



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC APPLICATION NO. E002 OF 2020

AKARIM ENTERPRISES LTD.....APPLICANT

VERSUS

SALESIO NGOCHI KAGWIMA (Suing as the legal representative of

GRACE KAGUNA MWENDA (DECEASED).....RESPONDENT

RULING

1. This is the ruling in a Notice of Motion filed by Akarim Enterprises Ltd against Salesio Ngochi Kagwima (Suing as the legal representative of Grace Kaguna Mwenda (deceased), who is the respondent herein. Akarim Enterprises Ltd, to be referred to as the applicant was the defendant in Marimanti SPMCC No. 26/2019 where the respondent was the plaintiff. In the suit, the respondent was claiming general damages under the Law Reform Act and Fatal Accidents Act as well as special damages and costs arising from a road traffic accident which occurred on 19/8/2019 involving the deceased and the applicant motor vehicle. Judgment in the matter was entered on 17/9/2020 in the ratio of 85:15 in favour of the respondent. The total sum awarded was Ksh.1,953,034/= .

2. The application brought before me is dated 9/11/2020 and basically seeks for an order that the court be pleased to extend the time within which the applicants may lodge their intended appeal against the judgment delivered on 17/9/2020 in Marimanti SPMCC No. 26/2019.

3. The applicant also seeks an order that there be stay of execution of the decree in the issued in the said suit pending the hearing and determination of this application.

4. The applicant is basically stating he was aggrieved by the judgment and is likely to suffer a miscarriage of justice unless the application is heard and appropriate orders issued. It is the contention by the applicant that the delay in filing the appeal within the statutory period was due to the fact that judgment was delivered in his absence and only became aware of the judgment weeks after it was delivered. The applicant further contends that delay was occasioned by the inadvertent mistake on the part of the applicant's insurer who misplaced the file and it took substantial time before it was found. The applicant is arguing the court to find that the intended appeal is highly meritorious and stands good chances of success as demonstrated by the annexed draft memorandum of appeal.

5. The applicant support the application with an affidavit sworn by Kibet Kemboi on 9/11/2020 where he enumerates the grounds which he relies on in support of the application. The and a further affidavit sworn on 15/1/2021.

6. The respondent has opposed the application and filed a replying affidavit sworn by Salesio Ngochi Kagwima on 14/12/2020. The contention by the respondent is that the applicant's advocate has sworn an affidavit on contentious matters instead of the client. That the application is belated and intended to deny him the fruits of judgment. The applicant deposes that the applicant had filed an application for stay of execution which he later withdrew and filed another application which he never prosecuted. That thereafter the applicant filed an application for stay which was settled by consent of the parties and the applicant was granted 45 (forty five) days stay of execution. The respondent refers to the consent as annexure SNK 3 which does not have any consent order.

The applicant contends that the application lacks merits and prays that if the court allows, the applicant be ordered to pay half the decretal sum and deposit the balance in an interest earning account. The applicant urges the court to find that the applicant was indolent having brought the application two months after the judgment was delivered. He further urges the court to find that the application is incompetent, biased in law and ought to be struck out with costs.

In response the applicant deposes that the applications dated 22/10/2020 and 4/11/2020 were filed by an advocate without instructions and ought to be disregarded as they were also not within their knowledge.

The application was disposed off by way of written submissions for the applicant it was submitted that on the issue of extension time within which to lodge the appeal, the applicant relies on **Section 79 G** of the **Civil Procedure Act Cap 21** which provides 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.”

He further relies on **Section 95** of the same Act which provides as follow:-

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

To further buttress their submissions the applicant relies on **Order 50 Rule 6 Civil Procedure Rules** which provides as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

It is the applicant’s submissions that this court is clothed with wide discretion to extend time.

The applicant referred to court to the case of **Samuel Mwaura Muthambi v Josphine Wanjiru Ngugi & Another [2018] eKLR** where Justice Ngugi relied on the court of Appeal decision in **Mwangi v Kenya Airways Ltd [2013] KLR** and stated as follows:-

“Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in Mwangi v Kenya Airways Ltd [2003] KLR.

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.*

The applicant further relies on the case of **Edith Gichugu Koiré v Stephene Njagi Thoita [2014] e KLR**, Justice Otieno Odek, where it was stated that:-

“Nevertheless, it ought to be guided by consideration of factors stated in many 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 if the application is granted, and whether the matter raises issues of public importance, amongst others...”

