



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. E53 OF 2020

MARYANNE CAMENE OJIAMBO....PLAINTIFF/RESPONDENT

-VERSUS-

SAMWEL MUCHOKI.....DEFENDANT/RESPONDENT

RULING

[1] The Notice of Motion dated 5 November 2020 was filed herein by **Samwel Muchoki, (the applicant)**, pursuant to **Sections 1A, 1B, 3A, 3B and 79G** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**. The applicant thereby seeks the following orders:

[a] Spent

[b] Spent

[c] That the Court be pleased to grant leave to the applicant to file an appeal out of time from the judgment and decree of this Court issued herein on **10 September 2020** pending the hearing and determination of this application;

[d] That the Court be pleased to grant a stay of execution of the decree of this Court issued herein on **10 September 2020** pending the lodgment, hearing and determination of the appeal to be filed in the High Court of Kenya at Eldoret.

[e] That costs of the application be provided for.

[2] The application is supported by two affidavits, namely, the applicant's own affidavit, sworn on **5 November 2020**, and the affidavit of **Pauline Waruhio**, the legal counsel at **Directline Assurance Company Ltd**. In his affidavit, the applicant averred that he got to learn that judgment was delivered herein on **10 September 2020** for **Kshs. 250,000/=**, with a stay of 30 days. He further averred that this matter was last in court on **25 March 2020** for mention to confirm the filing of written submissions; and that no notice of judgment was ever served on his counsel. It was further the contention of the applicant that, upon being informed of the judgment, it took time to obtain a copy thereof from the court and forward it to his insurers, **Directline Assurance Company Ltd**, who then gave instructions that an appeal be filed.

[3] The applicant further averred that the respondent is likely to commence execution proceedings, thereby exposing him to substantial loss and inconvenience to his business operations; and that the prejudice or inconvenience to the respondent, if any, can be compensated by way of a reasonable award of costs. Thus, the applicant urged that his application be allowed and the orders sought granted. He posited that the respondent is a person of straw; and that it will be well-nigh impossible to recover the decretal sum from her if the intended appeal succeeds. He also indicated that he is willing to furnish such security as the Court may order for the due performance of the decree.

[4] In the second Supporting Affidavit, **Ms. Waruhio** averred that **Directline Assurance Company Ltd** (hereinafter "**Directline Assurance**") is the insurer of motor vehicle **Registration Number KLG 072**, at whose instance this suit is being defended by dint of the insurer's rights of subrogation under the relevant policy of insurance. She further averred that they got to learn that judgment in **Eldoret CMCC No. 1042 of 2017: Maryanne Camene Ojiambo vs. Samwel Muchoki** was delivered on **10 September 2020**; but that a copy of the judgment was never received by the insurers in good time due to the effects of the COVID-19 pandemic on court operations. She further deposed that, being aggrieved by the said judgment, **Directline Assurance** advised the Advocates on record to appeal against the same.

[5] Further to the foregoing, **Ms. Waruhio** averred that the applicant is apprehensive that if no order of stay is granted, the application and the intended appeal shall be rendered nugatory; yet the intended appeal has high chances of success, as it raises substantive points of law as well as issues of fact. She further averred that the respondent's financial status being unknown, she is not in a position whatsoever of refunding the decretal sum in the event of success on appeal. **Ms. Waruhio** also made the assertion that the respondent will not be prejudiced since the applicant is ready and willing to provide a bank guarantee as security for stay of execution pending the hearing and determination

of the intended appeal.

[6] The applicant was constrained to file a Further Affidavit by him on **23 November 2020** to bring to the fore the fact that he had been served with a Notice of Proclamation dated **23 November 2020** in respect of his **Motor Vehicle Registration Number KAT 383C**. He therefore averred that unless interim orders of stay were given, the attached motor vehicle risked being sold in execution of the lower court's decree to his detriment. The applicant annexed copies of the Warrant of Attachment of Movable Property in execution of a Decree for Money as well as the Proclamation of Attachment dated **23 November 2020** to his Further Affidavit to buttress his averments.

