



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NUMBER 1165 OF 2003

JOHN BOSCO NGETA MAUNDU.....RESPONDENT/PLAINTIFF

VERSUS

WILLIAM WAMBUA KIWIA.1ST DEFENDANT
CHARLES MUTUKU. APPLICANT/2ND DEFENDANT
BAUMANN'S LTD. 3RD DEFENDANT
THE HON. ATTORNEY GENERAL. 4TH DEFENDANT

RULING

Before me is a Chamber Summons dated 10th December, 2008 filed by J M Nyaega & Co. Advocates for the 2nd defendant/applicant who is as Charles Mutuku. The application was filed under Order 3 rule 9A and Order 21 rule 22(1) of the Civil Procedure Rules, section 3A and 63(e) of the Civil Procedure Act (**Cap 21 Laws of Kenya**) as well as section 7 of the Appellate Jurisdiction Act (Cap 9).

The application has 6 prayers, three of which have been spent. They are as follows: -

1. *(spent)*
2. *(spent)*
3. *(spent)*
4. ***That there be a stay of execution of the judgment dated 10th March, 2003 and all consequent decrees thereon pending the hearing and determination of the applicants intended appeal in the Court of Appeal.***
5. ***That the Honourable Court be pleased to extend time to the applicant to file Notice of Intention to appeal.***
6. ***That costs of this application be provided for.***

The application has grounds on the face of the Chamber Summons. It was filed with a supporting affidavit sworn by the applicant on 10th December, 2008. The grounds of the application are: -

- (a) ***That the 2nd defendant being dissatisfied with the order of dismissal of his application for review had instructed the law firm of Nyadieka & Associates Advocates to appeal on that decision.***

- (b) *That the 2nd defendant had since discovered that the said firm had not followed his instructions and had not, to the date of filing this application, filed the Notice of Appeal within the requisite time.*
- (c) *That the 2nd defendant has now instructed the law firm of J M Nyaega to take over the conduct of this matter on his behalf and handle the appeal.*
- (d) *That it is mandatory that leave of the court be sought to come on record and also to file Notice of Appeal out of time.*
- (e) *That the 2nd defendant is apprehensive that unless orders of stay are granted in terms of the orders sought the intended appeal will be rendered nugatory, as the plaintiff has commenced execution proceedings.*
- (f) *That the 2nd defendant's appeal has great chances of success.*
- (g) *That it is therefore, important that the orders sought be granted as the 2nd defendant will otherwise suffer irreparable loss.*

It is imperative to note that prayer 2 of the application was for the present advocates to come on record. They were allowed to come on record.

The supporting affidavit gives the circumstances under which this application was filed. It annexes "CMI" which is a notice by the plaintiff to the applicant dated 13th December, 2008 to show cause why he should not be committed to civil jail in execution of decree for failing to pay the decretal amount, interest, costs of execution, and court collection fees totaling Ksh.2,236,280/-. It also annexes "CM2" which is an undated notice of appeal drawn by J M Nyaega & Company Advocates on behalf of the applicant.

The applicant through counsel also filed written submissions on 8th October 2010. It was contended that prayers 1, 2 and 3 of the application had been dealt with and that it was prayers 4, 5, 6 which were for determination. It was contended that the court had granted leave to the applicant to rely also on Order 41 rule 4 (1) of the Civil Procedure Rules by an order of 4th February, 2010.

On prayer 5 for extension of time to give notice of intention to appeal, counsel emphasized the provisions of rule 74 of the Court of Appeal Rules which states as follows:-

74 (1) any person who desires to appeal to the court shall give notice in writing which shall be lodged in duplicate with the registrar of the superior court.

(2) every such notice shall, subject to rules 82 and 94 be so lodged within 14 days of the date of the decision against which it is desired to appeal.

It was argued that notice of appeal herein was required to be filed within 14 days of the order made by Osiemo J, on 17th October, 2008. This was not done due to reasons stated in paragraphs 6, 7, 8 and 9 of the supporting affidavit. Counsel relied on section 7 of the Appellate Jurisdiction Act (Cap 9 Laws of Kenya) and argued that the High Court had jurisdiction to extend the time for giving notice of intention to appeal.

Reliance was placed on the publication **Judicial Hints on Civil Procedure by Justice Kuloba at page 227** wherein the learned author stated that appellate jurisdiction springs from statute and that an applicant may only be heard in the Court of Appeal if the provisions of the Appellate Jurisdiction Act (Cap 9) had been complied with.

Reliance was placed on the case of **Charagu Versus Kaburu [1986] KLR** at page 443 wherein Hancox JA, allowed the filing of a notice of appeal despite a delay of 2 months. Counsel urged this court to find that the delay herein, was not inordinate. He also urged the court to find merits in the application and extend the time for filing the notice of appeal.

