



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 73 OF 2020

PHILIP CHARLES OCHIENG ISAIAH

T/A BELDAFA MULTI AGENCIES.....APPLICANT

VERSUS

EQUITY BANK LIMITED.....RESPONDENT

RULING

1. Before the Court is an application supported by affidavits sworn by Phillip Ochieng' Isaiah (hereafter the Applicant) and dated 4th February, 2020, seeking leave to appeal out of time against the whole judgment and decree, and an order to of stay of execution of the said judgment delivered on 30th November, 2018, pending the hearing and determination of the intended. The motion as premised on the provisions of Article 159 of the Constitution section 59G of the Civil Procedure Act and Orders 42 Rule 6 and 50 Rule 5 of the Civil Procedure Rules.

2. The motion is supported by the affidavit of the Applicant wherein it is deposed that being aggrieved by the judgment of the lower court the Applicant desires; that the delay in filing the intended appeal was on account of delay in obtaining a copy of proceedings and that counsel had filed an application dated 13th May, 2019 which was later withdrawn, as such the Applicant had approached the court within reasonable time. The Applicant deposed the mistakes of his counsel should not be visited upon him that as an innocent litigant. He avers that the intended appeal is arguable with high chances of success and the court ought to enlarge time to enable the Applicant to file the same. The Applicant also stated that the delay in filing the instant application was occasioned by circumstances beyond his control and if the court were to decline to grant him stay of execution pending the determination of the intended appeal, his right to access justice would have been adversely affected. Finally, the Applicant expressed apprehension that if his appeal were to succeed the Respondent would not be in a position to make a refund to the Applicant.

3. Equity Bank Limited (hereafter the Respondent) opposed the motion through grounds of opposition dated 10th March, 2020. To the effect that the application is an abuse of the court process, does not meet the threshold for grant of leave to file an appeal out of time as provided for under Section 79G of the Civil Procedure Act, and has been made after inordinate and unexplained delay as judgment was delivered on 24th December, 2018. The Respondent asserts that the application is an afterthought intended to deny the Applicant the fruits of successful litigation.

4. The motion was canvassed orally on 2nd February 2021. Parties based their submissions on their respective filings. During oral submissions, the Applicant reiterated his affidavit material, and especially that delay in filing the intended appeal was occasioned by inability to obtain proceedings in good time which is sufficient justifiable cause as anticipated in Section 79G of the Civil procedure Act; and that the delay had been sufficiently explained. On the prayer for stay of execution, it was submitted that if it was denied, the Applicant will suffer substantial loss as the Respondent's financial standing was unknown. On this aspect reliance was placed on the case of counsel relied on **J.A Mweria v Miriam Maalim Bishar & Anor. [2018] eKLR** and **Butt v Rent Restriction Tribunal (1979) e KLR**. Finally, counsel submitted the intended appeal was arguable and the Applicant was ready and willing to provide security for due performance of the decree.

5. The Respondent relied on the contents of its grounds of opposition. It was submitted that the application did not meet the requirements of Section 79G of the Civil Procedure Act in that no substantive arguments were made in support of the prayer to appeal out of time. The Respondent asserted that judgment having been rendered by the trial court, the Applicant ought to have settled the decree and if aggrieved should have appeal in time. In support of his submissions, counsel relied on the cases of **Feroze Begum v Magarabhai Patel & [1964] EA 33** and **First American Bank of Kenya vIRST AMERICAN BANK OF KENYA V Ghulab Shah [2002] EA 65** . He asked the Court to dismiss the motion.

6. The court has considered the application in light of the parties' respective material and submissions. Section 79G of the Civil Procedure Act provides that:

“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.”

7. The successful applicant must demonstrate **“good and sufficient cause”** for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari material with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

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

8. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor.

9. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

“(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.”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR**.

10. The judgment sought to be appealed from was delivered in December 2018. And although the letter marked annexure **“PO2”** attached to the supporting affidavit indicates that a request for proceedings was made to the lower court in February, 2019, there is no evidence that the Applicant followed up on the request. It took another year for the Applicant to move this court. His claim to have filed an earlier application which was later withdrawn is not authenticated as the copy thereof referred to in the supporting affidavit as **“PO4”** was not attached to the affidavit. The delay of 14 months is inordinate and has not been satisfactorily explained. There was nothing to stop the Applicant from filing the instant application when it became clear that proceedings would delay, if indeed that was the case. No certificate of delay from the lower court has been exhibited before this Court. The Applicant was evidently indolent, and the Respondent cannot be blamed for dismissing the instant application as an afterthought.

11. I find that no good or sufficient cause has been demonstrated by the Applicant. The Respondent has a judgment and decree in its favour since 2018, which remains unsatisfied. As the debt accumulates interest, it will become harder for the Respondent to recover it and to enjoy the fruits of its judgment. Any further delay will therefore work prejudice against the Respondent. The prayer for leave having failed, the prayer for stay pending appeal which at any rate, could only ordinarily be granted based on a subsisting appeal, falls by the wayside. It is my conclusion that the application dated 4th February 2020 is without merit. The application is dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF MAY 2021.

C. MEOLI

JUDGE

In the presence of:

For the Applicant: N/A.

For the Respondent: Ms. Kiuluku h/b for Ms. Maina.

C.A: Carol