



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC APPEAL NO. 3 OF 2020

JOSEPH MBATIAN L. MURRUNKA.....1ST APPLICANT

JANET TUYUNI YIAMPOL.....2ND APPLICANT

VERSUS

JOSEPH L.K. MAKI.....RESPONDENT

RULING

A. INTRODUCTION

1. By Notice of Motion dated 10th September, 2020, the Applicant sought for the following orders: -

a) Spent.

b) Spent.

c) That this Honourable Court be pleased to **grant leave** to the Defendant/Applicant to **appeal out of time** against the judgment of the Honourable Principal Magistrate R.M. Oanda delivered on 9th July, 2020 in Kilgoris Principal Magistrate's Court L& E No. 40 OF 2018.

d) That this Honourable Court be pleased to grant a **Stay of Execution** of the Decree arising from the judgment in Kilgoris Principal Magistrate's Court L& E No. 40 OF 2018 pending the hearing and determination of this application.

e) That this Honourable Court be pleased to grant a **stay of execution** of the Decree arising from the judgment in Kilgoris Principal Magistrate's Court L& E No. 40 OF 2018 pending the hearing and determination of the intended appeal.

f) That the costs of this Application be provided for.

2. The application is based on the grounds thereof and the Supporting Affidavit dated 10.08.2020 and a Further Affidavit dated 04.12.2020. The applicant avers that judgment was delivered on 9/7/2020 during the Covid pandemic times and due to the economic downturn at the time, his economic capability was greatly affected and was therefore unable to instruct an advocate to represent him in the matter. The delay was further attributed to the delay by the respective registry to provide typed proceedings and the necessary documents to enable him file the appeal in time.

3. The Applicant contends that the intended appeal is arguable and has an overwhelming chance of success and thus may be rendered nugatory if the orders sought are not granted. He also stands to suffer substantial loss and irreparable prejudice should the orders not be granted.

4. He also stated that he is willing to abide by any terms that may be imposed by the court as a consequence of granting the stay of execution orders. It is his position that his application satisfies all the prerequisites and fundamental requirements for the granting of stay of execution proceedings as anchored under Order 42 Rule 6 of the Civil Procedure Rules.

5. The application was opposed. The Respondent filed a Replying Affidavit sworn on 30.10.2020 and a Supplementary Affidavit sworn on 08.12.2020 both in response to the Application dated 10.09.2020. It is the Respondent's assertion that the impugned Order/ Decree is not appealable since it is a negative order incapable of execution and that the application amounts to an abuse of the court process.

6. Further, he contends that the delay in lodging the appeal is inordinate and the explanation given by the applicant for his inability to file the memorandum of appeal within the required period does not hold water for the reason that one does not require typed proceedings before filing a memorandum of appeal.

7. I have read and considered the rival submissions by both the Applicant and the Respondent in this case and the various authorities cited in support of their respective cases and I have taken the same into account in arriving at my decision.

B. ANALYSIS AND DETERMINATION

8. The issues for determination which arise therefrom are as follows: -

a) Whether leave can be granted to appeal out of time.

b) Whether an order for stay of execution can issue against the decree and judgment dated 29th July 2019.

A. Whether leave can be granted to appeal out of time.

9. Section 79G of the Civil Procedure Act provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against while section 95 of the said Act gives the court discretion to extend the time as it deems fit even if the time originally fixed has expired.

10. Section 79G on the time for filing appeals from the subordinate courts provides as follows: -

“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.”

11. Section 95 of the Civil Procedure Act on Enlargement of time provides as follows; -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

12. The principles to be considered in exercising the court’s discretion on whether or not to enlarge time to file appeal were set out in the case of **Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi Civil Appeal 255/ 1997**, the court, in considering the exercise of discretion to extend time, held as follows: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

13. These principles were also reiterated in **First American Bank of Kenya Ltd -vs- Gulab P. Shah & Others HCC 2255/2000 [2002] IEA 65** as follows: -

i. *The explanation if any, for the delay;*

ii. *The merits of the contemplated action, whether the appeal is arguable;*

iii. *Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.*

14. I will therefore proceed to address each of the limbs outlined in the above mentioned cases to establish whether the Applicant has satisfactorily met each of the said principles. **The length of the delay and the explanation if any.** The present Application was filed on the 10th September, 2020 after the trial court delivered its judgment on 9th July, 2020. The Applicant has also given an explanation of the 2-month delay since the delivery of the final orders in the main suit on the 9th July, 2020. Even though I agree with the Respondent that the typed proceedings are not necessary in the filing of a memorandum of appeal; it is my considered view that the period of delay does not amount to inordinate delay and I find that the Application was filed without undue delay.