[7] Thus, on the strength of the Further Affidavit, the Court (**Hon. Githinji, J.**) certified the application dated **5 November 2020** urgent and granted the stay orders sought pending the hearing and determination of the said application. And in response to the application, the respondent relied on her Replying Affidavit sworn on **4 December 2020**. She made reference to a Memo dated **25 March 2020** by the Chief Magistrate, Eldoret, outlining the steps that would be taken to mitigate the effects of COVID-19 pandemic on court operations; and in particular the guideline that documents would henceforth be filed electronically. She further averred that notice of judgment was accordingly given and e-served on all concerned; and that even after delivery of judgment, her counsel took the further step of notifying counsel for the applicant of the existence of the said judgment, as by law required. She annexed copies of the Memo as well as the notice of judgment to her affidavit.

[8] It was thus the assertion of the respondent that the applicant is to blame for having slept on his rights. It was her contention that she should not be held to ransom on account of the applicant's laxity. In her view, the applicant has come to this Court too late in the day; and therefore that she stands to suffer immense prejudice should the application be allowed. She further averred that, should the Court be inclined to grant the application, then an order ought to be made that she be paid half of the decretal sum; and that the other half be deposited in a joint interest earning account.

[9] Pursuant to the directions given herein on **9 February 2021**, the application was canvassed by way of written submissions, in line with **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 No. 3137 of 20 March 2020**. Hence, in the applicant's written submissions filed herein on **15 March 2021**, reference was made to **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, Civil Application No. 255 of 1997** as to the guiding principles. It was therefore his submission that the delay has been sufficiently explained; and that the appeal is arguable.

[10] As to whether stay of execution is warranted, **Mr. Amihanda** made reference to the conditions set out in **Order 42 Rule 6** of the **Civil Procedure Rules** and urged the Court to exercise its discretion in the applicant's favour. He also submitted, on the authority of **Nairobi Civil Application No. 238 of 2005: National Industrial Credit Bank Limited vs. Aquinas Francos Wasike & Another (UR)** that the burden of proof was on the respondent to demonstrate that she would be in a position to repay the decretal sum in the event of a successful appeal; which burden had not been discharged in his view. Counsel for the applicant further cited the case of **Ishmael Kagunyi Tande vs. Housing Finance Company of Kenya Ltd** [2005] eKLR, as quoted in **Kenya Kazi Security Services Ltd vs. Kenya National Private Security Workers Union** [2013] eKLR on the risk of the appeal being rendered nugatory. Additionally, the case of **Housing Finance Company of Kenya vs. Sharok Kher Mohamed Ali Hirji and Another** [2015] eKLR was also cited for the proposition that the applicant stands to suffer substantial loss, notwithstanding that this application involves a money decree.

[11] Lastly, counsel submitted that the applicant's proposed appeal is arguable and has high chances of success. 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 in which it was held that stay ought to be granted so that the appeal is not rendered nugatory should it ultimately succeed. Counsel urged the Court to note that the applicant is willing to abide by such reasonable stay terms as the Court may order in the interests of justice. He reiterated the applicant's averment that, in the event that the Court orders conditional stay, the applicant be allowed to give security by way of a bank guarantee. He accordingly prayed that the application be allowed and the orders sought granted.

[12] On her part, **Ms. Kinyua** proposed the following issues for determination, vide her written submissions dated **4 February 2021**:

- [a] Whether the application has been brought timeously;
- [b] Whether there should be stay of execution;
- [c] Whether the applicants will suffer irreparable loss should stay of execution be denied;
- [d] Whether the applicant should be ordered to pay half of the decretal amount plus agreed/taxed costs to the respondent and deposit the other half in a joint interest earning account in the joint names of both counsel;
- [e] Whether the applicant's application dated **5 November 2020** is incompetent and an abuse of the court process;
- [f] The burden of proof.

