REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

MISCELLANEOUS APPL. NO. E004 OF 2021

PETER KIOKO.....1ST APPLICANT

PETER GICHOVI.....2ND APPLICANT

VERSUS

ELIZABETH WANZA MUSYOKI.....RESPONDENT

RULING

1. The trial court at **Kangundo in PMCC No.88 of 2019**, delivered a judgement on 3/11/2020 in favour of the Respondent for a sum of Kshs. 927,490/- plus costs and interests against the Applicants and held the Applicants 100% liable. The Applicants did not file an appeal within 30 days from the date of the judgement that has now precipitated the filing of the Notice of Motion dated 18/01/2021 before this court.

2. The Notice of Motion dated 18/01/2020 was filed on 21/01/2021 under certificate of urgency seeking the following orders: -

> ***1. Spent***
>
> ***2. THAT the Honourable Court be pleased to extend time and grant leave to the Applicants to lodge an appeal and file a Memorandum of Appeal out of time against the judgement and decree of the Honourable Martha Opanga, Senior Resident Magistrate Kangundo entered against the Applicants on 3/11/2020.***
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> ***3. THAT the Honourable Court be pleased to stay execution of the said judgement and decree pending the hearing and determination of this application.***
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> ***4. THAT the Honourable court be pleased to stay the execution of the said judgement and decree pending the hearing and determination of the intended appeal.***
>
> ***5. THAT the Honourable court be pleased to stay the attachment and sale of the Defendant's properties as listed in the warrants of attachment and proclamation dated 13/1/2021 pending the hearing and determination of the application.***
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> ***6. THAT this application be heard inter partes on such date and time as this Honourable court may direct.***
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> ***7. THAT the costs of this application be in the cause.***

3. The Applicants application is supported by the affidavit of Pauline Waruhiu, the Claims Manager at Directline Assurance Company Limited who are the insurers of motor vehicle registration number KBF 298D said to be registered in the name of one of the Defendants and who deponed inter alia; *that the intended appeal was not filed within 30 days as from 3/11/2020 when the court delivered judgement; that a stay of execution of the judgement and decree should be granted since the Respondent has served the Applicants with warrants of attachment and proclamation in execution of the judgement lest the Applicants will suffer substantial and irreparable loss and damage; that the Applicants are apprehensive that the Respondent will proceed to sell the Applicants properties; that the efforts to obtain instructions from the Applicants was strenuous since the Directors of the company had gone out of the country on business issues hence the delay to issue instructions to its advocates on record to file the appeal within 30 days; that the Applicants should not be penalized for the failure to file the appeal within time; that the appeal has overwhelming chance of success.*

4. The Respondents filed grounds of opposition dated 26/1/2021. The Respondent asserts that the Applicants application is frivolous, incompetent, vexatious, bad in law, incurably defective, abuse of court process, afterthought and filed in bad faith and late. The Respondents maintain that the Applicants application was filed two months late after the judgement had been delivered on 3/11/2020 and proclamation issued. The Respondents maintains that the Applicants application has been filed in order to frustrate the execution process. The Respondent contends that the court should order that half the decretal amount should be released to the Respondent plus costs of Kshs. 527,437.50/-. The court was urged to dismiss the application with costs.

5. I have given due consideration to the application, supporting affidavit, grounds of opposition and Respondent's written submissions. The Applicants have not filed written submissions despite directions made on 28/1/2021. I will render myself on the twin prayers that is on leave to file appeal out of time and stay of execution of the judgement and decree herein sought by the Applicants.

6. On the first issue, the Applicants have attached a draft Memorandum of Appeal to their application where they are asking the court to extend time and grant leave to the Applicants to lodge an appeal and file the same out of time. The insurer's claims manager claims that the delay was caused as stated in paragraphs 5 and 6 of her supporting affidavit where she avers that-

> ***"The efforts to obtain instructions from their client were a bit strenuous since the directors of the company had gone out of the country on business issues."***

> ***"…. we delayed in issuing instructions to the firm of Kimondo Gachoka Advocates to lodge an appeal against the said judgement."***

7. The Respondent maintains the Applicants application was filed two months later after the judgement had been delivered on 3/11/2020 hence an afterthought and intended to frustrate the execution process having taken out and served the warrants of attachment and proclamation dated 13/1/2021 upon the Applicants. The Respondent maintains that there has been inordinate delay to file the application and that the same is an abuse of court process which should be dismissed with costs.

8. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

> ***"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:***
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> ***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.***

10. It follows therefore that the appeal can only be admitted after 30 days only if the Applicant satisfies the court that there is a good and sufficient cause why the appeal was not filed within 30 days. The Applicants are now seeking the courts leave to file their appeal out of time since 30 days from the date of the judgement, lapsed on 3/12/2020 and the appeal had not been filed. Indeed, the court in ***Patrick Kiruja Kithinji vs. Victor Mugira Marete [2015] eKLR*** held that:-

> ***"In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this court. Consequently, we find that an appeal filed out of time is not curable under Article 159."***

11. The use of the word *'may'* connotes discretion of the court to grant leave to file appeal not filed within 30 days. What is *'good and sufficient cause'* was held in ***Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633***, that there is no difference between the words "sufficient cause" and "good cause". In ***Daphne Parry vs. Murray Alexander Carson [1963] EA 546*** that:-

> ***"…though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."***

12. Further in ***Wachira Karani v Bildad Wachira [2016] eKLR, Mativo J.*** held that:-

> ***"Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."***

The Supreme Court of India in Civil Appeal 1467 of 2011 Parimal vs Veena Bharti (2011) observed that:

> ***"Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently …"***

13. The power to enlarge time or not by the court being discretionary, the courts have suggested guiding principles on what will be considered as good and sufficient cause for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The Court of Appeal in ***Mwangi v Kenya Airways Ltd [2003] KLR*** listed them as follows: -

> ***a. The period of delay;***
>
> ***b. The reason for the delay;***
>
> ***c. The 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 any is involved.***

14. Again under the provisions of Order 50, Rule 6 of the Civil Procedure Rules which the Applicants application is premised, the courts have power to enlarge the time required for the performance of any acts stipulated in the Rules notwithstanding the fact that such time has expired. ***Njuguna J.*** in ***Equity Bank Limited v Richard Kerochi Ayiera [2020] eKLR*** at paragraph 16 stated that the discretionary power of the courts was reaffirmed by the Court of Appeal in the case of ***Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231***, where the court 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."***

15. In ***First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65*** the court set out the factors to be considered in deciding whether or not to grant such an application and these are:-

> ***(i). the explanation if any for the delay; (ii). 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; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.***

16. However, it is imperative to note that the court in ***Fakir Mohammed vs Joseph Mugambi & 2 Others [2005] eKLR*** held that the principles are non-exhaustive in the following words:

> ***"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path…….. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor."***

17. I shall now proceed to consider the Applicants application against the above principles. The Applicants application for extension of time was filed before this court on 21/1/2021 after the learned trial magistrate had delivered her judgement on 3/11/2020. This was two months after the delivery of the judgement. The Respondent maintains that the filing of the application two months after warrants of attachment and proclamation have been issued is to frustrate the process of execution. To the Respondent this is an afterthought. However, I note ***Asike-Makhandia J*** in ***Gerald Kithu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR*** stated that:-

> ***"There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR*** this Court stated:-
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> ***"The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. 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 exercisable."***

18. The key question for consideration therefore is whether the Applicant has satisfactorily explained the delay. The Applicants application is based on grounds inter alia that the Applicant's directors were out of country for holidays. The claims manager averred at paragraph 5 of her supporting affidavit that the efforts to obtain the instructions from their clients were strenuous since the directors of the company had travelled on a business trip outside the country even though no travel documents have been tendered before the court. Again I find no explanation has been given by the claims manager on the connection between receiving instructions from the client and the directors who are said to have travelled outside the country. Is it that the directors were required to assist in obtaining instructions from the client? What instructions was the claims manager obtaining from the client yet it is the insurer that is exercising its subrogation rights to defend the suit and not the Applicants who are their clients/insured? In ***Alfred Iduvagwa Savatia vs Nandi Tea Estate & another [2018] eKLR J. Mohammed JA.*** cited ***Aganyanya, JA*** in ***Monica Malel & Another V. R, Eldoret Civil Application No. Nai 246 of 2008*** where the learned Judge 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."***

Further, ***J. Mohammed JA.*** was guided by the case of ***Waweru & Another vs Karoni [2003] KLR* 448** where it was stated that:-

> ***"The rules of the Court must prima facie be obeyed and in order to justify a Court in extending the time during which some step in the procedure requires to be taken there must be material on which the Court can exercise its discretion."***

19. The two months' delay is not inordinate but the reason for the delay is not reasonable and plausible. The insurer's claims manager has not attached any documentation in support of her assertions. It is not clear whether it was the Applicants or the directors who had travelled outside the country. I do not see the connection between obtaining instructions from the client who in this case are the Applicants and the directors going on a business trip outside the country. Hence, the court is left in a quandary in respect of what led to the delay in filing the appeal within 30 days. Further, even if the insurer's directors were out of the country, there is sufficient ways for them to engage their officers who are on the ground such as the claims managers and give instructions through e-mail, telephone, fax etc. It is not in doubt that the world today is a global village and with advancement in ICT it is possible to transact business with ease the distance notwithstanding and even during this period of the Covid-19 pandemic. It is my view that the explanation given has not convinced the court. It seems the claims manager is just trying to throw any flimsy reason to the court.