The applicant submits that the delay was not inordinate, as he brought the application as soon as it was practicable, that he has given reasons for the delay and that the appeal is arguable. He relies on the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another [2018] eKLR** where the court stated that all what the court has to consider is the arguability of the appeal. He further submits that the respondent does not stand to suffer prejudice and that compliance with time limits is important but not stringent. The applicant urges the court that it would be fair to allow the application in order to give him the right to file the appeal against the judgment of the trial court.

On the prayer for stay of execution the applicant relies on Order 42 rule 6(1) & (2) of the Civil Procedure Rules which provides:-

“(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 subrule (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.”

The applicant submits he has proved that he is likely to suffer substantial loss as the respondent has commenced the process of execution and if stay is not ordered the appeal will be rendered nugatory. It is also submitted that the respondent is of unknown meaning who would not be able to refund the decretal sum and in the circumstances the appeal would be rendered an academic exercise. The applicant further submits that he is ready to provide security as the court may order and lastly that the appeal has been filed without unreasonable delay. The applicant has relies on the decision of this court in the case of **Kinyunjuri Maguta v Woluku Maguta [2018] eKLR** and submits that the delay was not unreasonable or inordinate. The applicant submits that the application has been brought in good faith and that it is in the interests of Justice that the application be allowed.

For the respondent it is submitted that the applicant seeks an order for stay of execution and must establish the grounds laid out under order 42 rule 6 (1) Civil Procedure Rules which are:-

- That substantial loss may result to the applicant unless the order is made.
- The application has been brought without unreasonable delay.
- Security for the due performance of the decree.

The applicant relies on the case of **Reliance Band Ltd (in Liquidation) v Nortake Investments Ltd – Civil Application No. Nai 93/02 (UR)** and urges the court to find that the intended appeal should not be frivolous and the appeal will be rendered nugatory if it succeeds. The applicant also relies on the court of appeal decision in **Chris Munga N. Bichange v Richard Nyagaka Tongi & 2 others**, for the same proposition.

The respondent submits that two issues arise for determination which are substantial loss delay and security. On substantial loss the respondents relies on the court of Appeal decision in **Silvestein v Cheson [2002] KLR 876** where the court stated that the issue of substantial loss is the cornerstone of both jurisdiction and is what has to be prosecuted by preserving the status quo because such loss would render the appeal nugatory. The respondent submits that at stake is a money decree which will not render the appeal nugatory if stay of execution is not ordered.

On the issue of delay it is submitted the delay in filing the appeal has such been explained.

On the issue of security the respondent relies on a per.....decision in the case of **Aran C Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates** (citation not given and copy not provided). He submits that the applicant has not provided security.

The respondent has not submitted on the issue of extension of time to file the appeal.

The court considered the application. Two issues arise for determination;

- 1) Whether the applicant should be granted an extension of time to file the appeal.
- 2) Stay of execution.

1) Whether the applicant should be granted an extension of time to file the appeal.

The law applicable is section 79 of the Civil Procedure Act which has been quoted verbatim (supra). In this case the applicant has filed a draft memorandum of appeal. The High Court has held the view that in application for extension of time to file an appeal, the party is supposed to file a memorandum of appeal and then move the court to have the appeal admitted out of time. This has been based on the provision to **Section 79 G of the Civil Procedure Act** which provides that, “*an appeal may be admitted out of time.*” I take the view that the section requires that an appeal be filed first and the party moves the court to admit the appeal out of time. The provision ought to be given such interpretation as it goes on to state that a party must show sufficient cause to not filling the appeal in time. The section implies that there is an appeal filed and the court is called upon to exercise discretion as to whether to extend the time and admit it. This is base on the requirement that an appeal filed must be arguable and not frivolous or vexatious. The court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR** set out the factors which the court has to consider when exercising the discretion on whether to extend time. These include inter-alia the arguability of the appeal. In the case cited by the respondent, **Samuel Mwaura Muthumbi v Josphine Wanjiru Ngugi & Another [2018] eKLR** the Judge considered the filing of an application seeking leave to appeal out of time before filing the appeal itself as a procedural technicality. The court of Appeal has however affirmed that a party must first file an appeal then seek extension of time.

