



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MISC APPLN NO. E294 OF 2020

THE PEOPLE MEDIA GROUP LIMITED1ST APPLICANT

ANNA WAIRIMU 2ND APPLICANT

VERSUS

WILLIAM KIMUTAI B. KEITANY.....RESPONDENT

RULING

1. The applicants, *The People Media Group Limited* and *Anna Wairimu* approached this court vide a Notice of Motion filed on 17th August 2020 principally seeking three substantive orders.

They implored this court to grant them leave to file their intended appeal against the trial court's decision in Milimani CMCC No. 3524 of 2013 consolidated with CMCC No. 3318 of 2013, CMCC No. 4457 of 2013 and CMCC No. 4473 of 2013 out of time and orders staying execution of the impugned decision pending hearing and determination of the appeal.

They also requested the court to deem the memorandum of appeal annexed to the application as properly and duly filed upon payment of requisite court fees.

2. The application is supported by the grounds stated on its face and the depositions made in two supporting affidavits sworn by *Ms Faith Ndonga*, the applicants' learned counsel and *Mr. Ken Ngaruiya*, the Ag. Chief Executive Officer of *Mediamax Network Limited*, the 1st applicant's parent company.

3. In the grounds premising the motion and in the supporting affidavits, the applicants contend that they are aggrieved by the decision of *Hon. Mrs. L.L. Gicheha (CM)* in the aforesaid consolidated suits and are desirous of challenging it on appeal but they need this court's leave to do so since the time prescribed by law to lodge appeals to the High Court has expired.

4. Regarding the reason for failing to file their intended appeal within time, the applicants explained that though the trial court's judgment was delivered on 30th April 2020 in the absence of both parties in view of measures taken by courts to combat spread of the covid-19 pandemic, their erstwhile advocates obtained the judgment on 18th May 2020; that further delay was occasioned by the applicant's need to consult their insurer's as required by terms of their professional indemnity cover before deciding whether or not to lodge an appeal as well as the subsequent decision by their insurer to change advocates and the bureaucracies associated thereto.

5. It is also the applicants' assertion that if stay is not granted, the respondent will proceed with execution which will prejudice their right of appeal. They advanced the view that if the application was allowed, the respondent is not likely to suffer any prejudice.

6. The application is contested through a replying affidavit sworn by the respondent on 4th September 2020. The respondent deponed that the application lacked merit as in his view, no good or valid reason has been given by the applicants for failure to file their intended appeal within the time set by the law; that the delay in filing the application was unreasonable considering that the applicants obtained a copy of the trial court's judgment on 18th May 2020.

7. On the prayer for stay of execution, the respondent urged me to find that the applicants have not demonstrated that they are likely to suffer substantial loss if orders of stay are not granted. He averred that if the prayer is declined and the decretal amount is paid, he had the means to refund the applicants the decretal sums if called upon to do so and that therefore, refusing to grant stay will not render the appeal nugatory. The respondent further deponed that the intended appeal does not have any chance of success and that the application was solely aimed at denying him enjoyment of fruits of his judgment.

8. By consent of the parties, the application was prosecuted by way of written submissions. Those of the applicants were filed by *Meritad Law Africa LLP* dated 25th November 2020 while those of the respondent were filed by the firm of *Nderitu & Partners* dated 26th November 2020. The submissions reiterated the positions taken by the parties in supporting and opposing the application.

9. I have given due consideration to the application, the affidavits on record and the rival written submissions filed on behalf of the parties as well as the authorities cited. In my view, the key issue that crystallizes for my determination is whether the applicants have demonstrated that they are deserving of the exercise of the court's discretion in their favour by granting them the orders sought in the motion.

10. I wish to state at the outset that I have noted that in their written submissions, both parties submitted at length on matters touching on the merits or demerits of the intended appeal. It is important to state at this juncture that in interlocutory applications such as the present one, the court is not required to delve into the merits or otherwise of the appeal or intended appeal as doing so has the potential of prejudicing the fair hearing of the appeal or embarrassing the judge who will preside over its hearing. I will therefore respectfully decline the parties' invitation to determine whether or not the trial court properly addressed its mind to the evidence adduced before it or the applicable law.

11. That said, given the nature of the orders sought in the motion, I will first address the applicants' prayer for leave to file their intended appeal out of time since my decision on the prayer will determine the fate of the prayer for stay of execution pending determination of the intended appeal.

12. As correctly submitted by both parties, the law governing appeals to the High Court is set out in *Section 79 G* of the *Civil Procedure Act* which states as follows:

“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.”

13. From the above provision, it is clear that this court has wide and unfettered discretion in deciding whether or not to enlarge time for filing of an intended appeal or validating an appeal that was filed out of time provided that the applicant establishes good and sufficient cause for failure to file the appeal within time.

14. Needless to state, the court's discretion, like all other judicial discretions, must be exercised judiciously in accordance with the law and established legal principles. It should not be exercised whimsically or capriciously. I am well guided by the decision of the Supreme Court in *Nicholas Kiptoo Arap Salat V IEBC & 7 Others, [2015] eKLR* in which the court held *inter alia* that extension of time is not an automatic right of a party and that to be deserving of the relief, a party must place before the court sufficient material proving that there was good cause for failing to file an appeal within the prescribed time.