On prayer 4, for stay of execution of the judgment dated 10th March 2003, and all consequential decrees thereon pending the hearing and determination of the intended appeal, the applicant's counsel firstly relied on Order 41 rule 4(1) of the Civil Procedure Rules. The said rule provides: -

4 (1) 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, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

It was contended that the applicant had a right to apply for stay of execution under the above rule. It was contended also that the considerations for grant of stay were firstly, where the applicant satisfied the court that substantial loss might result unless the stay order was granted. Secondly, the applicant had to show that the application had been made without unreasonable delay. Thirdly, that such security as the court orders for due performance of the decree holder has been given by the applicant.

On substantial loss, it was contended that the judgment creditor herein had already made several attempts to have the applicant arrested in the execution of the decree. It was argued that one of such attempt was made in blatant violation of a stay order issued by Justice Kamoni. It was the contention that if the applicant was now arrested pursuant the execution of decree of the court, he would suffer substantial loss.

It was also contended that such arrest in execution of decree herein would result in violation of Article 2(6) of the Constitution of Kenya 2010 which applied International Treaties ratified by Kenya. It was contended that such arrest would specifically violate the United Nations Convention on Civil and Political Rights which was ratified by Kenya on 1st May, 1972. It was urged that Article 11 of the Convention provides that no one could be imprisonment on the grounds of inability to settle a civil debt. Reliance was placed on the case of **Re-Ziporrah Wambui Mathara 2010 eKLR** in which Justice Koome, on 24th September 2010, upheld the provisions of the above Convention. It was the argument that the court found that if a party was deprived of his basic freedom by way of enforcement of civil debt through imprisonment, that meant that the ability to move and seek means and ways of repaying the debt was also curtailed.

On provision of security, it was contended that rule 4(2) of Order 41 of the Civil Procedure Rules did not require that the applicant must deposit the entire decretal sum. Reliance was placed on the case of **Butt Versus Rent Restriction Tribunal [1982] KLR 417** wherein the Court of Appeal listed the considerations on which application for stay of execution can be granted.

On the issue of making the application without unreasonable delay, it was contended that the decision in question was made on 17th October, 2008 and the present application was filed on 10th December, 2008. Though there was a delay, it was not inordinate. Reliance was placed on the case of **Tobias Ongani & 5 Others Versus Kenya Airways [2001] eKLR** where Justice Mbogholi stated, inter alia, as follows: -

“An order for stay of execution does not deprive a decree holder of the fruits of the said decree. It merely delays such an execution in the event that the appeal does not succeed and in a decree such as the one in issue the delay can always be compensated by an award of interest”.

It was argued that any delay in filling the application herein had been explained in the supporting affidavit in the application, and the delay was not inordinate.

Counsel contended that if stay was not granted, then the intended appeal would be rendered nugatory.

The application is opposed. Grounds of opposition dated 26th January, 2010 were filed on the same date by M/s Muema Kitulu & Co. Advocates for the plaintiff/respondent. I will reproduce the said grounds of opposition hereunder.

They are:-

- 1. The application herein is fatally defective in that the applicant has not demonstrated that he has sought or that he intends to seek stay of execution in the Court of Appeal contrary to the provisions of order 21 rule 22 of the Civil Procedure Rules.***
- 2. The application herein is fatally defective in that the applicant does not demonstrate what loss if any he will suffer if the application is disallowed.***
- 3. The application herein is fatally defective in that the applicant has not demonstrated the respondent's impecuniousness to the extent that he cannot compensate the applicant the total decretal sum if the appeal succeeds.***
- 4. The present application is based on gross misapprehension of the law in that the present application cannot be premised on the merits of the intended appeal.***
- 5. The present application is based on flawed understanding of the law in that the alleged incompetence or inaction of a counsel cannot be the basis for allowing for such an application.***
- 6. The present application is untenable in law in that it makes no offer as to costs nor does the applicant furnish any security for the decretal sum.***
- 7. The applicant misled this honourable court and enjoys interim orders from the vacation judge after failing to disclose facts to this Honourable court and had the said facts been brought to the attention of the vacation judge, the interim orders would not have been allowed.***
- 8. Without prejudice to the foregoing, the application herein is untenable in law in that it has not demonstrated sufficient cause for this honourable court to issue the orders sought nor does it meet the basic principles for granting a stay of execution pending appeal.***
- 9. Also without prejudice to the foregoing, the application herein is frivolous and an abuse of court process in that the judgment sought to be reviewed was issued on 10th March 2003 and therefore, clearly the present application has not been brought without delay, that it is a mere afterthought and an attempt to deny the plaintiff/respondent the fruits of a judgment justly obtained.***

The plaintiff also through their counsel on 14th September 2010, filed written submissions to the application. It was contended that in March 2003, Justice Osiemo awarded the plaintiff the sum of Ksh.800,000/- as general and special damages plus costs and interests. This award was issued against the 1st defendant (**William Wambua Kiwia**), the 2nd defendant (**Charles Mutuku who is the present applicant**), and the 3rd defendant (**Baumanns Limited**) jointly and severally. That the sum of Ksh.500,000/- only was paid by the 2nd defendant in 2010. That the amount owing had as at 22nd December 2008, accumulated to Ksh.2,243,938.80.

