Summit Coveline Limited & another v Mpangurwa (Miscellaneous Application E261 of 2023) [2024] KEHC 1645 (KLR) (20 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1645 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS APPLICATION E261 OF 2023

DKN MAGARE, J

FEBRUARY 20, 2024

BETWEEN

SUMMIT COVELINE LIMITED ..... 1ST APPLICANT

MALEL SHADDRACK KIPRONO ..... 2ND APPLICANT

AND

JEFFREY FERDINAND MPANGURWA ..... RESPONDENT

RULING

1. This is a Ruling over an Application dated 23/9/2023. The prayers sought are as follows: -
    a. Spent
    b. Spent
    c. There be extension of time within which to file and serve a memorandum of appeal from the judgment and decree of the chief magistrate's court at Mombasa given on 22/6/2023 in Mombasa CMCC Suit No. 1245 OF 2014.
    d. There be Stay execution of the Judgement and Decree given on 22nd June 2023 in Mombasa CMCC Suit No. 1245 OF 2014 pending the hearing and determination of the Intended Appeal to the high court of Kenya
    e. Costs of this Application be in the intended Appeal.
2. The grounds upon which the Application is made is that the Applicant intends to appeal against the Judgement of the Trial Court. They were not informed till 20/7/2023. By the time they sought instructions time had lapsed. There were only 2 days from the date they learnt of the delivery of the judgment till lapse of time to Appeal. Thereafter some two months were wasted between the advocates the insurers. The main ground upon which the Applicant questions the decision of the lower court is

whether the court was entitled to enter judgment and ignore their plea of res judicata. The problem with the plea of res judicata is that it is the Ace of all defenses. The plea is that despite all good English parties having spewed to the court, the respondent is having a second bite on the cherry.

3. Nothing in the response clears the ever-hanging question regarding Mombasa CMCC 332 of 2012.

4. Further, it was stated that there was imminent danger of execution, which would render the intended Appeal academic and the Applicant would suffer irreparable harm. They stated that the Intended Appeal had high chances of success.

5. Parties were dueling over whether the insurer could file an affidavit. They forgot that the response was also by an advocate. I do not find it necessary for now, to determine the propriety of the Affidavits filed.

Submissions

6. The Applicant filed submissions stating that the principles for exercise of discretion was set out in the case of *Thuita Mwangi v Kenya Airways Limited* [2010] eKLR, where the court of Appeal. While referring to the court of Appela Rules stated as doth: -.

> " Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:
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> > " 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".

7. They ask the court not to punish the client as a result of the innocent mistake by counsel. In this, they relied on the decision of *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR where justice R Nambuye as then she was stated as doth: -

> " In the circumstances of this application, since counsel has taken full responsibility for noncompliance with the rules, it is my view that it would be not only unfair but unjust to pin responsibility on the client for noncompliance and use this as basis for withholding the exercise of discretion in the applicant's favour. Second, the delay attributed to the applicants' counsel is one (1) year, two (2) months and seven (7) days from the date of the decision and a period of three (3) months and fourteen (14) days from the date of capacitation with a Certificate of Delay of 8th November 2019 which in my view is far much below the period of time in the George Mwende case [supra] which necessitated the Court therein to decline the exercise of its discretion in favour of the applicant therein, I find the same excusable."

8. On the merit of the Appeal, they rely on the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 Others* [2018] eKLR where it was stated posited as doth:-

> " Its [the] law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is res judicata.

> If in any subsequent proceedings (unless they be appellate) in the same or nay other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of res judicata can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case."

9. It was submitted that the merit of the Appeal is for the intended Appeal and not the current Application. This was a wrong submission. Indeed the court cannot determine the merit of the case at this stage. However, no court can grant an extension of time in a hopeless appeal.

10. It is their case that the case of *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR, the court stated as doth: -

> "I think a distinguished equity judge has said:
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> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."
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> I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the costs. The respondent will not agree.
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> I am unwilling to believe that in opposing the application for setting the judgment aside and allowing a hearing on the merits, the object of the respondent was to snap at the judgment in a case in which if the defendants were permitted a hearing, the quantum of the liability to pay damages may be much less."

11. Finally they appealed to the inherent Jurisdiction of the court jurisdiction of the court. In this, they relied on the case of *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR. Where the court stated as oth: -

> The extent of inherent powers of the court was eloquently explained by the authors of the *Halsbury's Laws of England, 4th Edn*. Vol. 37 Para. 14 as follows;
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> "The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." See also *Meshallum Waweru Wanguku* (*supra*)
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> This inherent jurisdiction is a residual intrinsic authority that the court may resort to in order to put right that which would otherwise be an injustice.

12. It was submitted that the merit of the Appeal is for the intended Appeal and not the current Application. This was a wrong submission. Indeed the court cannot determine the merit of the case at this stage. However, no court can grant an extension of time in a hopeless appeal.

13. The respondent on the other hand concentrated on the defects in the affidavits. These were matters of a mundane nature. There was no response in respect of prejudice.

Analysis

14. I have perused the Application, response and submissions and authorities filed by respective parties in support and opposition to the Application.

