice the respondent and it is a delaying tactic intended to frustrate the respondent.

Counsel contends that it was the duty of the applicant to be vigilant and not wait for 8 months to get the outcome of an application to set aside judgment. He deposes that contrary to the allegations that there is neither interlocutory nor final judgment on record, the matter was formally proved on 16<sup>th</sup> May 2013 and judgment delivered on 12<sup>th</sup> June 2013, which judgment the applicants were seeking to set aside by their application dated 1<sup>st</sup> August 2013. That the application herein is intended to frustrate the respondent from reaping the fruits of a lawful judgment; and that the application is highly prejudicial to the respondent and prayed for its dismissal with costs to the respondent.

As earlier indicated, the notice of motion dated 16<sup>th</sup> September 2014 was filed under certificate of urgency. The same was placed before Hon. Justice Waweru (duty judge) on the same day in chambers for an ex parte hearing and for interim orders of stay in the first instance but Hon. Justice Waweru declined to grant ex parte stage and directed the file to be placed before me for further directions/orders on 23<sup>rd</sup> September 2014.

On 23<sup>rd</sup> September 2014, the parties appeared before me with Miss Makau for the applicants and Mr. Gachoka for the respondents and both advocates agreed to have the application heard inter partes on 14<sup>th</sup> October 2014 with leave being granted to the applicant to file supplementary affidavit and corresponding leave to the respondent to file further affidavit if need be. The parties agreed to have the notice of motion dated 16<sup>th</sup> September 2014 heard on 14<sup>th</sup> October 2014.

When the matter herein was called out for hearing on 14<sup>th</sup> October 2014, Miss Atisimin held brief for Mr. Kiamba for the applicant whereas Mr. Gachoka was present for the respondent. Miss Atisim sought an adjournment on the ground that Mr. Kiamba who had the conduct of the matter was engaged in Embu in another matter. Mr. Gachoka opposed the application for adjournment on the ground that the ground relied on was vague as it was not clear which matter was holding Mr. Kiamba in Embu, noting that Miss Makau was the one conducting the matter the last time parties were in court and that the matter having been filed under certificate of urgency, and having taken the date by consent, it was not proper for an adjournment to be granted for the sake of it.

Having considered the application for adjournment and the opposition thereto, I declined to grant the adjournment and ordered the matter to proceed at 11.00 a.m.

The applicants' counsel did not appear at 11.00 a.m. and the matter proceeded in their absence as there was no reason given for their non availability. Mr. Gachoka prayed for dismissal of the applicant's application not only for non attendance to prosecute it, but also on the grounds that it lacked merit and he relied on the replying affidavit sworn by himself on behalf of his client. He urged the court to find that on the prayer for stay, the applicants had not satisfied the court that – they had met the conditions necessary as set out in Order 42 of the Civil Procedure Rules.

Further, that the delay in filing the application herein was inordinate as it was filed 8 months after the order complained of was issued which delay he submitted, was inordinate in the circumstances. Further, that no security for costs was offered before seeking stay pending appeal. he relied on the 4 authorities filed with his replying affidavit and grounds of opposition dated 23<sup>rd</sup> September 2014 emphasizing that it had not been shown that the applicants will suffer any loss if stay is not granted; that the applicants were guilty of laches, had not provided security and that the orders sought would cause/occasion hardship to

the respondent and were unjustifiable.

I have carefully considered the applicants' application, the replying affidavit and grounds of opposition against the grant of the orders sought, the respondent's submissions and the respondent's cited authorities and applicable law relied on by the respondent and the applicants in their application dated 16<sup>th</sup> September 2014.

There are basically two prayers sought in this application. The first one is stay of execution of decree pending appeal against an order dismissing the applicant's application for setting aside of *ex parte* judgment in the subordinate court and secondly, leave to appeal out of the stipulated period.

I will first consider whether the applicants have satisfied the court on the prayers for stay pending the intended appeal.

