REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 109 OF 2020

MICHAEL OPIYO (suing as the administrator

of the estate of TRACY OPIYO, Deceased).....PLAINTIFF/RESPONDENT

-VERSUS-

SOLOMON KIMELI BOR.....1ST DEFENDANT/APPLICANT

JOHN KOMEN….....2ND DEFENDANT/APPLICANT

RULING

[1] What is coming up for determination is the Notice of Motion dated **24 September 2020.** It was filed herein by the firm of **Kimondo Gachoka & Company Advocates** on behalf of the two applicants, **Solomon Kimeli Bor** and **John Komen**; and is expressed to be brought pursuant to **Sections 1A, 1B, 3A, 3B & 79G** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; as well as **Order 42 Rule 6** and **Order 50 Rule 6** of the **Civil Procedure Rules, 2010**. The two applicants seek for 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 **24 January 2020**, pending the hearing and determination of the application;
>
> **[d]** That the Court be pleased to grant a stay of execution of the decree of this Court issued herein on **24 January 2020** pending the lodgment, hearing and determination of the appeal to be filed in the High Court of Kenya at Eldoret.
>
> **[e]** That the costs of the application be provided for.

[2] The application is supported by two affidavits, sworn on **21 September, 2020.** The first affidavit was sworn by **Ms. Sonia Aguko**, an Advocate of the High Court, who has the conduct of this matter on behalf of the applicants. She averred that she got to learn from the records that judgment herein was delivered on **24 January 2020**; and that thereafter, it took a bit of time to obtain a copy of the judgment from the court due to the prevailing COVID-19 pandemic. In the meantime, the respondent has commenced execution proceedings thereby exposing the applicants to substantial loss and inconvenience to its business operations, by proclaiming the attachment of Motor **Vehicle Registration No. KCH 945F** Toyota Matatu through **Hegeons Auctioneers**.

[3] Ms. Aguko further averred that the applicants are apprehensive that if no order of stay is granted, the instant application would be rendered nugatory. She also pointed out that the attached motor vehicle is a commercial vehicle, used by the applicants for business purposes; and therefore that they stand to suffer substantial loss should the said motor vehicle be sold as intended. In her opinion the applicants have an arguable appeal; and that the delay in filing it is excusable. She annexed a copy of the draft Memorandum of Appeal to her affidavit as **Annexure "SA-2",** adding that it would be impossible to recover the decretal sum from the respondent if the appeal ultimately succeeds. On the flip side, it was her assertion that the respondent stands to suffer no prejudice at all; and that the applicants, through **Directline Assurance Company Ltd,** is willing to furnish such security as the Court may deem fit to order; including depositing half of the decretal amount in an interest bearing account in the names of both counsel.

[4] The applicants' second affidavit was sworn by **Pauline Waruhiu**, the Legal Counsel of **Directline Assurance Company Ltd**

(hereinafter, Directline Assurance). She averred that their company is the insurer of the subject motor vehicle, **Registration No. KCH 945F**, Toyota Matatu, and that it was on that account that **Directline Assurance** instructed the firm of **Kimondo Gachoka & Co Advocates** to file a Notice of Change herein. She further confirmed that Judgment was delivered on **24 January 2020** in **Eldoret CMCC No. 1258A of 2017: Michael Opiyo (suing as the administrator of the estate of Tracy Opiyo (Deceased) vs. Solomon Kimeli Bor & John Komen**. She added that a copy of the said judgment was not received in good time; likely due to the prevailing COVID-19 pandemic since most of the registries were closed.

[5] Ms. Waruhiu further averred that **Directline Assurance**, being dissatisfied with the said judgment, instructed the Advocates on record to pursue an appeal. She added that the respondent has already commenced execution proceedings, thereby exposing the applicants to substantial loss and inconvenience to its business operations by proclaiming the attachment of the subject motor vehicle through **Hegeons Auctioneers.** She was therefore apprehensive that if no order of stay is granted herein, the application will be rendered nugatory. She averred, as did **Ms. Aguko**, that the subject motor vehicle is a commercial vehicle and is used for the applicants' business; and therefore that they stand to be highly prejudiced if it is sold as is envisaged by the respondent's agents.

