Ombeo v Kenga (Miscellaneous Application E165 of 2023)
[2023] KEHC 23047 (KLR) (19 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23047 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS APPLICATION E165 OF 2023

DKN MAGARE, J

SEPTEMBER 19, 2023

BETWEEN

SIMON NYABARO OMBEO ..... APPLICANT

AND

BEJA HAMISI KENGA ..... RESPONDENT

RULING

1. This is an Application seeking leave to appeal out of time from the Judgment of the Hon. Christine K. Auka given on 26/10/2022 in Kwale PMCC No.72 of 2020.

2. The matter first came before me on 23/6/2023 and I certified the matter as not urgent and fixed it for highlighting on 28/7/2023 after giving directions on Replying Affidavits and submissions.

3. The decision sought to be challenged was given in the presence of the parties. The Applicant sought and was granted 30 days stay of execution at the time of delivery. The reason the Applicant gives for the delay is that he had sought a copy of judgment and there was a delay in being given the same. The second one was that there was a delay in accessing the Memorandum of Appeal that was sent via email. I am unable to understand the meaning and tenor of the second ground. The Application is indicated to have been made without undue delay.

4. The Respondent begs to differ. He indicates that the judgment for Ksh 282,270 was delivered in the presence of parties on 26/10/2022. It took 8 months for the Application to be filed. In their Replying Affidavit dated 27/6/2023, the Respondent sets out the chronology of events culminating to the filing of the impugned Application. The temporary stay lapsed on 26/11/2022. The Applicants were in slumber. The Respondent posited that on 31/5/2023, they sent the Applicant a copy of judgment and Bill of Costs for compliance. They annexed the document sent.

5. What was actually sent is an advice on judgment and the Bill of Costs, for agreement. There was indeed a discussion around costs. It appears that the Applicants were woken up by a demand for the payment of the decretal sum.

Analysis

6. It is self evidence that the judgment was available for the parties on the day of delivery or soon thereafter. The copies were not sought by the Applicant. The judgment was delivered in the presence of both parties. The Applicant knew it was adverse, hence sought 30 days stay.

7. The Respondent bid their time. In 31/5/2023, they sent a request for costs. There was correspondence over the Bill of Costs till the Applicant issued a 15-day notice lapsing on 24/6/2023 for payment. On the last day of that notice, this Application was filed. This was to forestall the execution that had been threatened.

8. The Court was not given a satisfactory explanation for the delay. There was no evidence of the need for the copy of judgment and the request for the same. A copy of judgment cannot be supplied though magic. The same ought to have been paid for. I note the judgment was already typed. It was thus available to make copies as soon as needed.

9. The so called "accessing" the Memorandum of Appeal is not explained. Section 79 G 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: 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."

10. A copy of judgment is not necessary at the time of filing the Memorandum of Appeal. In any case, the court below has not certified the time required for preparation and delivery of the judgment. The ground is thus not plausible.

11. The court asks him a very simple question, if it is true that he was waiting for proceedings, when did he pay for the same? He stated that he paid in 2023 when he was collecting the proceedings. Even where the judgment is required, there must be a request and payment for the same within the requisite time. In other words, if the request was made outside time of filing an appeal, such time may not be reckoned with.

12. The second reason of accessing the Memorandum of Appeal is not plausible. There is no evidence of when and where the Memorandum of Appeal was. There was no scintilla of evidence that a memorandum was sent to court or elsewhere and was not dealt with. I have seen that the Applications of this nature have been routinely made and allowed without having regard to the law on the issue of extension of time.

Respondent's submissions

13. The Respondent submitted that the Applicant failed to give a plausible reason for the delay. Reliance was placed on the decision of *John Martin Muchiri Mugo v British-American Insurance Company (K) Limited [2018]* eKLR, where justice P.J.O. Otieno, stated as doth: -

> " From the narrative, the applicant allegedly became aware of the delivery of judgment on 22/6/2022. The Applicant sat on their rights till November, 2022 when they filed this application. There is no plausible explanation for the delay. I am thus not satisfied that there is explainable delay.
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> From the record, what seems to have woken the Applicant is the filing of the party and party bill of costs on 30/8/2022 and served on 6/9/2022 as per annexure JMM2 in the Respondent's affidavit. It is not ease to drive out a party from the seat of justice. However, a party who watches the seat of Justice being rained on and only wakes up when someone else wants to seat on it, he does not call for mercy but condemnation. Equity only aids the vigilant. The Applicants were totally indolent. There is not explanation for the long delay."

14. The Applicant delayed for one year and 8 months. The Respondent indicated that the judgment was taken in presence of parties.

