



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 4 OF 2021

EVANS KIPTOO.....APPLICANT

-VERSUS-

REINHARD OMWOYO OMWOYO.....RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated **21 January 2021**. It was filed herein by the applicant, **Evans Kiptoo**, pursuant to the provisions of **Sections 1A, 3A, 79G, 95 of the Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; as well as **Order 22 Rule 22(1), 42 Rule 6 and Order 50 Rule 6** of the **Civil Procedure Rules, 2010**, for the following orders:

[a] Spent

[b] Spent

[c] That the Court be pleased to order a stay of execution of the Judgment delivered by the trial court on **10 September 2020** pending the hearing and determination of the intended appeal.

[d] That the Court be pleased to grant the applicant leave to file an appeal out of time against the judgment and decree of this Court delivered on **10 September 2020**.

[e] Spent

[f] That the costs of the application do abide the outcome of the appeal.

[2] The application was premised on the grounds that the applicant was unaware of the delivery of the lower court's judgment until he was served with a Proclamation of Attachment dated **10 November 2020**; and therefore that by that time the appeal period had expired. It was further the contention of the applicant that, being dissatisfied with the said judgment, he is desirous of filing an appeal. He believes his proposed appeal is arguable. The applicant relied on his Supporting Affidavit, sworn on **18 January 2021** reiterating his posturing that he was unaware of the entry of judgment until **Sadabri Auctioneers** served him with a Proclamation and copies of the Warrants of Attachment in execution.

[3] It was therefore the averment of the applicant that, since the appeal period had already lapsed, he is precluded from filing an appeal without the leave of the Court; and that he promptly filed the instant application for such leave. He added that the delay is not inordinate and therefore is excusable. The applicant further averred that the intended appeal is arguable and to that end, he annexed a copy of the draft Memorandum of Appeal for the Court's consideration. Also annexed to the Supporting Affidavit were copies of the lower court Judgment dated **10 September 2020**, Proclamation of Attachment, Decree and Certificate of Costs and the Warrant of Attachment.

[4] The respondent opposed the application. He relied on his Replying Affidavit sworn on **4 February 2021** wherein he deposed that the application has been brought in bad faith; granted that the applicant had filed a similar application before the lower court. He further averred that a Notice of Judgment was duly served on the applicant's counsel beforehand; and that after delivery of Judgment, notice was again given to the applicant as by law required. He therefore deposed that no useful purpose would be served by granting the orders sought as no appeal has been filed.

[5] Pursuant to Paragraph 6 of the **Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from the Risks associated with the Global Corona Virus Pandemic, Gazette Notice No. 3137 dated 20**

March 2020, directions were given herein on **10 February 2021** that the appeal be canvassed by way of written submissions. Thus, **Mr. Amihanda** for the applicant relied on his written submissions dated **19 March 2021**. He highlighted the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** and urged the Court to find that the applicant has satisfied the prerequisites set out therein; and is therefore entitled to an order of stay as well as leave to appeal.

[6] Counsel further submitted, on the authority of **National Industrial Credit Bank Limited vs. Aquinas Francos Wasike & Another** [2006] eKLR, that the respondent has not demonstrated his ability to pay back the decretal sum in the event the applicant's intended appeal is successful; and therefore that the applicant is likely to suffer substantial loss unless stay of execution is granted. According to counsel, the impugned Judgment awarded a substantial sum to the respondent; and therefore the applicant stands to suffer substantial loss in the event of success on appeal. Counsel cited **Housing Finance Company of Kenya vs. Sharok Kher Mohamed Ali Hirji and Another** [2015] eKLR in support of this argument; and added that it is immaterial that the lower court decree is essentially a money decree.

[7] As to whether the intended appeal is arguable, Counsel relied on **Ishmael Kagunyi Tande vs. Housing Finance Company of Kenya Ltd** [2005] eKLR, as well as **Kenya Kazi Security Services Ltd vs. Kenya National Private Security Workers Union** [2013] eKLR, in which it was held that:

“...for an applicant to succeed, he must not only show his Appeal or intended Appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be the success of the Appeal may be rendered nugatory.”

[8] Lastly, counsel stressed the point that an arguable appeal is not necessarily one that must succeed; and that it is sufficient that the intended appeal raises at least one arguable point. He relied on **Kenya Tea Growers Association & Another vs. Kenya Planters & Agricultural Workers Union**, Civil Appeal (Nai) No. 72 of 2001 and **David Omwenga & John Teleyio Ole Sawoyo** [2010] eKLR to bolster his arguments in this regard. He, consequently, urged the Court to find that the application was brought without undue delay; and that no prejudice will be suffered by the respondent if the orders sought are granted. He pointed out that the applicant is prepared to furnish security for the due performance of the decree, should his intended appeal be dismissed.