20. The appeal is intended to challenge the learned trial magistrate's award of damages on the basis that it is excessive hence it raises arguable issues. ***Nambuye J.*** in ***Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR*** stated that the principles to be distilled from the case of ***Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 23, Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR** and others may be enumerated inter alia as follows: -

"(x) An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court"

The learned Judge held that:

> ***"In my view, that in itself is arguable notwithstanding that it may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court . In my view, the issue of whether the applicant's claim was meritorious or otherwise is arguable notwithstanding that it may not succeed."***

21. In ***Divya J. Patel vs Guardian Bank Limited [2020] eKLR, J. Mohammed JA.*** held that an arguable appeal is not one that must succeed but one which is not frivolous and merits consideration by the Court. Indeed, the appeal seeks to challenge the liability and quantum on the basis that it was excessive hence they arguable issues that are fit for consideration by the court. However, it is imperative to note the Supreme Court of Kenya decision ***(M.K. Ibrahim & S.C. Wanjala SCJJ)*** in ***Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014]eKLR*** where the learned Judges held as follows:-

> ***"(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 reasonable reason for the delay. The delay should be explained to the satisfaction of the court.***

22. In ***Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR Odunga J.*** observed that:-

> ***"In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See Ratman vs. Cumarasamy [1964] 3 All ER 933; Savill vs. Southend Health Authority [1995] 1 WLR 1254 at 1259.***

23. It follows therefore that the Applicants explanation for delay in lodging appeal is not satisfactory. However, by dint of Articles 48 and 50 of the constitution the applicants are entitled to be given their day in court. It may be the view of the respondent that the intended appeal is frivolous but however, an arguable appeal is not one that must necessarily succeed but should be one which ought to be argued fully before a court of law. As the applicants wish to challenge the judgement of the lower court, I have no reason to deny them their right. The court will put in place the necessary conditions to be complied with by the applicants in order for them to pursue their appeal.

24. Having determined that the prayer seeking leave to extend time to file appeal has not been satisfactorily proved, the next task is to consider whether or not to grant the prayer seeking stay of execution of the judgement and decree. The Applicants have sought orders to stay judgement and decree pending the hearing and determination of the application and intended appeal. The respondent did not file a replying affidavit to the applicants' application. However, the respondent's counsel filed grounds of opposition dated 26/1/2021 and vide paragraph 8 thereof learned counsel suggested that the applicants should deposit half the decretal sums with the respondent while the rest be paid to court.

I find the said suggestion if allowed will be a lifeline to the applicants herein. It is also noted that the applicants are only appealing against the assessment on quantum and hence at the end of the day the respondent is not likely to go home empty handed.

25. The Applicants have claimed that execution process is in motion and hence they will suffer substantial loss in the event stay is not granted. This position was answered in the negative by the court in ***James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR,*** where the court held that:-

> ***"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***

26. Again in ***Kenya Shell Limited vs. Kibiru [1986] KLR 410***, ***Gachuhi, Ag. JA*** (as he then was) at page 417 held:

> ***"It is not sufficient by merely stating that the sum of Shas 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."***

27. The claims manager has not stated in her affidavit her fears in respect of the Respondent's inability to refund the decretal sum in the event the appeal was to succeed. It has been contended by counsel for the respondent vide the grounds of opposition that the respondent is an established farmer who can afford to refund the amount in case the appeal succeeds. The court in ***George Kimotho Ilewe vs Annastacia Wanza Muthuka & Joseph Mutuku Ngewa (suing as legal representatives of the estate of Judy Kioo Wanza – deceased)*** expressed itself at paragraph 27 as follows:-

> ***"The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there.''***

28. In ***National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR*** Court of Appeal held thus:

> ***"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…"***

29. Lastly, I note that there is no disclosure on whether a declaratory suit has been filed against the insurer as required under section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act. The claims manger avers at paragraph 2 of her affidavit that it had insured the suit motor vehicle registration number KBF 298D. The proclamation bears the name of the Applicants and not the insurance. There is therefore no threat of execution against the insurer to warrant the grant of an order for stay of execution against the judgement and decree. As the respondent's advocate has indicated the respondent's ability to refund the decretal sums in the event of success of the appeal, there is no likelihood of substantial loss being suffered by the applicants. However, in view of the respondent's counsel's suggestion that half the decretal sums be paid to the respondent while the balance being kept in court is a welcome gesture meriting an order for stay pending appeal.

30. In light of the foregoing, the notice of motion dated 19/1/2021 is allowed in the following terms:

a) ***The applicants are granted leave to file and serve their Memorandum of Appeal within 14 days from the date hereof.***

b) An order of stay of execution of the judgement and decree in Kangundo PMCC No.88 of 2019 is hereby granted pending the determination of the intended appeal on condition that the applicants pay half the decretal sums to the respondent and the balance thereof be deposited into an interest earning account in the joint names of the advocates for the parties within thirty (30) days from the date hereof failing which the stay shall lapse.

c) The costs hereof shall abide in the appeal.

It so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 2ND DAY OF JUNE, 2021.

D. K. Kemei

Judge