It was contended that the applicant filed an application for stay of execution 30 months after

judgment was delivered. He did not prosecute the same until 17th April, 2008 and the same was dismissed on 17th October, 2008. Subsequent to that dismissal, the applicant filed the present application dated 10th December, 2008 for leave to change advocates and for stay of execution pending appeal, as well as for extension of time to file notice of appeal.

It was contended that the applicant had filed several applications for stay of execution. An application dated 22nd December, 2008 was filed by the applicant. Interim stay was granted and the application fixed for inter partes hearing on 26th January 2009. The said application, however, for various reasons was not heard. It was dismissed on 27th July 2009, but later reinstated on 9th October, 2009.

The applicant also filed another application dated 29th July, 2009 for stay of execution under certificate of urgency. The said orders of stay were not granted. A further application dated 11th November, 2009 also seeking stay of execution was filed by the applicant. This multiplicity of applications for stay of execution, demonstrated that the applicant merely wanted the court to grant him stay for the sake of it.

On the present application for stay of execution, counsel argued that the considerations to be taken by the court were well settled. Reliance was placed on the case of **Halai & Another Versus Thornton (1963) Ltd [1990] KLR 355** where the parameters for grant of stay of execution were given. Firstly, the court stated that it had discretion to grant stay of execution. However, an applicant had to demonstrate a sufficient cause. Secondly, the court must be satisfied that substantial loss would follow from a refusal to grant stay. Thirdly, the applicant must furnish security. Finally, the application must be made without unreasonable delay.

It was contended that the applicant herein was guilty of inordinate delay in bringing the present application. He had come to court nine years after the judgment. He had therefore, not demonstrated sufficient cause to interrupt execution of a judgment issued more than nine years ago. Reliance was also placed on the case of **Joseph Kahugu Wakari Versus Barclays Bank Limited Civil Appeal No. Nairobi 237 of 1998 (UR)**.

On substantial loss, it was contended that circumstances of each case had had to be taken into account. Reliance was placed on the case of **Mungai Versus Ndaba [1981] KLR 367** where the Court of Appeal held that the circumstances and facts of each case must be looked at individually in exercising the discretion to grant stay. It was contended that the applicant had not demonstrated how his appeal would be rendered nugatory if the prayers sought were denied. Therefore, this court was not able to exercise its discretion on the ground of substantial loss to be suffered by the applicant.

On the issue of bringing the application without unreasonable delay, it was argued that the plaintiff's suit was determined by 10th of March 2003. The application to set aside judgment or to review judgment was filed on 28th September, 2005 and was not prosecuted until 17th April 2008. The present application was filed on 10th December, 2008 which was 2 months after the ruling of Justice Osiemo delivered on 17th October, 2008. It was argued that the delay of the applicant in making the application was not only inordinate but also reckless.

On the security for the decretal sum, it was argued that the Ksh.500,000/- paid by the applicant was merely paid pursuant to a court order made on 14th April, 2010 which was seven years after judgment was entered. No security had been offered. In any case, execution had been vigorously resisted by the applicant for the past 4½ years thus denying the plaintiff/decreed holder the fruits of the judgment. . It was argued that the financial standing of the decree holder was irrelevant in considering such an application for stay. Reliance was placed on the case of **Jethwa Versus Shah [1989] KLR 1988**. In any case, it was argued that the applicant had not demonstrated that the decree holder was of poor financial standing.

It was further contended that this application is frivolous and vexatious. Reliance was placed on the case of **Mpaka Road Development Co. Limited Versus Abdul Gafur Kana HCCC 318 of 2000**

(unreported).

The cases relied upon by the applicant were distinguished.

I have considered the application, documents filed, the submissions and the law. This application was filed after a ruling was delivered by Justice Osiemo on 17th October 2010. The present application was filed on 10th December 2010.