The circumstances under which an order for stay of execution may issue pending appeal are set out in Order 42 rule 6 of the Civil Procedure Rules as follows:

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order.

(2) No order for stay of execution shall be made under Sub rule (1) unless – the court is satisfied that substantial total loss may result to the applicant unless the order is made and that the application has

b) been made without unreasonable delay;

and

c) 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 applicant's advocate deposes in her paragraph 12 is that the applicant's intended appeal is meritorious with a good probability of success. This plea endears itself to this court pursuant to the principle that if an appeal raises arguable points, the court should grant stay of execution sought for sufficient cause shown. The applicant further urges this court to grant the orders sought as they will suffer irreparable damage if the orders sought are not granted.

I have examined the decree dated 12<sup>th</sup> June 2013 and issued on 7<sup>th</sup> August 2014 which is a monetary decree for Sh. 816,215 plus costs of Sh. 88,310.00. the applicant has not in any way shown that if the decretal sum is paid out to the respondent before the intended appeal is heard and determined, and if thereafter the appeal succeeds, the impecunious circumstances of the respondent will not allow for him to refund the money paid to him, and to that extent, the appeal will be rendered nugatory.

With regard to whether the application has been made without unreasonable delay, the subject matter of this application was issued on 5<sup>th</sup> February 2014. The application herein was made on 16<sup>th</sup> September 2014 which was well over seven months. The reason given for the delay is that they were not aware of the ruling which was initially slated for 29<sup>th</sup> January 2014 when the court indicated that the same was not ready and that it would be delivered on notice but that no notice was issued to them and they only learnt of it when they received the respondent's advocates letter dated 22<sup>nd</sup> August 2014. In the said letters, it was indicated among others that as the respondent had now been re-examined by the applicants' doctor and the very serious nature of his injuries confirmed, they should pay by 27<sup>th</sup> August 2014 failure to which a declaratory suit would be filed. There was no threat of execution therein. The applicants allege that the case has no judgment as only interlocutory judgment had been entered. Even when the decree as attached to the respondent's letter of 22<sup>nd</sup> August 2014 clearly show that there was an award for

special damages, general damages and even costs of the suit assessed.

It is the same judgment that the applicant sought to set aside yet, apparently, they have no idea whether it was interlocutory or final judgment. To my mind, this is to say the least a sign of complacency on the part of the applicants' advocate and an indication that they have not taken this matter with the seriousness it deserves as demonstrated by their failure to attend court on the hearing date for this application without supplying the court with any plausible reasons to warrant an adjournment of an application they had filed under certificate of urgency and even sought to obtain *ex parte* interim orders of stay of execution.

Further complacency is demonstrated by their lack of interest in seeking to know when the ruling would be delivered for over 7 months yet the ruling was delivered just 6 days after the initial scheduled date. There is no evidence exhibited of the effort made to know from court the outcome of their application. I therefore consider the delay in lodging this application for stay unreasonable and unexplained; and further, that the delay was actuated by lack of interest rather than lack of information on when the same would be delivered, which information was readily available in court.

The applicants herein, apparently, oblivious of Order 42 (2) (c) are seeking an unconditional stay of execution pending appeal. Regrettably, this court has no jurisdiction to order an unconditional stay of execution under the said Rule, which ousts the unfettered discretion of this court to the extent that -

- (1) the applicant must show that they will suffer substantial loss if the order of stay of execution is not granted;
- (2) that the application has been made timeously and without undue/unexplained delay;
- (3) That they must be ready to furnish security for the due performance of the decree. (See **HCCA 21/2010 Co-operative Insurance Co. (K) Ltd – Vs – David Mbugua Ngene;** and
- (4) Establishing sufficient cause notwithstanding the unexplained delay occasioned in the filing of the application herein, it would have been expected that the applicant would offer security for costs for the due performance of such decree or order.

