



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

MISC. CIVIL APPLICATION NO. E2 OF 2020

PATRICK KIBANYA

BRITS FREIGHTERS LTD.....APPLICANTS

VERSUS

BENJAMIN KIILU KYENGO.....RESPONDENT

RULING

1. The prayers for determination in the application dated 8.9.2020 are an order that the applicant be granted leave to lodge and appeal out of time against the judgement in Kithimani SPMCC 98 of 2018 and that there be a stay of execution of the judgement rendered between the parties in Kithimani SPMCC 98 of 2018. The application is brought under sections 1A, 1B, 3, 3A and 79G of the Civil Procedure Act and Order 42 Rule 6(1) and 51 Rule 1 of the Civil Procedure Rules. It is supported by the affidavits of Ruth Mbaleo and Wamae Ndegwa.
2. The background to the application, as gleaned from the pleadings and the annexures thereto, relates to a civil suit 98 of 2018 in the Senior Principal Magistrates Court in Kithimani where judgement was delivered on 14.5.2020. There is a copy of a draft memorandum of appeal, judgement of the trial court and letters requesting for the status of the suit in the trial court that are annexed to the affidavit.
3. The grounds stated briefly in the Notice of Motion and expounded in detail in the affidavit in support of the application were that judgement in the lower court was delivered on 14.5.2020 without notice to the parties and that the applicants are dissatisfied with the same. The applicant averred that it would be in the interests of justice if the orders sought are granted.
4. In opposition to the application are grounds of opposition that were filed on 28.9.2020 by learned counsel for the respondent. Counsel was of the view that the application was frivolous, lacking in merit and intended to deprive the respondent of the fruits of his judgement. It was posited that there was no explanation for the delay and proposed that half the decretal amount be deposited in court and the remainder be released to the respondent.
5. The application was canvassed vide written submissions. Learned counsel for the applicants placed reliance on section 79G and 95 of the Civil Procedure Act as well as Order 42 Rule 6 of the Civil Procedure Rules and urged the court to allow the application. In response, counsel for the respondent urged the court to dismiss the application and placed reliance on the case of **Captain Motorcycles Manufacturing Co Ltd v Jane Muthoni Mberere & Anor (2020) eKLR**.
6. The issue for determination in this application is **Whether the applicant should be granted leave to file the appeal out of time as well as the prayer for stay of execution.**
7. This court has the discretion, for sufficient cause, to extend time under section 79G of the Civil Procedure Act. Sufficient cause should relate to the inability to do a particular act.

Section 79G provides as follows:-

“ 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. ”

8. The above principles were considered by Duffus P in the case of **Mugo & Others v Wanjiru & Another [1970] EA 481** at p.484 where he stated thus;

"Each application must be decided in the particular circumstances of each case but as a general rule the applicant must

satisfactorily is explain the reason for the delay and should also satisfy the court as to whether or not there will be a denial of justice by the refusal or granting of the application.”

9. The Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] eKLR**. listed the factors which aid our courts in exercising the discretion whether to extend time to file an appeal out of time and they include the following:

a. The period of delay;

b. The reason for the delay;

c. The arguability of the appeal;

d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;

e. The importance of compliance with time limits to the particular litigation or issue; and

f. The effect if any on the administration of justice or public interest if any is involved.

10. I will keep the above principles in mind as I proceed to determine this application. It is not in dispute that the applicant is aggrieved with the decision of the trial court and has a draft memorandum of appeal and commendably even a record of appeal annexed to the application. A careful perusal of the grounds of opposition does not give any other reason why the respondent is opposed to the application save that the delay was not explained by the applicant.

11. In this case, the application was filed on 17.9.2020 that is about 4 months after the judgement was delivered. I find the delay not to be inordinate and that the explanation is understandable. I am unable to see the prejudice that the Respondent will suffer if the application is allowed. I find the applicants have easily met the test for grant of order for extension of time as well as leave to file the appeal out of time.

12. In determining the issue for stay of execution application, the court will be guided by the following considerations- :

(1) Whether the application has been brought without unreasonable delay;

(2) Whether the Court is satisfied that substantial loss would occur unless stay is granted; and

(3) On being convinced that stay is deserved, the court will ask the Applicant to furnish such security as shall be sufficient to satisfy any decree that might ultimately be binding on the Applicant.

13. The application is brought under inter alia section 3A of the Civil Procedure Act that states that;

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

14. Order 42 Rule 6 of the Civil Procedure Rules provides for stay of execution pending appeal and it sets out the conditions to be met by an Applicant in order to be entitled to an order for stay are set out in that Rule in the following terms:

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.

15. I have seen the memorandum of appeal and agree that the applicant has every right to be heard on appeal. The application has been filed timeously also and that there are persuasive grounds in favor of the application.

16. On the element of substantial loss I am guided by the case of **Kenya Shell Limited v Benjamin Karuga Kibiru & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018**, where it was stated that:-

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of

substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

17. Guided by the above authority, the only substantial loss the applicant will suffer if the stay order is not granted is that there will be a compromise on the right to be heard on appeal. In performing a balancing act between the competing claims, it would appear to be an occasion of injustice to the respondent who has been in court since 2018 to encounter any further delay in realizing the fruits of his judgement. I am convinced that stay is deserved so as to preserve the subject of the intended appeal as the same might end up being rendered nugatory in the event of its success. In the premises I am inclined to consider the invitation to make a pronouncement on security for costs. The respondent seems not opposed to an order that half the decretal sums be paid to him while the balance be deposited into a joint interest earning account in the names of both advocates. However, I note that the applicant’s proposed appeal is against liability and quantum and at this stage nobody knows which way the appeal might turn out. The best bet that takes care of the concerns of the parties is for an order that the entire decretal sum be deposited into an interest earning account in the joint names of the advocates pending the determination of the proposed appeal. This kind of arrangement seems appropriate in the circumstances.

18. The upshot is that the Application dated 8.9.2020 succeeds to the extent as follows:

a. The Applicants are granted extension of time as well leave to file the appeal out of time; which shall be filed within 14 days from the date of this ruling.

b. There be an order of stay of execution of the judgement and decree in Kithimani SPMCC No. 98 of 2018 upon the applicant depositing the entire decretal sums into a joint interest earning account in the names of both advocates for the parties within thirty (30) days from the date of this ruling failing which the stay shall lapse.

c. The Costs of the application shall abide in the appeal.

It is so ordered.

Dated and delivered at Machakos this 1st day of February, 2021.

D. K. Kemei

Judge