



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E138 OF 2021

KENPOLY MANUFACTURES LT.....APPLICANT/APPELLANT

VERSUS

KITHEKA KISILI.....RESPONDENT

RULING

1. The notice of motion dated 29th March 2021 and filed on 15th April 2021 seeks the following orders:

“1. Spent

2. That the honorable court be pleased to extend time for filing appeal.

3. That the memorandum of appeal filed herein be admitted as duly filed and served.

4. Spent

5. That there be stay of execution of the decree and judgment in Milimani CMCC No. 864 of 2016 Kitheka Kisili vs Kenpoly manufacturers Ltd pending hearing and determination of the applicants intended appeal.

6. That the costs of this application be in the cause.”

2. The application is premised on the grounds on its face plus the supporting affidavit by Fidelis Mueke Ngulli the applicant’s counsel.

3. A summary of the grounds and averments is that judgment in Milimani Chief Magistrate’s court civil case No. 864 of 2016 was delivered on 21st August 2020 (FMN1) in the absence of both the applicant; who only became aware of the delivery of judgment on 27th October 2020 (FMN2).

4. They were not able to immediately get instructions from their client due to the Covid19 pandemic challenges, and the abrupt departure of the counsel who was handling this case.

5. Counsel has averred that the trial court lacked jurisdiction to handle the matter in view of the supreme court decision in **Petition No. 4 of 2019 Law Society of Kenya v Attorney General & others [2019] eKLR** and the Ruling in **Hon. A.G. vs Law Society of Kenya & another [2017] eKLR (Civil Appeal No. 133 of 2011)**. This is the main ground of appeal.

6. The applicant has sought for stay of execution as it fears that the respondent could execute for the decretal sum which may be difficult to recover in the event of a successful appeal. The applicant therefore seeks for an extension of time to file an appeal and for stay of execution.

7. Mr. Peter Mwaura Kamau for the respondent in his replying affidavit opposes the application. He has averred that when the matter was mentioned on 22nd April 2020 for taking a date for judgment both parties were present. At that time the applicant never raised the issue of jurisdiction. Judgment was delivered on 21st August 2020 in the absence of both parties.

8. He contends that was communication between the counsel over the judgment (PMK 1-5) where the applicant’s counsel had sought for a negotiation. He therefore argues that the delay in filing appeal is inordinate and is prejudicial to the respondent.

Analysis and determination

9. I have considered the application, affidavits and the law. The guiding principles in respect to extension of time are well set out in a number of authorities for example; Edith Githungu Koine vs Stephen Njagi Thoithi [2014] eKLR where the court stated:

“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 among others ...”

10. In the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral Boundaries Commission & 7 others Supreme Court application No. 16 of 2014 [2015] eKLR the Supreme Court gave the following guidelines in a matter of this nature:

- 1. Extension of time is not a right of a 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 on 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 respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

11. The judgment in the present case was delivered on 21st August 2020 with the full knowledge of both parties who were however absent. The applicant has not denied having been made aware of the judgment’s outcome by the respondent’s counsel vide the letter – PMK1. A copy of judgment was equally sent to the applicant’s counsel upon his request – PMK 2 & 3.

12. No action was taken until 15th April 2021 when this appeal and application were filed. The applicant is a limited liability company and instructions would have been communicated by phone or by email etc. The issue of Covid 19 does not therefore arise.

13. Section 79G of the Civil Procedure Rules provides:

“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.”

14. The delay of eight (8) months without a satisfactory explanation is inordinate.

15. I have also looked at the appeal filed which raises only one ground which is on jurisdiction.

16. This ground is based on the Supreme court decision WIBA delivered on 3rd December 2019 where the parties were Law Society of Kenya vs Attorney General & anor (supra). The Supreme court upheld the decision by the Court of Appeal in Hon. A.G. vs Law Society of Kenya & anor (supra). In relation to matters pending before the trial courts the Court of Appeal held that the matters pending before the courts at the time of the enactment of the WIBA would be finalized.

17. The issue being raised by the appellant is therefore not an idle one. The same must be determined by this court. For this reason, I will allow the application dated 29th March 2021 and make the following orders:

- (i) Leave to file appeal out of time is granted. The Memorandum of Appeal dated 12th March 2021 shall be deemed to have been filed within the stipulated time.
- (ii) There shall be stay of execution on condition that the entire decretal sum is deposited in court within ten (10) days.
- (iii) Failure to comply will lead to automatic lapse of the orders of stay of execution.
- (iv) Costs shall be in cause.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 10TH DAY OF JUNE, 2021 AT NAIROBI IN OPEN COURT

H. I. ONG'UDI

JUDGE