[13] Counsel pointed out that, since the impugned judgment was delivered on **10 September 2020**, the applicant took action after an inordinate delay, and is therefore undeserving of the discretion of the Court. He added that no valid explanation has been given for the delay, granted the contents of the notice dated **15 March 2020** by the Chief Magistrate, Eldoret. She accordingly took the view that the application is nothing but an afterthought. Counsel cited **Kitale HCCA No. 28 of 2005: Barclays Bank of Kenya Ltd vs. Jeremiah O. Samba T/A Samba & Company Advocates** to support his argument that it is not enough for a party to simply blame counsel on record for all manner of transgressions in the conduct of litigation since the parties also have a responsibility to show interest and follow up their cases even where they are represented by counsel.

[14] As to whether stay of execution is warranted, counsel made reference to **Andrew Kuria Njuguna vs. Rose Kuria, Nairobi Civil Case No. 224 of 2001**; **Butt vs. Rent Restriction Tribunal** [1982] KLR 417, **Machira T/A Machira & Company Advocates vs. East African Standard (No. 2)** [2002] KLR 63 and **Absalom Dova vs. Tarbo Transporters** [2013] eKLR, among other authorities, for the proposition that the court's discretion in such matters ought to be exercised in an even handed manner, by taking into account not only the interests of the applicant, but also the interests of the successful litigant who would have to postpone the enjoyment of the fruits of his litigation if an order of stay was to be granted.

[15] I have given due consideration to the application and the written submissions filed herein by counsel for the parties, including the useful authorities relied on by counsel. It is manifest that the respondent successfully sued the applicant in tort before the lower court and thereupon obtained judgment in her favour in the total sum of **Kshs. 230,000/=** together with interest and costs. Being aggrieved by that decision, the applicant has now sought for leave to file an appeal out of time, contending that he was unaware of the decision until after the time for appeal had expired.

[16] In **Section 79G** of the **Civil Procedure Act**, it is provided 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 any time 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."

[17] It is now trite, therefore, that in an application of this nature, the application must satisfy the Court as to the following pre-requisites:

[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

[d] whether any prejudice will be suffered by respondent, if the application is allowed.

[18] Hence, in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi** (supra) 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."

[19] Accordingly, the first question to pose for determination is whether the applicant has satisfied the Court that he has good and sufficient cause for not filing his appeal within the period stipulated in **Section 79G** aforementioned. The applicant's explanation was that no notice of the date of judgment was given to his advocates; and that they were thereafter unable to get a copy of the lower court's judgment in good time. While the respondent annexed documents to her Replying Affidavit to show that notice of the judgment was served after delivery of the judgment, there is no indication that counsel for the respondents were served with notice prior to the delivery of the impugned judgment.

[20] More importantly, the applicant averred that it took some time for him to obtain a copy of the judgment and forward it to the insurers, **Directline Assurance**; who thereafter gave instructions for the filing of an appeal. It is plain then that the applicant was not solely to blame for the delay; which he attributed to the prevailing COVID-19 pandemic and the scaling down of services at the court registries. Again, I am convinced that the explanation is plausible. Indeed, the Court takes judicial notice that COVID-19 pandemic has posed challenges and impacted adversely on service delivery at the court registries. The Supreme Court accepted such an explanation in **William Olotch vs. Pan Africa Insurance Co. Limited** [2020] eKLR, and held that:

[3] UPON considering the written submissions on record for the Applicant and the Respondent dated 29th June 2020 and 14th July 2020, respectively, wherein the Applicant contends that the delay in filing the application for review to this Court was inadvertent, and was caused by the adverse effects posed by the Covid 19 pandemic, including restrictions on travel imposed by the Government and coupled with the challenges in accessing reliable internet; and

The Respondent in opposing the application submits that the explanation advanced by the Applicant is not plausible; that the reasons for the delay are not satisfactory, and, that the application lacks merit, is an abuse of the processes of this Court and does not disclose any substantial grounds for the Court to exercise its discretion; and

[4] HAVING considered the application, the Grounds of Opposition and the submissions filed by the respective parties, by a unanimous decision of this Bench, we find that ... the Applicant has a reasonable and cogent explanation and adduced sufficient reasons for the inadvertent delay in filing his application for review of the Court of Appeal decision on certification in Civil Application No. SUPP 15 of 2019..." (emphasis supplied)

[21] I am therefore convinced that the delay of about 2 months in filing the instant application, is neither inordinate nor inexcusable.