There is no deposition in the supporting affidavit or grounds in support of the application for stay and or demonstration of the applicants' willingness and readiness or ability or even inability thereof to furnish any security as the court may order. In other words, the applicants appear unmoved that the subject matter of the dispute is preserved so that the rights of the respondents/successful litigant are also safeguarded and the appeal, if successful will not be rendered nugatory. The applicants and their advocates are enjoined to assist the court achieve or further overriding objective stipulated in Sections 1A and 1B of the Civil Procedure Act. The just determination of a dispute goes both ways for the appellant and respondent as well. For those aims stipulated in the oxygen principle to be attained, the applicants have to play a significant role. In this case they have failed to assist the court to exercise any discretion in their favour.

In **Machura –Vs – East African Standard No. 2[2002] KLR 63** it was held thus:-

***“To be obsessed with the protection of an appellant or intending appellant in total disregard or ..... 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 juridical discretion... the courts 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 court.”***

Not even a deposition, upon reasonable grounds that the respondent will not be in a position to reimburse the decretal sum if it is paid over to him and the pending appeal was to succeed was made.

The failure to satisfy the conditions under Order 42 Rule 6 of the Civil Procedure Rules and or showing

any sufficient cause or reason to enable this court invoke the provisions of Sections 1A and 1B of the Civil Procedure Act in the applicant's favour means that no conditions precedent for granting stay of execution pending appeal have been met, following the commanding provisions of the said order which commences with a negative preamble that:

***“No order for stay of execution shall be made under subrule 1 unless ...”***

Consequently, I decline to grant the order of stay of execution of decree and judgment passed in Milimani CMCC 6800 of 2010 pending hearing and determination of the intended appeal. All the authorities cited by the respondent to wit HCCA 21/2010, HCCA 788/2007, HCCA 28/2007 and HCCA 119/1996 were considered and found to be good law applicable to application for stay pending appeal and though persuasive I uphold the principles espoused therein.

On the prayer for leave to appeal out of time, Section 79G of the Civil Procedure Act is the applicable law and it provides that,

***“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 to the Section, an appeal may be admitted out of time if the applicant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.

The Supreme Court in the **Nicholas Kiptoo Arap Korir Salat – Vs – IEBC & 7 Others SC App 16/2014** laid down the following as the underlying principles that a court should consider in exercising of discretion to extend time.

- a) 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;
- b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- d) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e) Where there will be any prejudice suffered by the respondent if the extension is granted; as to whether the application has been brought without undue delay; and whether in certain cases like election petitions, public interest should be a consideration for extending time.

The issue for my determination is, therefore, whether the applicant has satisfied the above conditions for grant of leave to appeal out of time.

In this case, the applicants need to show that they have an arguable appeal or that an appeal is not frivolous. The applicants seek leave to file an appeal arising from the magistrate's order dismissing their application to set aside *ex parte* judgement.

Although at this stage, it may not be necessary to determine whether the intended appeal is arguable and or not frivolous, the cardinal principle I employ is to accord every person an opportunity to ventilate their grievances where they are aggrieved by a decision of the court below. By so doing, this court will be exercising its discretion judiciously, to ensure that the applicants are not driven or ousted from the

judgment seat. I see no prejudice to be suffered by the respondent if this prayer is granted.

Furthermore, the Supreme Court has not commanded that all the above principles apply in one given case. In this case therefore, although it is clear that the application has not been brought without undue delay and which delay has not been sufficiently explained, I exercise my discretion and grant the applicants an extension of time within which they should file their intended appeal. I accordingly order that the intended memorandum of appeal shall be filed within 14 days from the date hereof failure to which the order herein lapses.

In the end, the applicants' application for stay of execution of decree pending hearing and determination of the intended appeal fails and the application for leave to file an appeal out of time succeeds. Costs of the application herein shall be in the intended appeal.

**Dated, signed and delivered at Nairobi this 19<sup>th</sup> Day of November, 2014.**

**R.E. ABURILI**

**JUDGE**