15. Further the Respondent submitted that there was no security offered and such security is inadequate. This is in regard to the portion of stay pending appeal. The respondent relied on the case of *Victory Construction v BM (a minor suing through next friend one PMM) [2019]* eKLR, where the court stated as doth: -

> " 29. I therefore appreciate the sentiments expressed by the High Court in *John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another [2016]* eKLR that:
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> > " There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in *the Constitution* as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief."
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> 30. Having considered the instant application, it is my view that this a case where a stay ought to be granted but on conditions since it would seem that the fulcrum of the applicant's case will be on quantum. Accordingly, the order which commends itself to me and which I hereby grant is that there will be stay of execution pending the hearing of this appeal on condition that the Appellant pays half of the decretal sum to the respondent and deposits the balance in a joint interest earning account in the names of the advocates for the respective parties in Kenya Commercial Bank, Machakos.

16. The Respondent also stated that on the basis of the decision of *New Wide Garments EPZ (K) Ltd v Ruth Kanini Kioko [2019]* eKLR, the application ought to be disallowed. In that case, Justice G V Odunga, as he then was stayed as doth: -

> " However, in this case it is not contended that the applicant will not in a position to pay the said sum and there are no facts adduced to support that averment or even grounds for such belief. The amount in question is less than 500,000.00 a far cry from the Kshs 4,000,000.00 that was in issue in the above case. There is no contention that if the applicant pays the said sum it is likely to fold up its operations or find itself in some financial embarrassment. In fact, the supporting affidavit did not make any averment as to what would constitute substantial loss to the applicant in this case. In my view substantial loss is a factual issue which must be raised in the supporting affidavit.
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> 36. In the circumstances of this case the conduct of the applicant in not moving with alacrity does not lend itself to favourable exercise of discretion in his favour. Further, the applicant has failed to place before me by way of satisfactory evidential means, material on the basis of which I can find that the applicant stands to suffer substantial loss unless this application is granted."

Appellant's submissions

17. I have not had sight of the Appellant's submissions. It could be that they cannot access the court to file them.

Analysis

18. There is absolutely no evidence that judgment was applied for. Further the issue of access is simply hot air. Proceedings were applied for. Further the delay of over 186 days, from the last day of filing or 217 days from delivery of judgment has not been explained. Such a delay is unexplained, inexcusable and inordinate.

19. 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 whim but through judicious consideration that such an Application is considered.

20. The factors to consider in dealing with such an Application are: -

    a. The length of delay.

    b. The reason for delay.

    c. The animus of the Applicant.

    d. The prejudice to the Respondent.

21. The Applicant has not explained the delay. It is my considered opinion that the 4 factors above are sequential. Therefore, one must fulfil each as you move to the next. If the delay is inordinate, in may not be necessary to go to the reason for delay. When the delay is reasonable, there must be a real and genuine reason for delay.

22. 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.

23. In our court system, delay is usually documented. Without documentation, it never happened. For example, a lost file where there is no record of follow up, is not lost. When applying for proceedings, they must first be as of necessity, a letter bespeaking the proceedings and payment of deposit. Without such, proceedings were never requested. The raison d'etre for payment is to enable the court prioritize according to payment and only serious Applicants for proceedings. Without payment, there are no proceedings being sought. Further, proceedings must be formally sought, even where the same were asked for in court, the registry must be moved and follow ups be done.

24. In this matter, the reasons for the delay are strange. Request for a copy of judgment was not made at all. There is therefore no explanation for in filing the Appeal. The absence of a copy of judgment is not available to the applicant. delay up to May 2023.

25. Therefore, for certification to be done, there must be a request for decree or judgment. Under Section 2 of the *Civil Procedure Rules*, a decree is defined as doth: -

> " decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—
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> a. any adjudication from which an appeal lies as an appeal from an order; or
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> b. any order of dismissal for default:
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> Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;
>
> Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

26. An Appeal can thus be made even if a formal Decree had not been formally extracted. A Decree includes a Judgment. The only thing the Applicant could have done is to pay and collect the Judgment, which was available from September 2021.

27. The Applicant delayed for over 8 months. The delay is inordinate. The reason given is not genuine and has not been explained. In *Salome Alice Akinyi v Aridempta Veronica Ooko & another [2019]* eKLR, Justice J Kamau stated as follows regarding the issue of vigilance: -

> " 24. It is correct as the Respondents submitted that "equity aids the vigilant and not the indolent." However, it was the view of this court that although the Applicant had delayed in filing her appeal, the delay of four (4) months in bringing the application seeking leave to file an application out of time was not inordinate."

28. The Applicant has not acted in good faith, waiting for many months and waking up and collecting proceedings then using them as an excuse. It is not necessary to address the prejudice to the Respondent given that the delay is inexcusable, inordinate and unexplained.

29. This is a proper Application to dismiss with costs.

Determination

30. In the circumstances I make the following orders: -

    a. The Application dated 23/6/2023 lacks merit and is accordingly dismissed with costs of 25,000/=

    b. The costs shall be paid within 30 days, in default execution to issue.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19TH DAY OF SEPTEMBER 2023 JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE