



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
Miscellaneous Application 394 of 2012

ISAAC NJIRU.....APPLICANT

VERSUS

KAGAARI SOUTH FARMERS CO-OP SOC. LTD..... RESPONDENT

RULING

By a Notice of Motion dated 17th July 2012 expressed to be brought under the provisions of Order 42 rule 6 and Order 50 rule 6 of the Civil Procedure Rules the applicant seeks the following orders:

- a) **That application be certified urgent and be heard Ex-parte in the first instance.**
- b) **That there be a stay of execution until the disposal of this case.**
- c) **That time be extended within which Applicant/Appellant may file his appeal.**
- d) **The costs of this application be provided for.**

The application is supported by an affidavit sworn by **Isaac Njiru**, the applicant on 7th July 2012. According to the applicant, his Appeal No. 85 of 2012 was withdrawn by his advocate due to technical error and therefore under section (sic) 22(3)(d) of the Constitution and overriding objective principle he is allowed to file his appeal afresh. According to him the respondent in an attempt to win the case on default and not on merit has raised more than six primary objections. The said appeal, according to the applicant, was filed by P N Mugo Advocate on 7th March 2012 who had before doing so applied for renewal of his practising certificate which application was erroneously rejected by the Law Society of Kenya. However as the seven days that was granted for filing the appeal was expiring the said advocate did file the said appeal on 7th March 2012 and was eventually allowed to apply for the said practising certificate the following day on 8th March 2012. According to the applicant the confusion in the issuance of the practising certificate is exemplified by the fact that two certificates were issued bearing different dates while in respect of one applicant though the application was made late the certificate was backdated to 1st January 2012. According to the applicant if he is sent to prison, his appeal will be rendered nugatory since he is 73 years old and cannot survive in prison. The respondent, on the other hand stands to suffer no loss or damage if the application is allowed. He further deposes that the respondent has sworn to send him to jail to suffer the same fate that has fallen his workmates. In his view he would be condemned un heard in breach of justice.

The respondent in opposition to the application filed what, according to it were grounds of opposition 16 in number. It is important to set them out for one to appreciate their full import. The said grounds were as follows:

- 1. That the application is a gross abuse of the court process whose sole aim is to delay and/or prevent the respondent from enjoying fruits of a lawful Award of the Co-operative Tribunal.**
- 2. That there is absolutely no urgency in the Application by the applicant reason being that he is intending to Appeal an Award given in 2009, between 2009 to date the Applicant's Advocate has engaged in several acts which are evidence of the fact that they are simply buying time;**
- 3. That the argument that the Appellants' Appeals have filed to take off because of their Advocate's mistakes and should not be visited upon them should be disregarded based on the ruling by Justice Ringera (as he then was) on page 4 of HCCC MISC APPL 308 of 2002, Charles Omwata Omowyo Vs African highlands and Procedure Co. Ltd. "Time had come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavour"**
- 4. That the intended Appeal stems from Civil Appeal No. 337 of 2009 (hereafter "The Said Appeal) which was brought to this court under certificate on 1st July, 2009 via a Notice of Motion dated 1st July, 2009 where lady Justice H. M. Okwengu allowed the Appellant to file an Appeal on the following terms;-**
 - a. The Appellant to deposit Kshs. 50,000/= into court as security.**
 - b. The Appellant to file and serve a record of Appeal within 4 months from 21st October, 2009 and take all necessary action to facilitate the speedy disposal of the appeal; and**
 - c. If the appeal is not disposed of within 12 months from 21st October, 2009 the order for stay of execution shall stand discharged unless otherwise extended by the Court.**
- 5. That Appellant never complied with any of the conditions in para 3 above and when the said Appeal was finally lodged the Appellant had included an Award which this Court had no jurisdiction to entertain;**
- 6. That upon objection by the respondent's Advocate, this Court advised the Appellant's Advocate that it lacked jurisdiction to entertain the said Appeal as drawn and allowed him to file an Amended Memo of Appeal so that it would be compliant;**
- 7. That the Appellant's Advocate wilfully declined to Amend the Appellant's Memo of Appeal 3 times despite the fact that this court kept telling him that it did not have jurisdiction to entertain the said Appeal as drawn(attached hereto are copies of bundles of the Memorandums of Appeals marked "KS");**
- 8. That after allowing the Appellant's Advocate to file the 4th memorandum of Appeal this Court directed the respondent's Advocate to file submissions to dismiss the said Appeal in the event it was not compliant;**
- 9. That the Appellant's Advocate is not a novice and/or layman who is ignorant of the law, hence in filing the initial Memo of Appeal in 2009 he knew it was not compliant giving rise to the belief that he is buying time, waiting for his clients (who he claims are no their last legs to finish their last legs and leave the Respondent with an Award, but no one to execute against;**
- 10. That despite being accommodated 4 times by this Court, the Appellant's Advocate refused totally, to comply with this Court's directive and when the Respondent's Advocate was to argue his**

case for dismissal of the said Appeal, the Appellant Advocate after being informed that he either withdraws the said Appeal or it'll be dismissed, ended up giving this Court a condition on which he would withdraw "that he be allowed to re-file the Appeal afresh";

