

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ELC CASE NO. 99 OF 2015

RICHARD KIPMALEL CHESIMET.....PLAINTIFF

VERSUS

NANDI COUNTY GOVERNMENT.....DEFENDANT

RULING

This ruling is in respect of application dated 10th November 2020 by the defendant/applicant seeking for the following orders -

- a) Spent.
- b) Spent
- c) THAT there be an order for stay of execution of the Judgement delivered on 6th May 2020 pending the hearing and determination of this application inter partes.
- d) THAT the applicant be granted leave to file an appeal out of time against the judgement delivered on 6th May 2020 and the notice of appeal annexed hereto be deemed as duly filed on payment of the requisite fees.
- e) THAT the court be pleased to grant a stay of execution of the Judgement delivered on 6th May 2020 pending the hearing and determination of the appeal against the said Judgement.
- f) THAT the costs of this application be provided for.

This matter was handled by Justice Ombwayo who has since been transferred from the station. Counsel agreed to canvas the application vide written submissions which were duly filed.

APPLICANT'S CASE

Counsel for the defendant/applicant relied on the provisions of Order 42 of the Civil Procedure Rules, sections 79G and 95 of the Civil Procedure Act seeking leave to appeal out of time, stay of execution of decree pending hearing and determination of the application and appeal together with costs.

It was counsel's submission that the defendant /applicant was not able to file a notice of appeal within 14days as the previous counsel on record did not notify them of the delivery of the decision.

The applicant submits that section 95 of the Civil Procedure Act has not limited which court has or lacks jurisdiction to make orders under such provisions if invoked by the applicant. Secondly, this honorable court is invited to be guided by section 7 of the Appellate Jurisdiction Act which states that:

“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”

Counsel cited the Court of Appeal Case of **Kenya Airport Authority & another vs Timothy Nduvi Mutungi (2014) eKLR**, where the court held that an application seeking extension of time to appeal to the Court of Appeal can be made to the High Court as such applications are competent and that the High Court does have jurisdiction to extend time for giving notice of intention to appeal pursuant to Rule 7 of the Court of Appeal.

Mr. Tororei further submitted that the applicant also has the option to either move the Court of Appeal or the Superior Court under Rule 4 of the Court of Appeal Rules to seek orders for extension of time to file an appeal out of time and relied on the case of **Maree Ahmed & Another vs Leli Chaka Ndoro (2017) eKLR** where a similar issue was tackled.

Counsel therefore submitted that the court has the requisite jurisdiction to hear and determine the application and cited the case of **Big Road Enterprises vs DHL Global Forwarding (K) Limited (2017) eKLR** where Sewe J, was guided by the Supreme Court decision in

Nicholas Kiptoo Salat vs Independent Electoral & Boundaries Commission & 7 Others: SC pp No 16 of 2014 and the Court of Appeal decision in **Lucas Mwitwa Machera & Another vs Gati Maroa Wangera & Another (2017 eKLR)** on extension of were established as follows:

1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
5. Whether there will be any prejudice to be suffered by the respondents if the extension is granted.
6. Whether the application should have been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

Mr Toroei urged the court to exercise its unfettered discretion in the applicant's favour and find that it has met the criteria to warrant extension as sought. That the applicant filed the application without undue delay and further that no prejudice will be occasioned to the plaintiff should the application be allowed.

It was counsel's submission that the applicant will be prejudiced as it shall be condemned to pay the plaintiff loss of earnings of Kshs 30,000/ per month from the date of filing suit pending removal of the bus terminus together with costs of the suit and yet the defendant was and/or is not in possession of the suit property.

On the second limb where the applicant is seeking for an order for stay of execution, counsel submitted that the applicant has to demonstrate that it has met the requirements set out under Order 42 Rule 6 of the CPR that is, that it shall suffer substantial loss should the orders sought not be granted, that it has approached this court without unreasonable delay and that it is ready to provide security for the due performance of the decree.

Counsel cited the case of **Selestica Limited v Gold Rock Development Ltd [2015] eKLR**, the court held as follows:

"Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The power to grant an application for stay of execution pending appeal is a discretionary one on sufficient cause being shown, where the applicant may suffer substantial loss; the application is made without unreasonable delay and on provision of such security as the Court may impose."