[22] As to whether the proposed appeal is arguable, I have looked at the draft Memorandum of Appeal annexed to the Supporting Affidavit in the light of the Judgment of the lower court. The applicant proposes to challenge both liability and quantum and contends that the lower court erred in not paying due regard to the decisions on quantum filed alongside his written submissions; and therefore that it was on account of this omission that the lower court ended up with an award that was excessive in the circumstances.

[23] Plainly therefore, the appeal is arguable, bearing in mind that an arguable appeal is not necessarily an appeal that must ultimately succeed. In Kenya Tea Growers Association & Another vs. Kenya Planters & Agricultural Workers Union (supra), the Court of Appeal made this clear when it held that:

“He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision.”

[24] On the question of prejudice, having weighed the competing interests and rights of the parties, I take the view that the party that would suffer the most prejudice would be the applicant, should he be denied a chance to pursue his proposed appeal. As matters stand, the respondent already has a decree in his favour; and the delay in its enjoyment, if any, will invariably be compensated for by costs as well as interest on the principal sum, should the appeal turn out to be frivolous. In the premises, I find instructive the position taken 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."

[25] Thus, I am satisfied that the applicant has satisfied the conditions for leave to appeal out of time for purposes of **Section 79G** of the **Civil Procedure Act**; and I so find.

[26] Turning now to the second aspect of the application, which is the prayer for stay of execution pending appeal, the applicant relied on **Order 42 Rule 6** of the **Civil Procedure Rules**. It provides that:

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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..."

[27] At this stage, it must be appreciated that the respondent, having been successful in her litigation, is entitled to the fruits of her judgment. Thus, it is useful to bear in mind the apt expressions made in Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63, that:

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

[28] In the premises, an applicant for stay of execution of decree or order pending appeal is under obligation to satisfy the conditions set out in **Rule 6(2) of Order 42** aforementioned, namely:

[a] that substantial loss may result to the applicant unless the order is made;

[b] that the application has been made without unreasonable delay.

[c] that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

[29] Counsel for the applicant urged the position, with which I entirely agree, that although the application involves a money decree, the applicant nevertheless stands to suffer substantial loss in the event of a successful appeal because the respondent has not shown that she will be in a position to refund the decretal sum, if paid now. In Kenya Hotel Properties Ltd vs. Willesden Properties Ltd the Court of Appeal held that:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.”

[30] The onus of proving that the respondent is in a position to refund the decretal sum in the event of a successful appeal was on the respondent. This was well discussed by the Court of Appeal in National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another [2006] eKLR, thus:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

[31] With the foregoing in mind, I have perused the respondent’s Replying Affidavit but find no such indication of means. I therefore find the applicant’s assertion, that it stands to suffer substantial loss, unrebutted. And having ruled that the delay in filing the instant application is excusable, it follows that the applicant has indeed satisfied the Court that he is entitled to the grant of an order of stay pending appeal.

[32] In the result, I find merit in the application dated **21 September 2020**. The same is hereby allowed and orders granted in respect thereof as hereunder:

[a] That the applicant be and is hereby granted leave to appeal out of time from the Judgment delivered on **10 September 2020** in Eldoret CMCC No. 1042 of 2017: Maryanne Camene Ojiambo vs. Samwel Muhoki; and that the said Appeal be filed within 14 days from the date hereof;

[b] That execution of the judgment and the ensuing Decree in Eldoret CMCC No. 1042 of 2017: Maryanne Camene Ojiambo vs. Samwel Muhoki be and is hereby stayed pending the hearing and determination of the intended appeal on condition that the entire decretal sum be deposited by the applicant in an interest earning account in the joint names of counsel for the parties within 14 days of the date hereof;

[c] That the costs of the subject application shall abide the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF MAY 2021

OLGA SEWE

JUDGE