



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APPLICATION NO. E170 OF 2021

ELIJAH MURIMI MURIITHI.....1ST APPLICANT

GIKWA JAMES KAHURA.....2ND APPLICANT

-VERSUS-

MARTIN KING'ORI MAINA..... RESPONDENT

RULING

1. The motion dated 13th April, 2021 by **Elijah Murimi Muriithi** and **Gikwa James Kahura** (hereafter the Applicants) seeks *inter alia* the extension of time and leave to the Applicants to lodge an appeal out of time against, and an order to stay execution of, the judgment and decree in **Milimani CMCC No. 5426 of 2019** entered in favour of **Martin King'ori Maina** (hereafter the Respondent), pending the hearing and determination of the intended appeal. The motion is expressed to be brought under Section 3A, 79G and 95 of the Civil Procedure Act, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 & 3 of the Civil Procedure Rules *inter alia*. On grounds, among others that, being dissatisfied with the judgment and decree of the lower court, the Applicants desire to prefer an appeal but the stipulated period for filing such appeal has lapsed.

2. The motion is supported by the affidavit of **Ms. Purity Waikwa**, Counsel for the Applicants, practicing as such in the firm of **Kimondo Gachoka & Company Advocates**. The gist of her depositions is that she is seized of the matter pursuant to instructions from **Directline Insurance Company Limited** - the insurers of motor vehicle **KBZ 837F** in respect of which the claim in the lower court arose; that the Applicants are aggrieved by the judgment of the lower court delivered on 15th January, 2021 and the period within which an appeal could have been filed has since lapsed. She deposes that the delay in filing the motion and appeal was occasioned by the fact that the counsel for the Applicants had challenges in contacting the Applicants herein to inform them of the judgment and that by the time she managed to get hold of the Applicants, the statutory period for filing appeal had already lapsed.

3. Counsel further asserts that the Applicants have a strong and arguable appeal which has a high chance of success; that the motion has been made in good faith and the Respondent any prejudice suffered by the Respondent can be compensated by way of costs. She goes on to express apprehension that the Respondent may move to levy execution before the intended appeal is heard, thereby exposing the Applicants to prejudice and substantial loss, as there is a likelihood they will not recover the decretal amount if paid over to the Respondent. Finally, counsel expressed the Applicants' willingness to provide security in the form of a bank guarantee.

4. The motion was opposed by grounds of opposition dated 23rd April, 2021. To the effect that the motion is an abuse of the court process, is an afterthought, lacking in substance, is totally defective and intended to deny the Respondent the fruits of his judgment.

5. The motion was canvassed through written submissions. The Applicants failed and or opted not to file submissions in respect of their motion despite being given ample opportunity to so.

6. On the part of the Respondent, counsel reiterated the grounds of opposition and relying on the decisions in **Gerald M'Limbine v Joseph Kangangi** and **Asma Ali Mohamed v Fatime Mwinyi Juma** argued that no evidence been tendered to support the flimsy reason proffered for the delay and the Applicants ought to have filed the memorandum of appeal first before bringing the present motion. Further, counsel asserted that the Applicants have not demonstrated how execution will result in substantial loss. He cited the cases of **Jeny Luesby v Standard Group Ltd [2014] eKLR** and **Equity Bank Ltd v Taiga Adams Co. Ltd. (2006) eKLR**. Thus, he asserted that the motion has no merit ought not to be allowed.

7. The Court has considered the rival affidavit material and submissions made in respect of the motion. It is evident on a plain reading of Order 42 Rule 6(1) of the CPR that an order to stay execution pending appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the Civil Procedure Rules.

Although the provision does not expressly say so, this can be inferred from the rule. Further, an analogy can be drawn from Order 42 Rule 6 (4) of the Civil Procedure Rules which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given. Equally, Order 42 Rule 6 (6) of the Civil Procedure Rules states:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.” (emphasis added).

8. It would seem the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the Civil Procedure Rules). Until the memorandum of appeal is filed, the court may be acting in *vacuo* by considering the Applicants’ prayer for stay of execution pending a non-existent appeal. The Court of Appeal in **Abubaker Mohamed Al-Amin v Firdaus Siwa Somo [2018] eKLR** while citing with approval the decision of the High Court in **Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased)) [2017] eKLR** concurred and adopted the foregoing reasoning.