[6] Ms. Waruhiu reiterated the assertion that the intended appeal has high chances of success as it raises substantive points of law as well as issues of fact; and therefore that the applicants stand to suffer immense prejudice should the intended attachment and sale be proceeded with before the institution, hearing and determination of the appeal. This, she deposed, is because she is reasonably apprehensive that if the decretal amount is paid over to the respondent, she will not be in a position whatsoever to refund the same if the intended appeal is successful, as her financial status is unknown. **Ms. Waruhiu** also confirmed that **Directline Assurance** is ready, willing and able to furnish security by depositing 50% of the decretal sum in court pending the hearing and determination of the appeal.

[7] The respondent opposed the application and filed a Replying Affidavit in response, sworn on **21 October 2020**. In his view, the application is an afterthought; and has only been brought to deny the respondent the fruits of his judgment. He conceded that judgment in **Eldoret CMCC No. 1258A of 2017** was delivered on **24 January 2020**; and that the applicants were given 30 days' stay of execution. It was therefore his averment that the applicants have had enough time to settle the claim. He discounted the explanation offered for the delay in filing both the instant application and the appeal. In his view the COVID-19 pandemic is no excuse, granted that judgment was delivered long before the advent of the pandemic.

[8] In addition to pointing out that the applicants filed a similar application before the lower court, the respondent proposed that, should the Court be inclined to grant the orders sought, then the applicant should be required to release 50% of the decretal sum to the respondent, and deposit the remainder in an interest earning account in the joint names of the parties within 14 days, pending the hearing and determination of the appeal. He urged the Court to bear in mind that justice delayed is justice denied; and that it has been over one year since the lower court matter was concluded.

[9] Pursuant to the directions given herein on **27 October 2020**, the application was canvassed by way of written submissions. This was 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 Notice No. 3137** dated **20 March 2020**. Accordingly, **Mr. Amihanda**, learned counsel for the applicants, relied on his written submissions dated **11 March 2021** and thereby urged the Court to be guided by the principles enunciated by the Court of Appeal in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi** wherein it was held 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."**

[10] With the regard to the prayer for stay of execution, **Mr. Amihanda** submitted that, in exercising its discretionary powers, the Court ought to consider the special circumstances and the unique principles laid down in that regard in **Order 42** of the **Civil Procedure Rules**. In his view, the applicants have demonstrated that they stand to suffer substantial loss; granted that the decree involves an amount to the tune of **Kshs. 1,466,715/=;** yet the respondent has not demonstrated that he will be able to pay this sum back to the applicants in the event of a successful appeal. In support of this argument, counsel relied on **Nairobi Civil Application No. 238 of 2005: National Industrial Credit Bank Ltd vs. Aquinas Francos Wasike & Another (UR)**. The cases of **Ishmael Kagunyi Tande vs. Housing Finance Company of Kenya Ltd** [2005] eKLR, **Kenya Kazi Security Services Ltd vs. Kenya National Private Security Workers Union** [2013] eKLR and **Housing Finance Company of Kenya vs. Sharok Kher Mohamed Ali Hirji and Another** [2015] eKLR were also relied on by counsel to buttress the submission that the applicants stands to suffer substantial loss, notwithstanding that this application involves a money decree.

[11] Mr. Amihanda further urged the Court to find that the application has been brought without undue delay. He pointed out that judgment was delivered on **26 October 2020** and the instant application filed on **7 December 2020** (which dates appear not to be in consonance with the dates in issue herein); and therefore that the delay is not inordinate. As regards the arguability of the appeal, counsel 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 Sawoyoo** [2010] eKLR to support his proposition that an arguable appeal is not necessarily one which must succeed. In his submission it suffices for the applicants to show that there is at least one issue on which the Court shall pronounce itself. He reiterated the applicants' averment that they are willing to abide by such reasonable stay terms as the Court may order, not only in the interest of both parties but also in the larger interest of justice.