In **Charles Karanja Kiiru v Charles Githinji Maigira C.A at Mombasa C.A 71/2016 [2017] eKLR**, the position held by the High Court in **Gerald M’Gimbine v Joseph Kangangi [2009] eKLR and Martha Wambui v Irene Wanjiru Mwangi & Another [2015] eKLR** which had held that an appeal must be filed and the applicant seek leave to have it admitted outside the statutory period. That “*admitted*” under **Section 79 G Civil Procedure Act** connotes both the act of allowing or permitting an appeal already filed to be admitted out of time. See also **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others [2014] eKLR, Supreme Court**. In this case the applicant has not filed what is annexed to this application is a draft memorandum of appeal. The decision the applicant relies on in **Josephine Wanjiru Ngugi v Josephine Karani** is persuasive. Failure to file an appeal before moving the court for extension of time is fatal and the application is an abuse of court process. The application for extension of time to file is not properly before this court and is only good for rejection. Section 79G requires that the applicant files the appeal and at the same time seek leave of the court to have the appeal admitted out of the statutory period. The provision does not in any way provide that an intending appellants first seeks the court permission to admit a more existent appeal. He pray for extension of time to file appeal is not properly before the court and is struck out.

2. Stay of execution

The law on staying of execution is anchored under the provisions of order 42 rule 6 of the Civil Procedure Rule 5 (supra). A party seeking orders for stay of execution must satisfy the following conditions:

- a) Substantial loss may result to the applicant unless the order is made.
- b) That the application has been filed without unreasonable delay.
- c) Security as may be ordered by the court has been provided for the due performance of the decree or order as may be eventually be finding on the applicant.

I will proceed to consider whether the applicant has established these grounds;

a) Substantial loss

The decree which the applicant seeks to stay is a monetary decree. In such a situation the applicant must show that unless stay of execution is ordered, the applicant will not be in a position to recover the money if the appeal succeeds. The amount of money in the decree must be so large while considered against the economic status of the respondent who may not be in a position to refund. It is also considered on the status of the respondent who may stand to suffer substantial loss. If the applicant pleads that the respondent will not be able to refund the decretal sum, it is upon the respondent to prove that he/she is not a person of straw and will be able to refund the decretal sum. See **Metenei Ole Kilelu & 10 Others v Moses K. Nailole Civil Appeal No. 340/2008.**

In this case the amount involved is Ksh.2,184,236.00. The applicant has demonstrated that the respondent has started the process of execution, see annexure SMK1A. The respondent has not tendered evidence to show that he is not a person of straw and that he will be able to refund the decretal sum if the appeal succeeds. The amount involved is huge. The applicant is likely to suffer substantial loss if payment is not done and same is not recovered in the event that the appeal succeeds.

b) That application has been filed without unreasonable delay.

The judgment was delivered on 17/9/2020 and the application was filed on 4/12/2020. The applicant has explained the delay which amounts to a period of over two months. The delay was not in-ordinate or unreasonable. The respondent will not suffer any prejudice as he had conceded to a stay of execution for 45 days, see paragraph 11 of the replying affidavit sworn by Salesio Ngochi Kagwiria. The respondent also deposes that the applicant filed the application for stay before the trial court on 22/10/2020.

The respondent did not however annex the consent on the stay of execution.

c) Security

It the court which orders the appropriate security to be offered by the applicant. It is sufficient of the applicant to depose that he is ready to provide security. In this case the applicant has deponed that he is willing to provide security and to abide by such terms as this court may determine. The respondent has not shown the ability to refund but the applicant is writing to deposit the security as may be ordered by the court for the due performance of the decree.

In conclusion

The prayer for extension of time to file the appeal is without merits and is dismissed. The application for stay of execution has merits and is allowed on the following terms.

- i) There be stay of execution for 30 days within which period the applicant will file the intended appeal.
- ii) If appeal be filed within that period there be stay of execution pending the appeal.
- iii) The judgment on liability before the lower court was by consent and the respondent intends to challenge the quantum. Bearing this in mind, with regard to security, I order that the applicant will pay the respondent part of the decretal sum amounting to Ksh.500,000/= within 30 days, the balance of the decretal sum be deposited in an interest earning bank account in the names of the advocates of the parties within 30 days.
- iv) Cost of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 13TH DAY OF MAY 2021.

L.W. GITARI

JUDGE