On the issue of substantial loss, the applicant submits that it will suffer substantial loss as it has been condemned to pay the plaintiff loss of earnings of Kshs 30,000 per month from the date of filing suit pending removal of the bus terminus together with costs of the suit and yet the defendant was and/or is not in possession of the suit property. That is the stay is not granted the intended appeal will be rendered nugatory.

The applicant submits that there has been no inordinate delay in preferring the application as the judgment was delivered on 6/5/20 and that the previous counsel did not inform it of the said delivery prompting the new counsel to take over and file the current application.

Counsel relied on the case of **Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR where Munyao J** held:

"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay being dependent on the surrounding circumstances of each case. even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter."

On the issue of security counsel cited the case of **Selestica Limited (supra)**, where the court held as follows:

On the third condition of whether sufficient security has been offered for the due performance of decree, in the supporting affidavit, the appellants states that it is ready to furnish security to the court should the court so order. Order 42 Rule 6(2) (b) states in material particulars: such security as the court orders for the due performance

In my view, the rule gives the court unfettered discretion to issue any orders as to preserve the subject matter pending the hearing of the appeal. I have no doubt therefore that I have the power to order such security for the due performance of decree or order, and that the appellants did not have to furnish such security upfront before arguing the application for stay pending appeal. In any event, where the court orders for security deposit and there is default, then the orders for stay are rendered useless for a defaulting party.

The applicant therefore urged the court to find that it has met the threshold for stay of execution and leave to file an appeal out of time.

RESPONDENT'S CASE

Counsel for the respondent submitted that the court has no jurisdiction to hear and determine the application for leave to appeal out of time

and cited the case of **STANDARD LTD — vs- GEKONGA and Others (E.A REPORT (2005) IEA (CAK) at page 376** where the court held;

"the order which was made by consent extending the time for filing an application for extension of time to lodge a notice of appeal in this court was made within jurisdiction and is of no consequence. I say so because section 7 of the appellate jurisdiction act gives the high court power to extend the time for giving notice of intention to appeal from the judgement of the high court or for making an application for leave to appeal or for a certificate that the case is fit for appeal. This the high court had power to extend time for giving the notice of appeal. The high court did not extend time for giving the notice of appeal but instead extended time for the filing of an application in this court to lodge a notice of appeal. The high court has no such powers. The applicant did not require leave to appeal from the judgement of the superior court given on 11th July 2003. It cannot be said therefore that by making the order, the superior court was giving leave to appeal. The present application was filed on 3rd may 2004 — almost 10 months from the date of the judgement. In the circumstances, am not satisfied that the applicant has demonstrated that there is a serious intention to appeal against the award further I am satisfied that there has been an inordinate and inexcusable delay in the filing this application."

Mr Nyamweya further submitted that the application seeks for leave to file an appeal out of time and does not seek extension of time to file notice of appeal against judgement. That leave to appeal relates to situations where it is not automatic or as of right to appeal to the Court of Appeal.

Counsel also submitted that there is no such thing as leave to file appeal out of time in matters relating to appeals to the Court of Appeal. That what the superior court has jurisdiction over is extension of time to file notice of an intended appeal. The applicant has not sought that and can therefore not be granted that which he has not sought.

It was Mr Nyamweya's submission that the applicant can apply for extension of time in the Court of Appeal which the applicant has opted to use the wrong forum. Counsel further submitted that there is nothing placed before the court to show that the applicants made any inquiries from their advocates about the fate of their case and there is also nothing placed before the court to show that the relationship between the applicant and their advocates had irretrievably broken down.

On the issue of stay of execution of judgment delivered on 6th May 2020 pending the hearing and determination of the appeal, counsel submitted that there is no appeal so far that has been filed and there is no imminent threat of execution.

Counsel therefore urged the court to dismiss the application with costs to the respondent.

ANALYSIS AND DETERMINATION

This is an application for leave to file an appeal out of time and stay of execution of the judgment pending appeal. The issues for determination are whether the applicant has met the threshold for grant orders of stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules and whether this court has jurisdiction to deal with the application for leave for leave to appeal out of time.