[12] On her part, **Ms. Nyamwega** for the respondent opposed the application. She relied on her written submissions filed on **12 March 2021** in which she proposed the following four issues for determination:

[a] Whether the time for the applicants to institute an appeal should be enlarged;

[b] Whether execution of the decree of the subordinate court should be stayed; and

[c] Who should bear the costs of the application.

[13] In respect of the first issue, **Ms. Nyamwega** placed reliance on **Mwangi vs. Kenya Airways Ltd** [2003] eKLR; **Fakir Mohammed vs. Joseph Mugambi & 2 Others, Civil Application No. NAI 332 of 2004 (UR)** and **John Mbua Muthoni & Another vs. Ruth Muthoni Kariuki** [2017] eKLR**,** for the applicable test and the factors that the Court of Appeal looks at in exercising its discretion under **Rule 4** of the **Court of Appeal Rules.** She submitted that the same test is applicable for purposes of **Section 79G** of the **Civil Procedure Act;** and it involves the interrogation of the application on the following parameters:

[a] The period of the delay;

[b] The reason for the delay;

[c] 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 applicable.

[14] It was, thus, the submission of **Ms. Nyamwega** that the application is woefully deficient with regard to the explanation given for the delay; noting that judgment was delivered on **24 January 2020** and that the application was not filed until **25 September 2020**. She pointed out that there is no evidence whatsoever that he applicants requested for a copy of the judgment or any indication as to when they received the same. She further pointed out that, although the applicants blamed the COVID-19 pandemic for the delay, they could not explain away the fact that the 30 days' stay granted by the lower court expired on **23 February 2020** before the advent of the virus in the country; and even then, the Judiciary did not scale down its operations until **15 March 2020**. In counsel's view, therefore, no plausible reason has been given for the delay.

[15] With regard to the arguability of the proposed appeal, **Ms. Nyamwega** faulted the applicants for their failure to avail a copy of the lower court's judgment, without which the Court is not in a position to determine whether or not the intended appeal is arguable. She submitted, too, that since the claim has been pending in court since **2017** when the suit was instituted before the lower court, any further delay would be highly prejudicial to the respondent; and therefore that it is in the interest of justice that this litigation be brought to an end.

[16] On whether a good case has been made for stay, **Ms. Nyamwega** made reference to **Order 42 Rule 6** of the **Civil Procedure Rules** and the cases of **Chris Munga N. Bichage vs. Richard Nyagaka Tongi & 2 Others** [2013] eKLR and **Mohammed Salim T/A Choice Butchery vs. Nasserpuria Memon Jamat** [2013] eKLR for the applicable prerequisites and for the proposition that the right of appeal must be balanced against an equally weighty right of a successful party to enjoy the fruits of the judgment delivered in his favour. In counsel's view, the applicants have not satisfied any of the conditions for stay. She accordingly prayed for the dismissal of the application with costs.

[17] I have given careful consideration to the application, the averments in the pertinent affidavits as well as the written submissions filed herein by learned counsel and the authorities brought to the attention of the Court. To begin with, I note that **Ms. Nyamwega** had several slips to fault the applicants for, and rightly so, in my view. For instance, she pointed out that since this is a miscellaneous application, there is no plaintiff or defendant. She also deprecated the inelegant manner of drafting employed by counsel for the applicants, and again she has a point; for it reveals that not much thought went into the prayers sought or even that the application was intended to be filed before this Court. Hence in prayer 3 of the Motion, the applicants inexplicably prayed 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 honourable court issued herein on 24th January 2020 pending the hearing and determination of this application…"** It is further manifest that reference was made to dates that were inapplicable to the specific facts relating to the subject matter herein. Such display of inattention is inexcusable; not even where an application is one in a series; and counsel is best advised to take heed.