In the ruling, the Judge stated that it was delivered in a Notice of Motion for stay of execution of the judgment and the decree of the court dated 10th March 2003 pending review. The learned Judge also observed that the application for stay was filed on 28th September 2005, which was over 2 years after judgment was delivered. It was also observed that the applicant did not appeal against the judgment but that he intended to apply for review of the judgment. The court went ahead to find that the applicant never appealed within the statutory period and did not intend to appeal against the judgment. The court being of the view that stay of execution could only be considered where there was an intended appeal, came to the conclusion that the application lacked merits. Therefore, the court declined to exercise its discretion to grant stay. The application was consequently dismissed 17th October, 2008.

The present application was filed on 10th December 2008. It was deponed in paragraph 7, 8 and 9 of the affidavit in support of the application sworn by the applicant on 10th December 2008, that the applicant was dissatisfied with the orders of Justice Osiemo and instructed his then advocated M/s Ogonji & Tiego to appeal against the decision but the said advocate failed to take action. It was deponed that as a consequence, the applicant instructed the current advocate Ms Nyaega Advocate who filed the present application.

The application has 2 substantive prayers for this court's decision. Firstly, stay of execution pending hearing and determination of appeal (prayer 4). Secondly, (prayer 5) which is for leave to extend time to file notice of intention to appeal. Each of these prayers has separate and distinct considerations to be taken by the court.

I will start with prayer 5 for leave to extend time to file notice of intention to appeal. This prayer is governed by section 7 of the Appellate Jurisdiction Act (Cap 9 Laws of Kenya). The section gives unfettered discretion to the High Court to extend time for giving notice of intention to appeal. It states as follows:-

7. 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 the time for giving such notice or making such appeal may have already expired.

Under rule 74 of the Court of Appeal Rules, notice of appeal is required to be given to the Registrar within 14 days of the decision against the decision to be appealed against. The application asks for extension of time to file a notice of appeal on a decision made in 2003. Apparently, after execution commenced, the applicant filed an application for review of the court's decision, which was dismissed by Osiemo J, in October, 2008 which was approximately five years after the substantive decision was made.

It was then that the applicant decided that he wanted to appeal (and has filed this application asking for extension of time to give notice of appeal (prayer 5). In **Charagu Versus Kaburu [1986] KLR 1943** Hancox JA (as he then was) found that a delay of 2 months was not an inordinate delay. The learned Judge of Appeal granted leave to give notice of appeal after the lapse of 2 months. The court stated, inter alia:-

“The applicant says that the time lapse was not his fault as he had not been informed of the date of the judgment of the High Court and did not know of it till January, 6th 1984. Therefore, I am satisfied, the

delay was not applicant's fault but that of the former advocate. The actual delay from when notice of appeal was due (November, 11 1993) that was exactly 2 months".

In my view, an applicant for leave to extend time for giving notice of appeal has the burden of explaining the delay and the cause of the delay to the court. In the affidavit filed in support of the application, the applicant states that he filed an application for review of the judgment, but does not state when that application was filed. From my perusal of the file, the application for review was dated 28th September, 2005 and filed on the same date. The prayer for review was prayer 3 in that application. Both in the affidavit in supporting of the present application as well as submissions, the applicant and his counsel have not attempted to explain the reason why the application for review was filed in 2005 for a judgment delivered on 10th March 2003. They seem to be more candid with what happened after the dismissal of the application for review on 17th October, 2008.

The above ruling by Hancox JA was very clear that the learned Judge of Appeal (as he then was) was satisfied about the delay and reasons for delay. The Judge was also satisfied that the delay was not inordinate.

In our present case, the reason for the delay in filing the application for review, and the reason for the delay in deciding whether to appeal and filing the application for extension of time to file notice of appeal more than 5 years after judgment was delivered has not been explained. I am not able therefore to determine the reasons for the delay, the merits of those reasons and whether consequently the delay in filing the present application is or is not inordinate. In those circumstances this court is not able to exercise its discretion judicially to extend the time for giving a notice to appeal. Prayer 5 of the application has therefore no merits and has to fail. I will dismiss the same.

On prayer 4 for stay of execution pending appeal, since I have ruled that there are no merits in granting extension of time to give notice of appeal from the judgment of this court dated 10th March 2003, I do not think that there is need to consider the merits of prayer 4. Following the dismissal of prayer 5, dealing with this prayer 4 will serve no purpose. Prayer 4 will therefore fail and I will dismiss the same.

Costs of this application will be to the plaintiff.

Consequently, and for the above reasons, the application dated 10th December, 2008 is hereby dismissed. Costs of the application are to the plaintiff.

Dated and delivered on 5th day of May 2011.

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GEORGE DULU
JUDGE

In the presence of: -

Mr. Makori for applicant/2nd defendant

Mr. Omogo holding brief for Mr. Kitulu for respondent/plaintiff

Catherine Muendo – court clerk.