The first issue that the court must deal with is as to whether it has jurisdiction to grant leave to appeal out of time. I notice that the applicant is also seeking that the court deems as duly filed an annexed notice of appeal.

I agree with the submissions of respondent's counsel that this court has no jurisdiction to grant the orders as sought. The applicant relies on section 7 of the Appellate Jurisdiction Act which provides that;

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:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

This section is in respect of the jurisdiction of the High Court to extend time for giving notice of intention to file an appeal from a judgment of the High Court. The applicant has sought for leave to appeal out of time and not extension of the time within which a notice of intention to appeal should be filed.

In the case of **Trimborn Agricultural Engineering Limited v David Njoroge Kabaiko & another [2000] eKLR** held as follows;

I said in the case of Gabriel Kigi and others vs Kimotho Mwaura & another Civil Application No Nai 197 of 1997 (unreported):

"But I must revert to section 7 of the Act. That section in my view gives discretionary powers to the High Court to allow extension of time to file a notice of appeal when there is as yet nothing before this Court. It is in this particular aspect that I agree with Bosire Ag JA in the Robinson & others vs Muthami application (supra)"

The applicant should therefore file the application in the relevant court where Rule 4 of the Court of Appeal Rules shall apply as was held in the case of **MUCHUNGI VS JAMES MUCHUNGI KIRAGU & ANOTHER, [1998] eKLR** where the Court stated:

"Lastly, we would like to observe that the discretion granted under Rule 4 of the Rules of this Court to extend the time for lodging an

appeal, is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”.

I find that this court has no jurisdiction to hear and determine the application hence the application for leave to file an appeal out of time is hereby struck out with costs to the respondent

Had the court had jurisdiction then the court would have looked at whether the applicant has brought the application without undue delay and if so has a reasonable explanation been given. The current application was filed on 10th November 2020 and the judgment was delivered on 6th May 2020. The applicant has laid blame on the previous counsel whom it says they had a strained relationship hence the judgment delivery was not communicated to it.

The applicant has not given any cogent explanation for the delay in filing the application or the notice of appeal within 14 days as required by law. Mere blame of the previous counsel is not enough ground to explain the undue delay. The application was filed after 183 days.

In the case of **Annah Mwhaki Wairuru v Hannah Wanja Wairuru [2017] eKLR** Okwengu J. had this to say:

14] Much as the applicant has attempted to shift the blame to her counsel, nothing has been exhibited to confirm that indeed the former advocate failed to advise her of the ruling, or that there was any correspondence or any action taken by the applicant in regard to this serious omission. Nor has any explanation been given as to why the advocate withheld the information from the applicant.

[15] What the applicant is presenting appears to me to be not just a case of an inadvertent omission or innocent mistake by her counsel, but a serious case of negligence as the advocate not only ought to have advised the applicant of the ruling but also ought to have taken action to respond to the application filed by the respondent of which he had indeed been served. This is the kind of mistake that this court cannot condone. An advocate is an officer of the court who is expected to be upright and dependable. Whereas is alleged herein the advocate has conducted himself in a manner that is not consistent with what is expected from an officer of the court, this Court cannot cover up such misconduct by treating it lightly.”

No proper reason has been advanced to show why there was a delay in filing the notice of appeal and the application. The determination of time to compute unreasonable delay is dependent on case by case basis as two days can be deemed as undue delay while a year or so be considered as reasonable delay.

In the case of **George Mwendu Muthoni vs Mama Day Nursery and Primary School, Nyeri CA No. 4 of 2014, (UR)**, the court declined to order for extension of time on account of the applicant’s failure to explain a delay of twenty (20) months.

This is now water under the bridge as the court has determined that this is not the right forum to bring this application. Having said so, on the issue of stay of execution pending the hearing and determination of the appeal, it should be noted that there is no appeal that is pending therefore an order of stay pending the hearing and determination of the appeal would not be tenable.

The application is therefore dismissed with costs to the respondent.

DATED and DELIVERED at ELDORET this 12TH DAY OF APRIL, 2021

M. A. ODENY

JUDGE