



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. E511 OF 2020

PETER KIRONJO MWAURA.....PLAINTIFF

-VERSUS-

SYNERGY INDUSTRIAL CREDIT LIMITED.....DEFENDANT

RULING

The application dated 1st December 2020 seeks the following orders:-

1. Spent

2. Spent

3. THAT this Honourable Court be pleased to grant an extension of time within which to lodge an Appeal in respect of the Judgement in Milimani CMCC 1720 of 2014.

4. THAT the Honourable Court be pleased to grant an Order for Stay of Execution of the Judgement and subsequent Decree arising from Judgement delivered on the 16th September, 2020 pending the hearing and determination of the intended Appeal.

5. THAT the costs of this application be provided for.”

The application is brought under order 42, Rule 6 (1) (2), order 50 Rule 5 of the Civil Procedure Rules, 2010, section 3A, 63 (c), 79G and 95 of the Civil Procedure Act and all other enabling provisions of the law. It is supported by the affidavit of PETER KIRONJO MWAURA sworn on even date. The respondent filed a replying affidavit sworn by JACOB MBAE MEEME on 5th February, 2021. The application was determined by way of written submissions.

Mr. Gachie appeared for the applicant. Counsel submit that Judgement was entered on 16th September, 2020. The applicant requested for a 30 days stay of execution as he intended to appeal. Time to file the appeal lapsed due to inability on the part of the applicant to mobilize adequate resources in time to instruct his advocate. The respondent extracted a decree and obtained execution warrants on 3rd November 2020. An auctioneer was in the process of tracking down the applicant’s assets.

It is submitted that the court has powers to enlarge time for filing an appeal. Counsel relies on the case of KARNY ZAHARYA & ANOTHER VS SHALOM LEVI, Civil application No 80 of 2018 where KOOME J.A stated.

“Some of the considerations to be borne in mind while dealing with an application for extension of time include; the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party’s opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether , prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not the role of the single judge to determine definitely the merits of the intended appeal. That is for all the full court if and when it is ultimately presented with the appeal.”

Counsel for the applicant contend that there was a delay of about forty-four (44) days to file the appeal. Due to hard economic times and the Covid – 19 pandemic which forced the application to go to self-quarantine having contacted a positive case, the applicant could not meet the deadline. The appeal raises weighty issues and has overwhelming chances of success. Counsel relies on the case of SAMUEL MWAURA MUTHIMBI VS JOSEPHINE WANJIRU NGUGI & ANOTHER (2018) eKLR where Justice Joel Ngugi held:-

“Statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not in themselves a core substantive value..... a look at the appeal at hand, the same was brought merely a month after time had run out, looking at the draft Memorandum of Appeal filed, I am unable to say that the intended appeal is not – arguable. Of course, all the Applicants have o show at this stage is arguability – not high probability of success.... A demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard. I believe that the Applicant had discharged this burden.”

On the issue of stay of execution, Counsel submits that the application meets the threshold for granting the orders being sought. The intended appeal raise arguable points and has high chances of success. The purpose of the order of stay of execution is to preserve the subject matter so that the right of appeal can be excised without prejudicing the appeal. The applicant will suffer substantial loss if the appeal succeeds yet the response had proceeded with execution. The decree is for payment of 1,830,086/78 which is a colossal sum. It would be unreasonable for the applicant to settle the decretal sum before the determination of the appeal. counsel referred to the case of NATIONAL INDUSTRIAL CREDIT BANAK LTD VS AQUINAR FRANCIS WAMBILT & ANOTHER (2006) Eklr where the court of Appeal held:-

“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.”

Miss Mutava appeared for the respondent. counsel submitted that the applicant was granted thirty (30) days stay of execution. That period lapsed. On 1st December, 2020 the current application was filed. Section 79 G of the Civil Procedure Act provides that an appeal to the High court shall be filed within thirty (30) days from the date of decree or order appealed against. The applicant was awakened by the execution process. counsel relies on the loss of FIRST AMERICAN BANK OF KENYA LTD VS GULAB P. SHART AND 2 OTHERS, NAIROBI (Milimani) HCCC No 2255 of 2000 (2002) IEA 65 where the court set out the following factors to be considered: -

1. The explanation if any for delay,

2. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice.

3. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favour of the Applicant.

Counsel submits that once there is non – compliance with the required timelines, the burden shifts upon the party seeking indulgence to satisfy the court why the court’s discretion should be exercised in his favour. There is no evidence tendered that the applicant has come into contact with a Covid -19 positive person. The applicant’s previous counsel was fully aware of the consequences of not filling an appeal within the statutorily prescribed timelines. counsel referred to the case of COUNTY GOVERNMENT OF MOMBASA VS KOOBA KENYA LIMITED (2019) Eklr where SICHALE (JA) cited the case of ABDUL AZIZI NGOMA VS MUNGAI MATHAYO (1976) KLR 61 where it was held by the court of Appeal as follows:

“We would like to state once again that this court’s discretion to extend time under rule 4 only comes into existence after sufficient reason for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered...”

