



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO.19 OF 2021

SILAS KANYOLU MWATHA.....INTENDED APPELLANT

~VERSUS~

JOSEPHINE KAVIVE JAMES.....RESPONDENTS

Coram: Justice Reuben Nyakundi

Mr. Kimonda Gachoka Advocate for the Applicant

Mr. Njoroge Mwangi Advocate for the Respondent

RULING

The applicant has filed a notice of motion dated 9th March 2021 in terms of Section 3 A , 79 G and 95 of the Civil Procedure Act, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6, Order 51 Rule 1 and 3 of the Civil Procedure Rules seeking the following substantive orders:

- a. That this honorable court be pleased to extend time and grant leave to the applicant to lodge a memorandum of appeal out of time against the judgement and decree entered in PMCC Number 1 of 2020 on 29th September 2020.**
- b. That the honorable Court be pleased to stay the execution of the decree in the aforesaid judgement pending the hearing and termination of the intended appeal.**

The applicant based his application on the grounds on the face of the motion and sworn affidavit dated 8th March 2021. On the other hand, the respondent filed a replying affidavit opposing the application. The gist of the applicant's averments to support his application revolves around the following reasons; The failure to comply has not been intentional or negligent but was due failure for the client to issue instructions to proceed with the appeal and that took a bit of time hence the delay and breach of Section 79 G of the Civil Procedure Act. Secondly, there is need to stay the execution of such a decree to enable the applicant exercise his right of appeal so as not to render the appeal nugatory.

I have considered the notice of motion and the affidavits in support and against the reliefs being applied for and it is all about exercise of discretion by this Court on whether in both tactical prayers, the applicant has met the criteria and the principles of law to benefit as such to extend time or grant stay of execution.

Determination

Being equitable reliefs, they are underpinned on well settled principles which guide the Court to decline or grant the applications in the case of **Salat v Independent Electoral & Boundaries Commission & 7 others [2014] KLR-SCK**, the Court held as follows on extension of time to file an appeal out of time:

- 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 ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis;**

4. Whether there is reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;
5. Whether there would be any prejudices suffered by the respondents if the extension was granted;
6. Whether the application had been brought without undue delay; and;
7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.

The time stipulation is a requirement of the law as clearly stated in Section 79 G of the Civil Procedure Act. In short, parties cannot, either unilaterally or by agreement between them, metaphorically, waive away the rules of the court. The rules of the Court are meant to achieve timely and orderly commencement, progress and proper determination of litigation of proceedings. Given the statutory limit, principally, the delay is inexcusable unless the applicant shows sufficient cause to justify the delay and that any such extension shall not prejudice the respondent. In this regard, the Court in **Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR** the Court of Appeal while referring to other authorities observed:

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy and caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors states in previous decisions of this Court including but not limited to the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted and whether the matter raises issues of public importance. In Henry Mukora Mwangi v Charles Gichina Mwangi-Civil Application No. Nai 26 of 2004, this Court held:- “It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize his principle by referring to the decision in Mwangi v Kenya Airways Ltd. [2003] KLR 486 in which this Court stated: _ “Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing an application for extension of time under rule 4 of the Rules.

For instance, in **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi- Civil Application No Nai. 255 of 1997 (unreported)**, the Court expressed itself thus:-

“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 in general the matters which this court takes into account in deciding whether to grant an extension of the time are: first, the length of delay; secondly the reason for delay; thirdly(possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

The legal authorities demonstrate that it is indeed a balancing exercise between the need for there to be a good reason for the delay and the prejudice that may be caused to the other party if the extension were granted. That’s why in the Salat case (Supra) observed **“Extension of time being a creature of equity, one can only enjoy if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it”**.

In the present application, I have given due attention to the issue of delay and prejudice which may be occasioned to the respondent. In the present case, judgement was delivered on 29th September 2020 and the notes of motion to extend time on 19th March 2021. From the evidence, the cumulative delay period is on or about 6 months from the original time of 30 days stipulated in Section 79 G of the Civil Procedure Act. The delay though inordinate has been explained by the applicant and may be excusable given the Covid-19 Pandemic which one may consider extenuating circumstances. On the second tangent, I will stress the point on a particular prejudice likely to be occasioned by virtue of the fact that the respondent will be deprived of the fruits of the judgement in respect of a case which I can fairly say that in pursuit of the appeal the applicant should have made a proposal to pay out part of the decretal sum not contested.

In my judgement, I will exercise my discretion to grant an extension of time on condition that the applicant accedes ground to pay 50% of the damages awarded to the respondent. This is readily manifested from the primary proceedings and submissions made by both parties to procure judgement before the trial Court.

Reverting to the issue on stay of execution, I am guided by the following principles:

In Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR the court had the following to say; “The principles governing the exercise of the court’s jurisdiction under rule 5(2)(b) of our Rules are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applications must show that they have an arguable appeal; and second , this Court should ensure that the appeal, if successful should not be rendered nugatory. We need only restate these principles from Reliance Bank Ltd (In Liquidation) vs Norlake Investments Ltd - Civil Appl. No. Nai. 93/02 (UR), thus:-

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable one, that it is not a frivolous appeal,
2. That if an order or stay or injunction, as the case may be, is not granted, the appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”

Lastly, both limbs must be demonstrated to exist before one can obtain relief under rule 5(2) (b). (See **Republic v Kenya Anti-Corruption Commission & 2 others [20090 KLR 31]**).

We are further guided by this court's decision in **CARTER & SONS LTD VS DEPOSIT PROTECTION FUND BOARD & 2 OTHERS- Civil Appeal No 291 of 1997, at Page 4** as follows: "the mere fact that these are strong grounds of appeal would not, in itself, justify an order for stay... the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course be made without reasonable delay".

I have considered the rival affidavit evidence and the various facts that are alluded to particularly by the applicant in persuading this court to grant stay of execution. These matters as elaborated as of necessity paints a picture of a likely partial substantial loss which is likely to be suffered by the applicant in the event stay not granted. However, by and large, this is an application with no special circumstances but basically an applicant who is desirous to approach an appeal's court to litigate the judgement on the award of damages. This implies he has no issue with liability. As I have stated elsewhere, the court should not make it a practice of depriving a successful litigant of the fruits of his or her litigation for reason that the defendant in the lower court proceedings has preferred an appeal. That is why though the remedy is discretionary, the Civil Procedure Rules outline very clear conditions to be met before any stay is granted or denied. In the present case, balancing the competing interests of the parties to the intended appeal, I do exercise discretion to allow stay of execution in terms of Order 42 Rule (6) (1) of the Civil Procedure Rules to grant tied to the condition on partial payment of the decretal sum of the decree and the balance to be deposited in a joint earning interest account of both parties to the intended appeal within 30 days of today's order.

In the circumstances, the notice of motion dated 9th March 2021, for extension of time and stay order is allowed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF APRIL 2021.

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R. NYAKUNDI

JUDGE

NB:

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules. [info@kglaw.co.ke, njorogemwanginjoroge@gmail.com]