15. The respondent has opposed the applicants' prayer for enlargement of time primarily on grounds that there was unreasonable delay in filing the instant application and that no plausible reason has been advanced to explain why the intended appeal was not filed within time.

16. From the material placed before me, I find that it is not disputed that the impugned decision was delivered on 30th April 2020 in the absence of the parties and it was not until 18th June 2020, about one and a half months later, that the applicants' former advocates became aware of the judgment. As noted earlier, the law requires that appeals from subordinate courts to the High Court should be filed within 30 days of the judgment or order appealed against.

17. Since the trial court's judgment was delivered on 30th April 2020, the thirty day period limited for lodging of appeals to the High Court expired on or about 1st May 2020. This in effect means that by the time the applicants' former advocates became aware of the judgment, time within which to file the intended appeal had already expired.

18. Regarding whether or not the instant application was filed timeously, my view which I also expressed in *Hezekiah Ngugi v Kenya Power & Lighting Co Limited, [2020] eKLR* is that there is no standard measure of what constitutes inordinate or inexcusable delay in applications of this nature. The test is subjective and is dependent on the facts and circumstances of each particular case.

19. The facts in this case show that the period between the date of receipt of the trial court's judgment and filing of the application under consideration was about two months. In my opinion, the delay is not unreasonable or inordinate considering that in between that period, the applicants changed their advocates and the incoming advocates obviously needed time to familiarize themselves with the matter before taking appropriate action.

20. Whilst I concur with the respondent's submission that allowing the prayer for extension of time will delay realization of fruits of his judgment and that obstacles should not be put on the way of a successful litigant who wishes to proceed with execution, my take is that the right of a successful litigant should be weighed against the equally weighty right of the unsuccessful party who is dissatisfied with the trial court's decision and desires to exhaust the appeal process.

21. The right of appeal is both a constitutional and statutory right and denying a party an opportunity to exercise that right may amount to violation of the party's right of access to justice guaranteed under *Article 48* of the *Constitution* as well as the right to a fair hearing enshrined in *Article 50 (1)* of the *Constitution*.

22. Having weighted the competing interests of the parties, I find that if I decline to grant the applicants' prayer, they will suffer grave prejudice since they will be removed from the seat of justice before having an opportunity to ventilate their grievances on appeal whereas if I

allow the application, the respondent is not likely to suffer any prejudice that cannot be ameliorated by an award of costs. The interests of justice in this case, in my view, tilts more towards granting as opposed to denying the applicants' prayer for enlargement of time.

23. I however hasten to add that though the applicants had indicated in one of their prayers that they had filed a memorandum of appeal which they requested the court to admit out of time, my perusal of the court record does not show that such a memorandum of appeal was indeed filed.

24. The document described as a memorandum of appeal annexed to the supporting affidavit of *Mr. Ken Ngaruiya* is neither dated nor signed. *Order 42 Rule 1* of the *Civil Procedure Rules* which provides for the manner in which appeals to the High Court should be lodged states as follows:

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

It is common knowledge that pleadings must be dated and signed. Since the document described as a memorandum of appeal was neither dated nor signed, it does not qualify to be a memorandum of appeal as envisaged by the law. Consequently, there is nothing for this court to validate as sought in prayer 8.

25. In view of the foregoing, I am satisfied that the applicants have demonstrated good and sufficient cause to warrant the exercise of this court's discretion in granting the prayer for extension of time to file their intended appeal. I therefore find merit in prayer 7 of the motion and it is hereby allowed. The applicants are granted leave to file and serve their intended appeal within 14 days of today's date.

26. Turning now to the applicants' prayer for stay of execution pending appeal, I have considered the extensive submissions and the authorities cited by both parties in support and in opposition to this prayer. It is however my view that a close reading of *Order 42 Rule 6 (1) and (2)* of the *Civil Procedure Rules* reveals that stay of execution pending appeal should ideally be granted when there is an existing appeal which is awaiting determination. See: **Subru Motors Limited v Linet Nehema Onyoni & 2 Others, [2020] eKLR.**

27. In this case, there is no appeal pending as the applicants are yet to file an appeal and that is why they sought for, *inter alia*, leave to file an appeal out of time. I do not therefore find any basis upon which I can exercise my discretion to grant orders of stay of execution as sought by the applicants.

28. The above notwithstanding, given that I have already granted the applicants leave to file their intended appeal, it is only just and fair that I exercise my discretion in granting the applicants temporary stay of execution limited to the period of leave granted in order to preserve the substratum of the intended appeal so that if no appeal is filed within the stipulated time, the respondent can proceed with execution to recover fruits of his judgment. Accordingly, I hereby grant the applicants stay of execution of the trial court's decision to last for 14 days of today's date.

29. Costs follow the event and are at the court's discretion. In this case, the order that best commends itself to me on costs is that the respondent should and is hereby awarded thrown away costs assessed at KShs.20,000.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH 2021

C. W. GITHUA

JUDGE

In the presence of:

Ms Ndonga for the applicants

Ms Ndirangu holding brief for Mr. Nderitu for the respondent

Ms Karwitha: Court Assistant