11. That this Court accommodated the Appellant's Advocate yet again and allowed him to re-file the Appeal;

12. That the Appellant's Advocate knows very well that one needs a practicing Certificate to be able to act as an Advocate but despite so knowing the Appellant's Advocate proceeded to file an Appeal via a Memorandum of Appeal dated 6th march, 2012 contained in Civil Appeal no. 85 of 2012 (the "2nd Appeal") without a Practicing Certificate for 2012;

13. That when the Respondent Advocate's application to dismiss the 2nd Appeal came up for hearing the 1st time, the Appellant's Advocate wilfully absented himself;

14. That when the Respondent Advocate's application to dismiss the 2nd Appeal came up for hearing the 2nd time the Appellant's Advocate admitted that the application for dismissal had merit and he withdrew the 2nd Appeal "to save the court's time" as he put it, it is therefore shocking he is again trying to institute the same Appeal;

15. That the Respondent and his Advocate have severally averred that the respondents are old and on their last legs(whose meaning may mean the Respondents are about to die) hence explaining why the Respondents' Advocate is out to delay the execution of the Tribunal's Award;

16. That the respondent in para 5(c) of his Supporting Affidavit sworn on 17th July, 20102 claims that the "Respondent has become vexatious litigation as he has raised more than 6 primary objections...", a Respondent reacts to applications and cannot be a vexatious litigant;

From the foregoing one can immediately see that the respondent under the guise of grounds of opposition filed statement of facts similar to an affidavit save that they were not on oath.

It is important at this stage to distinguish grounds of opposition from a replying affidavit. Affidavit is evidence and where a respondent intends to dispute factual averments in the supporting affidavit he should file a replying affidavit. Where, however, it is intended to oppose an application on legal issues only, a respondent should file a statement of grounds of opposition. Where, on the other hand, a respondent intends to oppose an application on both law and fact, he may file both a replying affidavit and grounds of opposition. However, the Courts do frown upon affidavits which are couched in legal pronouncements rather than factual matters. Similarly statements of grounds of opposition which are meant to controvert factual matters in a supporting affidavit are unacceptable. Without the facts being contained in an affidavit the same are worthless.

Turning back to the merits of the present application, in an application of this nature, the matters to be taken into consideration are those which were set out in Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, Civil Application No. 255 of 1997 and these are the length of the delay, the reason for the delay, the possibility/chances of appeal succeeding and the degree of prejudice to the respondent. With respect to the first ground, the law as I understand it is that where there has been a delay of whatever period, some explanation for the same must be furnished. Dealing with the same issue, Githinji, JA in Kenya Canners Limited vs. Titus Muiruri Doge Civil Application No. Nai. 119 of 1996 aptly expressed himself as follows:

"The power given by rule 4 of the Court of Appeal Rules to extend time is discretionary which discretion should be exercised judicially. However in exercising its discretion the Court is guided by such factors as the merits or otherwise of the intended appeal, the prejudice that the Respondent would suffer if the application is allowed and the length of the delay...For the Court to exercise its discretion judicially, the applicant should at least inform the Court of the nature of the dispute

between the parties, the subject matter of the intended appeal and the magnitude of the loss that the applicant is likely to suffer if time to file the appeal is not extended. The applicant should place before the Court relevant material such as a copy of the Judgement intended to be appealed from, so that the Court could make its own assessment of all surrounding circumstances including the importance of the intended appeal to the applicant”. (Underlining mine).

I must say with due respect to the parties herein that the exact factual position of the dispute is difficult to decipher based on the scanty material which was availed by both parties. Doing the based I can on the said material, it would appear that the applicant had been given an extension of time to file an appeal which according to him he did but the same had to be withdrawn after it emerged that the appeal was filed before his advocate obtained a valid certificate. That appeal was withdrawn on 7th July 2012 while the present application was filed on 17th July 2012 which was some 10 days later. Although there was no explanation offered for the said period, in my view the period was not that inordinate as to be fatal to the application. On the chances of success of the intended appeal, I do take cognisance of the fact that the applicant had been granted an extension of time earlier which would imply that the court must have been satisfied that the appeal was not frivolous. On prejudice to the respondent, since the respondent has not controverted the averment that it stands to suffer any prejudice, I have no material on which I can find otherwise. Accordingly I am satisfied that the applicant’s prayer for extension of time is merited and time is hereby extended to the applicant to file his appeal within 7 days.

With respect to the limb dealing with stay of execution for me to grant the same I must be satisfied that the applicant stands to suffer substantial loss. In the absence of any material relating to the nature of the decision intended to be appealed against I am unable to do so. If the applicant’s state of health does not augur well for his being committal to jail there are in my view appropriate mechanisms available to him to enable him advance his case other than by way of stay pending appeal. Accordingly I decline grant the stay of execution sought. The costs of this application will however be in the appeal.

Dated at Nairobi this 24th day of September 2012

G V ODUNGA
JUDGE

Delivered in the presence of
Mr. P. N. Mugo for the Applicant
Mr. Mbutia for the Respondent