REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 75 of 2012

RICHARD NGETICH……………...…….……….1ST APPELLANT
NJOROGE IRANYA……………...………...……..2ND APPELLANT
VERSUS
FRANCIS VOZENA KIDIGA………..…….……….RESPONDENT

RULING

Before me is the application dated 21/6/2012. The applicant prays that the court do admit the appeal filed on 5/4/2012 out of time and that there be stay of execution of the judgment delivered on 2/3/2012 in Nakuru CMCC 459/2009, pending hearing of the appeal. The judgment having been delivered on 2/3/2012, the time for filing appeal lapsed on 2/4/2012, but the applicants' claims to have learnt of the judgment on 30/12/2012, a Friday, and they were not able to file the appeal. The appeal was filed on 5/4/2012, two days after the time lapsed and the applicant is asking the court to overlook that mistake by invoking **Article 159(d)** of the **Constitution**. The applicants also urged the court to consider the proviso to **Section 79G** of the **Civil Procedure Act**, which allows the court to allow an appeal to be filed out of time if the court is satisfied that there is good reason or for sufficient cause. Mr. Kinyanjui, the applicants' counsel, also urged that under **Order 21 Rule 21** of the **Civil Procedure Rules,** the court was under a duty to notify the applicant of the delivery of judgment which it did not do. He also blames the respondent for not notifying the applicants of the judgment. Counsel relied on the decision of the court in **Pan African Paper Mills E.A. Ltd v Martin Cheroben Masai, CMisc. 85/2006**, where the High Court held that it was an error for the trial court to fail to notify the applicant of the date of judgment. The applicant contends that he has shown sufficient cause why the appeal should be filed out of time and stay granted because the plaintiff is not a man of means and if stay is not granted, it will be an exercise in futility. Counsel also relied on the decisions in;

1. **Bethuel Muiruri Benjamin v Development Bank of Kenya, CA 496/00;**

2. **Joseph Njenga Kamau v General Motors Ltd CA 453/08;**

3. **Muhamed Muigai & Co. Advocates v Samwel Kimani Macharia.**

Mr. Kinyanjui urged the court to strike out the replying affidavit of the respondent for being defective in that it is dated 25/6/09, yet facts alluded to in this application occurred in 2012. He also urged that the replying affidavit and the verifying affidavit to the plaint were not signed by the same hand yet purportedly sworn by the respondent and it offends provisions of the **Oaths and Statutory Declaration Act Cap 15, Laws of Kenya**.

The application was opposed. The respondent filed an affidavit dated 25/6/2012 and counsel, Mr. Wambeyi submitted that there is no suit upon which the application can be granted; that the application violates **Section 79G** of the **Civil Procedure Act** and it is not a mere procedural technicality; that the

applicants should have filed a miscellaneous application seeking leave, like that the **Pan African Mills Ltd** case which was brought by way of a miscellaneous application. Counsel also referred the court to the correspondences between counsel which show that the application used the wrong address when addressing the respondent's counsel and blamed the delay on the applicants' counsel.

Before the applicants came to this court they filed an application dated 4/4/2012 before the trial magistrate. The magistrate rendered his ruling on 15/6/2012 and I do agree with that ruling that the court had no jurisdiction to grant stay where there was no appeal. The applicants moved to this court which is the correct forum.

I have now considered the rival arguments. I start by considering whether the respondent's affidavit dated 25/6/2009, is defective. It is dated 25/6/2009, but the issues under consideration herein arose in 2012. It is filed in court on 29/6/2012. It is a reply to the application dated 20/6/2012 and supported by an affidavit of the same day. In my view, I believe Mr. Wambeyi's submission that the year "2009" on the replying affidavit of the respondent is a typographical error and this court will overlook it. I believe the affidavit was sworn in 2012 and it addresses the issues that occurred in 2012. The objection is overruled.

As to whether the respondent signed the replying affidavit. I have seen the signature on the said replying affidavit dated 25/10/2009, the verifying affidavit sworn by the respondent in March 2009. Even on the naked eye, the two signatures are remarkably different and it is doubtful that they were made by the same hand. Somebody tried in vain to sign like the original signature on the verifying affidavit of 19/3/2009. I must strike off the replying affidavit dated 25/10/2009 due to the variation in signatures with that of 1913/09.