Counsel for the respondent is of the considered view that there is no plausible explanation as to why the applicant failed to file the appeal on time.

On the issue of stay of execution, it is submitted that the applicant must show that he will suffer substantial loss. The applicant has not shown what substantial loss will be suffered. Counsel referred to the case of BROOKSIDE DAIRY LIMITED VS ADONCAN NJAGI & 2 OTHERS (sued as registered officers of Mathiru Dairy Self Help Group (2020) eKLR where Justice F. Gikonyo cited a Ugandan Case of SEWAKAMBO DICKSON VS ZIWA ABBY VALT -00 CCMA 0178 of 2005 (High Court of Uganda at Kampala) where it was held :

“Substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal..”

It is further contended that the gist of the suit is a loan extended to the applicant by the respondent. There is no evidence that the Respondent will not be able to refund the money should execution proceed. The Respondent is a hire purchase company that has been in existence for over 20 years. Counsel relies on the case of BROOKSIDE DAIRY LIMITED VERSUS ADONCAN NJAGI & 2 OTHERS (Supra) where F. GIKONYO J, Held:

“There must be substantial reasons for grant of stay of execution. It is not enough to say that the Applicant will be burdened financially. That is the natural consequence of a judgment entered against him. It is also not enough to say that the fact of filing of the proposed appeal entitles an applicant to a stay of execution of decree. We do not see how the appeal, if successful will be of execution of decree. The respondent is a sound bank.

The applicant in the case at hand in my view is in the same position as the Applicant in the above Court of Appeal

application. I have already found that the Applicant's intended Appeal is successful will not be rendered nugatory. The upshot of all the above is that his application dated and filed on 13th March 2006 without merit and is dismissed with costs....”

It is contended that the court has to balance the interest of the applicant against those of the Respondent who should be left to enjoy the fruits of his Judgment. Counsel cited the case of MACHIRA T/A MACHARIA & CO. ADVOCATES vs east African standard (woe) 2002 eKLR 63 where the court held:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to first with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his Judgment or of 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 case in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

Counsel for the Respondent maintain that should the court grant the application, the applicant should provide reasonable security as he has stated that he is willing to abide by any reasonable conditions imposed by the court. Counsel relies on the case of GIAFRANCO MANENTHI & ANOTHER VS AFRICA MERCHANT ASSURANCE COMPANY LTD (2019) eKLR where it was observed.

“.... the applicant must show and meet the condition of payment of security due to performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court of an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 rule 6 (1) of the Civil Procedure Rules, it is trite that the winner of the litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed an appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the Judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

The applicant herein raise two issues, namely:

1. Whether the court should extend time to file an appeal.
2. Whether execution of the decree of the trial court should be stayed.

The principles upon which both issues are grounded are now well settled. Both counsel have made reference to past decided cases on the two issues. Similarly, in the case of WASIKE VS KHISA & ANOTHER (2004) 1 197 KLR, GITHINJI JA (as he then was held:

1. In exercising its discretion, the court is guided by such factors as the merits or otherwise of the intended appeal, whether the extension of time will cause undue prejudice to the respondent and the length of delay.
2. It would be a fetter on the wide discretion of the court to require a minute examination of every single act of delay and to require every such act to be satisfactorily explained.
3. It is not every delay in taking any appropriate step required that would disentitle a party to any relief. It is only the unreasonable delay which is culpable and whether or not delay is unreasonable will depend on the circumstances of the case.

On the issue of stay of execution, in the case of BUTT – V- RENT RESTRICTION TRIBUNAL (1982) eKLR, 417, the court held: -

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

The impugned Judgement was delivered on 16th September, 2020. The current application was filed on 2nd December, 2020. This is a period of two and a half months. The reason behind the delay is that the applicant was seeking funds to instruct an advocate. The connection that the applicant contacted a Covid – 19 positive person is not established. I do find the two and half months is not inordinate delay.

The Respondent contend that the dispute arose out of a loan granted to the applicant. A decree was extracted indicating that the Respondent’s counter claim of ksh 1,034,198 was awarded with interest and costs. The applicant’s right of appeal should be balanced with the Respondent’s right to enjoy the fruits of its Judgement. Orders 42 rule 6(2) puts emphasis on the need to provide security as a condition to an order of stay of execution. I do find that the application dated 1st December, 2020 is merited and is granted in the following terms.

- 1. Time to file a memorandum of Appeal is hereby extended by a period of fourteen (14) days hereof.**
- 2. The Applicant to file and serve his memorandum of Appeal within 14 days hereof.**
- 3. Execution of the trial court’s decree is hereby stayed pending the hearing and determination of the appeal.**
- 4. The applicant to deposit either in court or joint interest earning account of both counsel a sum of Ksh. 800,000 within sixty (60) days hereof.**
- 5. In default of complying with order four (4) above on deposit of Ksh. 800,000 as security, the orders of stay of execution shall stand vacated and the respondent shall be at liberty to execute.**
- 6. Costs of the application shall follow the outcome of the appeal.**

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF JUNE, 2021.

.....

S. CHITEMBWE

JUDGE