[9] On behalf of the respondent, **Mr. Mwinamo** relied on his written submissions filed herein on **24 February 2021**. He reiterated the averments set out in the Replying Affidavit and pointed out that a delay of 5 months is manifestly inordinate and should not be countenanced; particularly because no plausible explanation was given for it by the applicant. He further submitted that no useful purpose will be gained in extending the time to lodge the appeal out of time, since execution has already been levied. Counsel further took issue with the fact that the applicant has relied on **Section 79G** of the **Civil Procedure Act**, yet no substantive appeal has been filed by him. He relied on **Ndungu Muhindi James & Another vs. Cecilia Wanjiku Waweru** [2020] eKLR and urged the Court to dismiss the application with costs.

[10] It is common ground that the respondent sued the applicant in **Eldoret CMCC No. 433 of 2019: Reinhard Omwoyo Omwoyo vs. Evans Kiptoo**; claiming general and special damages for injuries sustained in a road traffic accident. The said accident involved motor vehicle Registration No. KAK 699Z, in which the respondent was then travelling as a lawful passenger. It is also common ground that the parties settled the issue of quantum by consent at 90:10% in favour of the respondent; and that the duty of the lower court was restricted to determining the issue of quantum. The lower court thereafter assessed damages at **Kshs. 308,000/=**, and reduced that sum by the agreed 10% contributory negligence, attributed to the respondent. Hence, final Judgment was entered in the respondent's favour on **10 September 2020** in the resultant sum of **Kshs. 277,200/=**.

[11] The applicant now contends that he is aggrieved by that Judgment and wishes to appeal, but cannot do so without leave because the appeal window of 30 days, as stipulated in **Section 79G** of the **Civil Procedure Act** has since elapsed. He also prayed for stay of execution pending the filing, hearing and determination of the intended appeal. It appears however that the application for stay has been overtaken by events. The Proclamation of Attachment issued by **Saddabri Auctioneers**, dated **10 November 2020**, was explicit that, unless the sums due were paid within 7 days, the attached property would be removed from the applicant's possession for sale. Those 7 days lapsed on **17 December 2020**; long before the instant application was filed.

[12] Accordingly, **Mr. Keter**, attending on behalf of the respondent at the first *inter partes* attendance for directions on **10 February 2021**, informed the Court execution had already been levied, and therefore there was nothing to stay, even in the interim. In the premises, the Court declined the invitation to grant stay of execution pending the *inter partes* hearing of the instant application. The respondent maintained this stance in his Replying Affidavit as well as in the written submissions filed by his counsel. As no evidence was availed to the contrary, I have no hesitation in holding that the applicant's prayer for stay of execution is untenable in so far as it has been overtaken by events.

[13] In the premises, the only issue for determination is whether sufficient cause has been made by the applicant for leave to file an appeal out of time from the Judgment of the lower court in **Eldoret CMCC No. 433 of 2019**, dated **10 September 2020**. The key enabling provision relied on by the applicant is **Section 79G** of the **Civil Procedure Act**, which stipulates that:

"Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for 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."

[14] I agree entirely with the submissions of **Mr. Mwinamo** for the respondent that the proviso to the above provision envisages that a substantive appeal be filed first; and that an application such as the one before the Court ought to be made in that appeal, seeking orders for the admission of the appeal out of time. This position was well explicated by **Hon. Emukule, J.** in **Gerald M'limbine vs. Joseph Kangangi** [2008] eKLR, thus:

My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court’s process under section 79B which says:

“79B Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily”

It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the Civil Procedure Act except upon the existence and perusal of the appeal to be “admitted” not to be “filed out of time.” Admission presupposes that the appeal has been filed and will be “admitted” for hearing after a judge has established under Section 79B that there is “sufficient” ground for interfering with the decree part of a decree or order appealed against.”

To allow the Applicant’s Motion would be to defeat entirely the requirements of Section 79B of the Civil Procedure Act and indeed Section 79G itself upon which the Applicant relies – the requirement for a Certificate of Delay in the preparation and delivery to the appellant of a copy of a decree or order. The Applicant’s motion is bereft of such explanation or certificate. Default by the Applicants former advocate would then have seen properly anchored on such certificate.

