



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

MISC. CIVIL APPLICATION NO. E009 OF 2020

LEONARD MATASIA.....APPLICANT

VERSUS

SIMON MAKOKHA SABUNIRESPONDENT

RULING

Vide a Notice of Motion Application dated 15th December 2020 the applicant seeks;-

1. Spent
2. That there be stay of execution against the applicant in Bungoma CMCC No. 199 of 2015 pending hearing and determination of this application *inter partes*.
3. That the applicant herein be given leave to file appeal out of time.
4. That costs of this Application be allowed.

The application is supported by the grounds on the face of the motion and the applicant's affidavit.

The applicant in a brief affidavit depones that he filed an application in the lower court seeking to set aside an *ex-parte* judgement which application was dismissed on 22/2/2019. That after the dismissal, he applied for proceedings with the intention of appealing but the proceedings took long to be ready until the time for appeal lapsed. That when he finally obtained the proceedings, the time within which to appeal had lapsed hence this application.

He further depones that if the orders of stay are not granted and leave to appeal out of time granted, the respondent is likely to execute thus rendering the intended appeal nugatory and academic and that if the orders sought are not granted, he will have been condemned unheard hence irreparable loss.

The applicant has annexed the certificate of delay issued on 11th November, 2019 a draft Memorandum of Appeal and the proclamation.

The respondent in opposing the application depones that the applicant has not explained why it took him more than 1 and half years to file the application. That the applicant was issued with proceedings and judgment on 3/5/2019 and the application was filed on 23/12/2020. That the orders sought are discretionary and that the applicant has approached the court with unclean hands. That indeed the applicant was served with pleadings in the trial court matter but deliberately lied to court. That the application is frivolous, vexatious and an abuse of the court process and finally that he stands to suffer irreparable loss and damage if the orders sought are granted.

Parties filed their respective submissions.

The applicant through Mr. Kituyi Advocate submits that the major reason for not filing his appeal within time upon dismissal of his application on 22/2/2019, he sought for proceedings to enable him prepare for the appeal which was only availed on 3/5/2019 that the certificate of delay was signed in November 2019 enabling him to come to court to lodge the application. That there was no way the applicant could have explained himself other than by annexing the certificate of delay and therefore not deliberate but occasioned by the above facts.

That around November, 2019, the applicant instructed counsel to file the instant application but the applicant was impecunious hence counsel could not proceed immediately. Counsel submits that in 2020, Covid-19 came and nothing could move and invites this court to take judicial notice thereof and that it was until December that the applicant got funds to instruct counsel.

Mr Kituyi submits that the delay was not inordinate. That since the applicant was not served in the lower court, he needs this court to intervene.

Finally, the applicant has cited the provisions of section 79G of the Civil procedure Act and the decision in **Kenya power & Lighting Co. Ltd vs Rose Anyango & Highrise enterprises Civ. Misc. Application No. 29/2020** in support of his submissions.

The respondent through Mr. Bw'Onchiri on the contrary submits the applicants delay has not been explained and urges this court to dismiss the application with costs.

Upon perusing the application together with the annexures thereto, the replying affidavit and the rival submissions, this court is of opinion that the following are the issues that present themselves for determination.

1. Whether the applicant has advanced sufficient reasons for an extension of time to file his appeal out of time.
2. If (1) above is in the affirmative; is the applicant entitled to stay of execution pending the intended appeal to this court.

On the first issue, it is not controverted that the order intended to be appealed against was issued on 22nd February, 2019, the Certificate of Delay was issued on 11th November 2019 and the application filed on 23rd December, 2020. From the certificate of delay, it is clear that the proceedings and judgement were supplied on 3rd May, 2019.

From the onset, the law applicable on appeals to this court is captured in section 79G of the **Civil Procedure Act** which states;

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.

A computation of time shows that a period of approximately 19 Months had already lapsed between the day the proceedings were supplied on 3rd May, 2019 and the time the application was filed on 23rd December, 2020.

Clearly, the applicant has not complied with the dictates of section 79G. The section however further provides; ***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 (Emphasis added).***

The applicant submits that the proceedings took long to be supplied, that upon receiving the same, the applicant did not have money to instruct counsel and when he finally instructed, Covid-19 struck hence the delay.

The respondent submits that the applicant has not put forth sufficient reasons to be granted the leave sought.

This power to extend time for lodging appeal is discretionary and should be invoked sparingly at the instance of a deserving party. In such applications the court is called upon to balance the twin but conflicting rights of parties; the applicant's right to exhaust the appeal systems provided by the law vis-a vis the respondent's right to enjoy the fruits of his judgment.

In **Nicholas Kiptoo Arap Korir Salat Vs. The Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR** the Supreme Court gave a number of factors to be considered in such circumstances and held that :-

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 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 respondents if the extension is granted;***
6. ***Whether the application has been brought without undue delay; and***
7. ***Whether in certain cases, like election petitions, public interest should be a consideration for extending time.***

This court takes note of the outbreak of Covid-19 in early 2020 and the attendant hardships. This court is inclined to allow the application in the interests of justice.

On the issue of stay pending appeal, the court notes that there is no appeal that has been preferred and therefore this court is of the view that the issue of stay shall be raised and determined at the appeal. I shall make the following orders;

1. The applicant is granted leave to file appeal out of time within 30 days from the date hereof failure of which the orders herein shall lapse.

2. The prayer for stay of execution is declined.

3. No order as to costs.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF MARCH, 2021

S. N RIECHI

JUDGE