15. The issue before me is whether the delay in lodging a Memorandum of Appeal has been satisfactorily explained. If the reason for delay is not sufficient, then the issue as to whether stay of execution should be granted will not fall for determination because there will be no Appeal. This must be weighted as against the conduct of the parties. The main case was heard and determined 9/10 years after filling. The delay cannot be blamed on the Applicant.

16. This is a well travelled route. Justice Waki, JA in *Seventh Day Adventist Church East Africa Ltd. & Another v M/S Masosa Construction Company* Civil Application No. Nai. 349 of 2005 held that:

> "As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant's counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle."

17. The delay in not knowing the time of delivery of the judgment has been fully explained. The Respondent, despite knowing the delivery of judgment, chose to inform the Applicant 2 days before the end of the time for filing. It is not expected that a decision could have been arrived at regarding Appeal. The next question is whether the delay therefore is reasonable and if so whether it is explained.

18. It is imperative to note the Supreme Court of Kenya decision (M.K. Ibrahim & S.C. Wanjala SCJJ) in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the learned Judges held 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 to case basis.

(4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court."

19. In *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR Odunga J. observed that: -

> " In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman vs. Cumarasamy* [1964] 3 All ER 933; *Savill v Southend Health Authority* [1995] 1 WLR 1254 at 1259.

20. It follows therefore that the Applicant's explanation for the delay is key in guiding the Court's exercise of discretion on the issue of leave to appeal out of time.

21. The judgment was notified late triggering a series of unfortunate events leads to delay in filing. The period of two months, though long was not inordinate.

22. The Applicant was under a duty to show the reasons for the delay. However short the period of delay, it must be explained. In *Alfred Iduvagwa Savatia vs Nandi Tea Estate & another* [2018] eKLR J. Mohammed JA. cited Aganyanya, JA in *Monica Malel & Another v R*, Eldoret Civil Application No. Nai 246 of 2008 where the Learned Judge stated;-

> " When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show .... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay."

23. Why is the reason of delay necessary? Section 79 G of the *Civil Procedure Act* provides as doth: -

> " 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:
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> 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."

24. Therefore, in my view, without a valid reason, this court has no jurisdiction to extend time. It is not manna to dish out. It is exercise of discretion. Unless the court is properly moved, it has no power to exercise discretion. It is not by whims but through judicious consideration that such an Application is considered.

25. The hence courts have distilled several factors to be considered when considering such an application. These are: -

a. The length of delay.

b. The reason for delay.

c. The animus of the applicant.

d. The prejudice to the Respondent.

26. The Applicant has explained the delay substantively. When the delay is reasonable, there must be a real and genuine reason for the delay. Where there is doubt, either way, the court can then exercise discretion one way or another. The court cannot find that the delay is inexcusable, inordinate and no reason is given and then, out of sheer whims and fiat, extend time. That makes litigation unpredictable and unending.

27. In this matter, the reasons for the delay are well explained. The Applicant's advocates needed to do more as they are not just bean counters. Further, the length of the delay is not inordinate in the circumstances. There is also an expression of good faith in proposing to settle the security which takes care of prejudice to the Respondent. Again, the effect of the finding in the Lower Court is that there is a real possibility that the respondent may be compensated twice for a matter that was litigated upon. The intended Appeal cannot be said to be idle.

28. The Court in Asike-Makhandia J in *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR stated that:-

> " There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR this Court stated:-
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> > " The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

29. The Respondent is entitled to the fruits of the judgment while the Applicant has the right of Appeal which they had given away but seek the intervention of court to redeem it. In my view the injustice to the Applicant if the Application is dismissed exceeds the prejudice to the Respondent if the Application is allowed. In *Harris Horn Senior, Harris Horn Junior v Vijay Morjaria* Nyeri Civil Appeal No. 223 of 2007 when confronted with similar arguments, the Court made observations therein *inter alia* as follows:

> (32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case."

30. This is a proper application to GRNT leave to appeal out of time.

31. On the issue of stay of execution there are principles guiding the grant of a stay of execution pending appeal which are well settled. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:

> " No order for stay of execution shall be made under subrule (1) unless—
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> (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
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> (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.

32. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.

33. Section 1A(2) of the *Civil Procedure Act* provides that "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objectives are; "the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties."

34. Therefore, an Applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.

35. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

36. Therefore, the Applicant is willing to deposit security. The Applicant has to deposit funds within a timeline to be fixed by this Court as a condition. Therefore, I do not see how the Respondent will be prejudiced. I am consequently inclined to allow the Application.

Determination

37. The upshot of the foregoing is that I allow the Notice of Motion dated 23rd September 2023 as follows:

    i. Leave is granted to the applicant to file an Appeal to this court. The memorandum of Appeal shall be filed within 14 days from the date hereof.

    ii. The Main Appeal shall be fixed before the Court for directions upon filing.

    iii. There be a stay of execution of the Judgement and decree dated 22nd June 2023 in Mombasa CMCC No. 1245 of 2014 pending the Hearing and Determination of the Intended Appeal.

    iv. The Applicant shall deposit security of the judgment sum as indicated in the judgment into a Joint Interest Earning Account in the name of the Advocates for the Parties within 45 days.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF FEBRUARY, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mogaka Omwenga & Mabeya Advocates for the Defendant

Gachiri Kariuki & Company Advocates for the Respondent

Court Assistant - Brian