15. The second limb is on the **Chances of success of the intended Appeal.** I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case at this stage. Having that in mind, I wish to state that from the Draft Memorandum of Appeal, one of the issues the Applicant intends to raise is that the trial court failed to take into account the Amended Plaint in arriving at its decision among other factors which in my view amounts to an arguable appeal.

16. With regards to the third limb, I find that the Respondent will not be prejudiced should the appeal be filed. In any event, the same will put to rest the rival claims by both parties herein.

17. In the Upshot therefore, I find that the Applicant has proved on a balance of probabilities the grounds set for the grant of leave to file an appeal out of time as set out in the above mentioned provisions and for that reason I find that Prayer no. 2 in the Notice of Motion dated 10.09.2020 is merited.

B. Whether an Order for stay of execution can issue against the decree and judgment dated 29th July, 2019

18. Order 42 Rule 6 (2) sets out the grounds of issuing an Order for Stay of Execution as follows: -

(2) No order for stay of execution shall be made under sub- rule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) 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.

19. I wish to adopt the Court of Appeal decision in **Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another [2007] eKLR** relied on its earlier decision in **David Thiong'o T/A Welcome General Stores vs Market Fancy Emporium [2007] eKLR** and held as follows: -

“This Court has repeatedly stated in previous decisions, among them, David Thiong’o T/A Welcome General Stores vs Market Fancy Emporium, Civil Application No. NAI. 47 OF 2007.... that in an application under Rule 5(2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum, there would be nothing arising out of that decision for this court to enforce or to restrain by injunction... the decision of 9th February, 2007 in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. Accordingly, no order of stay can properly issue relating to it.”

20. The Judgment and Decree which the Applicant seeks to Appeal is for the dismissal of the suit; the Applicants claim for compensation was dismissed. The trial court found that there being no lease agreement between the plaintiff and the defendant, the defendant cannot be compelled to pay and/or compensate the plaintiff for amounts of money which he never received or benefitted from in any way. In my view, the dismissal and subsequent Orders as made by the trial court, are negative orders; neither the Applicant nor the Respondent was required to do or to refrain from doing anything.

21. In view of the foregoing, I therefore find and hold that what the applicant is seeking is stay of dismissal of the suit in the trial court which was a negative order; which, by parity of a long line of decisions of the Court of Appeal on the subject is incapable of being stayed. I therefore find that an Order for Stay of Execution against the judgment and decree dated 29th July, 2019 cannot issue and thus prayer number (d) and (e) of the Notice of Motion Application dated 10.09.2020 is not merited.

CONCLUSION

23. In the upshot, I accordingly find that the Application dated 10.09.2020 is partially merited and I will therefore proceed to allow in the following terms: -

a. That the Applicant is hereby granted Leave to file the intended Appeal against the judgment delivered on 9th July, 2020 in Kilgoris Principal Magistrate’s Court L & E No. 40 of 2018 within thirty (30) days from the date of this Ruling.

b. That the Applicant do file the Record of Appeal within 30 days from the date of this Ruling.

c. Costs of the Application do abide the Appeal.

DATED, SIGNED AND DELIVERED IN VIRTUALLY AT MIGORI ON 8TH DAY OF NOVEMBER, 2021.

MOHAMMED N. KULLOW

JUDGE

RULING DELIVERED VIRTUALLY IN THE PRESENCE OF:-

MR. MINGATI FOR THE RESPONDENT

NO APPEARANCE FOR THE APPLICANT

TOM COURT ASSISTANT