Even though I have struck off the respondent's affidavit, the respondent addressed issues of law and I will go ahead to consider these issues. Does the application offend **Section 79G** of the **Civil Procedure Act**? The said Section reads:-

"Every appeal from a subordinate court to 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 of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time"

In the proviso to the above **Section**, the court has the discretion to admit an appeal out of time if the appellant satisfies the court that he had good and sufficient cause that led to the delay. In this case, the delay was only two days. The appeal should have been filed by 2/4/2012 and it was filed on 5/4/2012. The delay was not inordinate.

The reason that the applicants advanced for the delay was that they were not aware of the judgment having been delivered because both the respondent and the court did not communicate to them the date of delivery of the said judgment. The respondent did not address that issue. There is no evidence that the respondent had notified the applicants of the delivery of judgment. Secondly, the court's attention was drawn to the correspondences addressed to Wambeyi Advocate by the applicant's counsel. The address in the letters is **15684, Nakuru**. From the replying affidavit dated 25/6/2009, Mr. Wambeyi's postal address is **17765, Nakuru.** However, I have seen the verifying affidavit filed with the plaint dated 19th March 2009. Wambeyi Advocate's address is shown as Box 15864, Nakuru. It is the firm of Wambeyi which first misled the respondent by giving a different address. It seems the applicant's letters never reached Wambeyi & Co. Advocates because of the wrong address and hence the disconnect in communication. The applicants are not to blame for that mistake. That error can only be attributed to the firm of Wambeyi & Co. Advocates.

If the court were to go ahead and strike out this appeal because there was no application brought by way of miscellaneous application seeking leave to file it out of time, it would mean that the applicants start the

process afresh, file an application seeking leave of the court to file appeal out of time by way of miscellaneous application and if it is granted, then they would file an appeal. That would be a long winded process, time wasting and costly. **Article 159** of the **Constitution, Section 1A & B** of the **Civil Procedure Act** enjoins this court to do justice without undue regard to technicalities. The question I ask myself is whether any prejudice will be suffered by the respondent if the order sought is granted. So far, the respondent has not demonstrated what prejudice he will suffer if the appeal is deemed as properly and duly filed out of time. The applicant has a right of appeal while the respondent has the right to enjoy the fruits of his judgment. The court has the duty to make a delicate balance between the two competing rights. The applicant has demonstrated a keen interest in preferring an appeal and the error of failing to move the court by way of a miscellaneous application does not in any way prejudice the respondent.

The delay in filing an appeal was only two days. The delay is not inordinate and for the above reasons, it is my view that the respondent will not suffer any prejudice if the order allowing the appeal to be filed out of time is allowed and the court to deem the appeal filed on 5/4/2012 as duly filed.

Whether an order of stay can be granted; The principles for grant of an order of stay under **Order 42 Rule 6** of the **Civil Procedure Rules** are clear; that the application should have been filed without undue delay; that substantial loss will occur if stay is not granted and lastly, the applicant should provide security for due performance of the decree.

As earlier observed, the application was brought without undue delay. The decree is for over Kshs.500,000/-. The applicant stated that the respondent is not able to repay the said sum if it were paid to him and the appeal succeded. The respondent did not reply. This court has no idea whether the respondent is a man of straw or is capable of repaying the decretal sum if it were paid to him. The applicants have not offered any security for due performance of the decree and in its discretion, the court will give a conditional stay order.

In the end, the court will allow the application and will deem the appeal filed on 5/3/2012 as properly on record and duly filed. The same should be served on the respondent within 14 days hereof. It is further ordered that there be stay of execution on condition that the applicants, do within 14 days of the date hereof, deposit the entire decretal sum in an interest earning account, in the joint names of the counsel for the parties. In default, the stay order do vacate automatically. Costs to abide the appeal.

DATED and DELIVERED this 19th day of December, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:
Mr. Odhiambo for the appellants

Mr. Kamau holding brief Tuiyot for the respondent

Kennedy – Court Clerk