9. Earlier, the Court of Appeal in the case of **Equity Bank -Vs- Westlink MBO Limited [2013] eKLR** while commenting on Rule 5 (2) (b) of the Court of Appeal Rules, whose wording is substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules, and on Order 42 Rule 6 (6) of Civil Procedure Rules, the Court of Appeal left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also **Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR**). Order 42 Rule 1 states;

“(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

10. There is no provision for the filing of a notice of intended appeal in the High Court from a decision of the subordinate court. Order 42 Rule 1 of the CPR provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, an appeal is yet to be filed and there is therefore no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter. If the Applicants desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application.

11. The combination of a prayer seeking extension of time to lodge an of appeal out of time together with a prayer for stay of execution as presented in this miscellaneous cause is misplaced. Even if the former prayer were allowed, it would require the Applicants to first file the substantive appeal and then seek stay pending appeal by a subsequent application. That said, it is considered view that the words that “*an appeal may be admitted out of time*” in Section 79G, appears to admit both retrospective and prospective applications. So that leave under the section may be sought before or after a memorandum of appeal is filed. However, it may be more prudent for a party who also seeks stay of execution in the same motion for leave, to appeal out of time to have filed the memorandum of appeal in advance.

12. In the circumstances, the prayer seeking to stay execution of the judgment in **Milimani Civil Suit No. 5426 of 2019** pending the hearing and determination of the intended appeal has no legal anchor and is consequently disallowed.

13. Turning now to the prayer seeking leave to appeal out of time, the power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the Civil Procedure Act. The affidavit in support of the motion was sworn by the Applicants’ advocate. She asserts that delay was occasioned by the fact that she had challenges in contacting the Applicants to inform them of the judgment and by the time she managed to get to them the time within which to lodge an appeal had since lapsed. No particulars are given, nor explanation offered for the failure by the Applicants to swear their own affidavit.

14. Section 79G of the Civil Procedure Act provides that:

“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.”

15. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “*good and sufficient cause*” for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** 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 general the matters which this court takes into account in deciding whether to grant an extension of time

are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

16. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of **Telkom Kenya Limited V. John Ochanda And 996 Others [2015] eKLR** that:

“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court’s discretion in curing the pleadings before it. This Court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place....

It is this Court’s position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not irrelevant but are the handmaidens of justice that facilitate the right of access to justice in the terms of Article 48 of the Constitution....”

See also **Patrick Wanyonyi Khaemba V Teachers Service Commission & 2 Others [2019] eKLR**.

17. Similarly, the Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

- 1. Extension of time is not a right of any 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 a case- to-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 suffered by the Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**
- 7.”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR**.

18. In this instance, the court cannot establish with certainty the date of the delivery of the lower court judgment. The motion states that the judgment was delivered on 15th January, 2021 whereas the draft Memorandum of appeal cites the date of delivery as 15th February, 2021. As such the delay in this case could be about three to four months. The Applicants’ counsel has claimed that the delay was occasioned by the fact that after the judgment she had challenges in contacting the Applicants. No dates or further particulars are supplied, nor evidence of correspondence tendered in proof of the alleged efforts. It is not established when she finally managed to contact the Applicants to inform them of the judgment.

19. The Respondent has correctly challenged this unsupported explanation; counsel for the Applicants did not deem it necessary to give any flesh to the bald allegations in her affidavit, and worse, the Applicants who are the rightful owners of the application did not depose any affidavits to shed light on the circumstances leading to delay in filing the appeal and or motion.

20. A party seeking extension of time should not appear to presume on the court’s discretion, regardless of the period of delay. In this case, the Applicants have in the vaguest terms possible sought to explain the delay of three to four months without offering a scintilla of evidence in support. Such a casual approach flies in the face of the discretionary jurisdiction invoked and relevant pronouncements of superior courts. In the circumstances, the court agrees with the Respondent that the Applicants have not demonstrated “*good and sufficient cause*” for not filing the appeal in time and the extension sought cannot be granted. In the circumstance the entire motion must fail and is for dismissal with costs. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 10TH DAY OF FEBRUARY 2022

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Ms Gulenywa

For the Respondent: Mr Waiganjo

C/A: Carol