[15] The learned Judge proceeded to dismiss the application with costs. The same line of thought was expressed in Ndungu Muhindi James & Another vs. Cecilia Wanjiku Waweru [2020] eKLR, wherein the case of James Njau Githui (supra) was followed. Hon. Kasango, J. held thus after reviewing relevant authorities on the proper construction of the proviso to Section 79G:

“It follows that the prayers for an appeal to be filed out of time and stay pending the determination of that yet to be filed appeal will fail in view of the jurisprudence pronounced in the above case James Njau Githui (supra)...”

[16] The foregoing notwithstanding, situations abound in which extension of time has been granted pursuant to Section 79G of the Civil Procedure Act, vide miscellaneous applications such as this. For instance, in Vincent Sunday Yier vs. Foam Mattress Limited [2004] eKLR, Hon. Tanui, J. took a divergent but expansive view of the proviso aforementioned. He held that:

The first ground of the respondent is that Section 79G of the Civil Procedure Act does not apply to this application as there is no appeal already filed out of time. I do not need [read] the proviso to section 79G as saying that an appeal has to be filed out of time before it being admitted. I think the correct meaning is that the court is empowered to extend time to enable an appeal be filed after 30 days have expired. In any case filing of appeal is a constitutional right of a litigant which the court should readily grant. The fact that the applicant has come under section 79G of the CPA instead of Order XLIX rule 5 of CPR should not invalidate the proceedings as long as the jurisdiction is not affected and no prejudice is caused to the respondent (Boyes V Gathure (1969) EA 385.

[17] The same line of thinking has been adopted in numerous other provisions; no doubt with the objective of ensuring that parties are afforded the opportunity to ventilate their grievances on appeal as opposed to restricting access to justice, particularly where no prejudice would be suffered by the respondent. Indeed, in Banco Arabe vs. Bank of Uganda [1999] 1 EA 22, that:

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuance of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered."

[18] More importantly, it is now a constitutional imperative to apply provisions such as Section 79G of the Civil Procedure Act with the necessary adaptations necessary to give effect to the Constitution of Kenya 2010. Section 7(1) of the Sixth Schedule to the Constitution reads:

“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”

[19] One of the provisions that must always be borne in mind while dispensing justice is Article 159(2)(d) of the Constitution; in respect of which, the Supreme Court held thus in Raila Odinga vs. Independent Electoral and Boundaries Commission & 4 Others [2013] eKLR:

“The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and requirements of a particular case, and conscientiously determine the best outcome.”

[20] It is plain therefore that the Court, when considering an application such as the instant one, has unfettered discretion; and therefore need only concern itself with whether justifiable cause has been shown to warrant such exercise of discretion. For this reason, the principles laid down by the Supreme Court in Nicholas Kiptoo Korir arap Salat vs. IEBC & 7 Others [2014] eKLR are pertinent; namely:

“(T)he underlying principles a court should consider in exercise of such discretion include:

- 1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**
- 7.”**

[21] The same principles were enunciated in Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, the Court of Appeal held that:

“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 time are: first, the length of the delay; secondly, the reason for the 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.”

[22] Accordingly, for purposes of determining whether the applicant is entitled to the discretion of this Court, I have considered the application for extension of time to appeal under the following parameters:

- [a] whether there is a good and reasonable explanation for the delay;
- [b] whether the application has been brought without undue delay;
- [c] whether the proposed appeal is arguable, and
- [c] whether any prejudice will be suffered by Respondent.

[23] In respect of the first prerequisite, the applicant averred that his Advocates were unaware of the Judgment until **10 November 2020** when he was served with Proclamation. The respondent however countered this by exhibiting copies of the notices sent to his counsel before and after Judgment. **Annexure RO 2** to the Replying Affidavit confirms that the applicant’s advocates were indeed informed of the delivery of Judgment in **Eldoret CMCC No. 433 of 2019 on 10 September 2020**; and that stay of execution had been granted for 30 days by the trial court. The letter further shows that a copy of the Judgment had been enclosed and forwarded therewith.

[24] The foregoing assertions were never rebutted by the applicant. Moreover, if, as conceded by the applicant, he got to learn of the Judgment on **10 November 2020**; what was the justification for the delay in filing the instant application? No explanation at all was proffered by the applicant for the delay between **10 November 2020** and **25 January 2021** when the instant application was filed. I am therefore far from convinced that the delay in filing the instant application has been convincingly explained. It therefore matters not that the intended appeal is arguable; or that no prejudice will be suffered by the respondent; for all the four prerequisites must be present to elicit the discretion of the Court in the matter.

[25] In the result, I find no merit in the application dated **21 January 2021**. The same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF MAY 2021

OLGA SEWE

JUDGE