[18] The applicants seek two main prayers, namely, leave to appeal out of time, and an order of stay of execution pending appeal. From the draft Memorandum of Appeal annexed to the Supporting Affidavit sworn by **Ms. Pauline Waruhiu**, it is discernible that the disputants were before the lower court in **Eldoret CMCC No. 1258A of 2017** in respect of loss suffered by the estate of **Tracy Opiyo** (deceased); and that, after hearing the parties, the lower court made an award to the estate in the sum of **Kshs. 1,246,705/=.** Being aggrieved by that decision the applicants are now desirous of filing an appeal but cannot do so without leave because the appeal window has long been closed by dint of **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 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…"**

[19] Nevertheless, the proviso to the above provision recognizes 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."**

[20] Hence one of the issues for determination is the question whether, from the standpoint of **Section 79G** of the **Civil Procedure Act**, a good case has been made out by the applicants for leave to appeal out of time. Since the power to grant extension of time to file an appeal is discretionary, to be exercised for good and sufficient cause, the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi,** (supra) is

pertinent. There the Court of Appeal reiterated the considerations to guide the exercise of discretion in such matters thus, albeit for purposes of **Rule 5(2)(b)** of the **Court of Appeal Rules:**

> **"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."**

[21] While there is no dispute that the lower court's judgment was delivered on **24 January 2020,** the instant application was not filed until **25 September 2020.** That is a delay of 8 months. As correctly pointed out by counsel for the respondent, there is nothing in the two replying affidavits to show when counsel got to know of the existence of the judgment or when a copy thereof was placed in the hands of the applicants. This is germane, granted that the same firm of Advocates was acting for the applicants in the lower court matter; and therefore raising the question as to whether or not counsel was in attendance when the judgment was delivered and the 30 days' stay of execution given. More importantly, there is no indication at all that any request was formally made for a copy of the judgment; and if so when.

[22] As against that, the respondent averred that counsel for the applicants were duly served with Notice of Judgment for **5 December 2019** when the judgment was deferred to **24 January 2020**. An Affidavit of Service to that effect as well as a copy of the notice were annexed to the respondent's Replying Affidavit as A**nnexures MO "1" and MO "2".** Thus, while I agree that the COVID-19 situation has had the effect of slowing down court registry operations, this application involves a judgment that was delivered well before the onset of the pandemic in this country.

[23] Moreover, the applicants were granted 30 days stay of execution for which no account has been given. Hence, in the absence of proof of diligence on the part of either the applicants or their counsel in pursuing copies of the proceedings and judgment of the lower court for purposes of appeal, I am unable to find that a plausible explanation has been given for the delay of about 8 months. In this regard, I am fortified by the decision of the Court of Appeal in **Alfred Iduvagwa Savatia vs. Nandi Tea Estate & Another** [2018] eKLR, that:

> **"A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercised. Aganyanya, JA in Monica Malel & Another V. R, Eldoret Civil Application No. Nai 246 of 2008 stated;-**
>
> > ***"When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show ….. the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay."***

[24] With regard to the arguability of the appeal, it is now trite that an arguable appeal is not necessarily one that must succeed; and that even one arguable point is sufficient for purposes of **Section 79G** of the **Civil Procedure Act.** Hence, 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."**

[25] However, it is noted that whereas a copy of the draft Memorandum of Appeal was annexed to the application, indicating that the appeal is basically on quantum, the lower court's judgment was not. Hence, the Court is in no position to assess or comment on the arguability of the intended appeal.

[26] In the premises, it cannot be said that sufficient cause has been shown by the applicants as to why they should be granted leave to appeal out of time. That being my view, I need not go into the question of prejudice, or even whether there should be stay pending appeal. Indeed, the interest of justice also require that a successful litigant be allowed to enjoy the fruits of his litigation. Accordingly, in **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2)** [2002] KLR 63, it was held 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.**

[27] The same thought was expressed in **Portreitz Maternity vs. James Karanga Kabia, Civil Appeal No. 63 of 1997 thus:**

> **"That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right**

[28] In the premises, it is my resultant finding that the application dated **24 September 2020** is completely devoid of merits and is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 4TH DAY OF MAY 2021

OLGA SEWE

JUDGE