



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**(CORAM: R. MWONGO, J.)**

**MISCELLANEOUS CIVIL CASE NO. E007 OF 2020**

**BERNARD KURIA.....1<sup>ST</sup> APPLICANT**

**FRANCIS KUNGU KAMAU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**JANE WAIRIMU MWANGI.....RESPONDENT**

**RULING**

1. The applicant seeks inter alia, leave to appeal out of time and stay of execution of the judgement in Engineer SPM Civil Case Number 53 of 2018 purportedly issued on 2<sup>nd</sup> October 2020 against the Applicant. It was not until 10<sup>th</sup> December 2020 when the present application was filed
2. The applicant's application is premised on the grounds that: the Appellant has been aggrieved by the judgment of the delivered on 2<sup>nd</sup> October 2020 in Engineer SPM Civil Case Number 53 of 2018 and has filed a Notice of Appeal intending to appeal against the said judgement in its entirety; the Plaintiff Respondent has already commenced execution proceedings and attached the 1<sup>st</sup> Appellant's motor vehicle registration number KWW 466 which act may render the appeal nugatory; the Plaintiff/Respondent will not be able to recover the decretal amount from the proclaimed goods as they are not equivalent in value to the decretal sums; the application has been made expeditiously and filed without undue delay; the Appellant is willing to furnish security for due performance of the Appeal in the form of an irrevocable Bank Guarantee and the same to be deposited with the court; certified copies of proceedings are yet to be availed; the intended appeal is arguable and has good prima facie prospects of success;
3. The applicant asserts that, in view of the foregoing, it is in the interests of justice that this honourable court should exercise its discretion in favour of the Plaintiff and order for stay of execution pending the hearing of the intended appeal, and that he is not in any way obstructing or delaying the cause of justice.
4. The Application is opposed by the Respondent through a Replying Affidavit dated 15<sup>th</sup> December 2020. Her grounds are that: when the Judgment was issued electronically on 16<sup>th</sup> April 2020 the advocate on record was Joe Ngigi & Co Advocates for the defendants and thus the firm of Wairegi Kiarie and Associates is not properly on record for failure to file a consent with the firm of Joe Ngigi & OC. Advocates to allow them to come on record on behalf of the Applicant; that the Application is as filed before the court is inept, bad in law and fatally defective and as such it ought to be dismissed with costs to the Respondent; that the Decree and Certificate of costs was issued and served upon the applicant on 2<sup>nd</sup> October 2020; that upon being served and failing to pay the decretal sum, they sought for execution against the Applicant and a warrant of attachment was issued on the 17<sup>th</sup> November 2020; that the applicants never did anything and it was only upon attachment of the motor vehicle that they have now moved to court seeking for stay of execution.
5. In addition, the respondent asserts that: the applicants have at all times been aware of the judgment and Decree as is evidenced from the demand notice to the previous counsel on record and correspondences between the parties proposing how they intend to pay the decretal sum; neither a copy of the judgment nor decree and certificate of costs nor the intended memorandum of appeal has been annexed to enable the court determine whether or not the intended appeal has high chances of success; that the delay in filing the instant suit has not been explained and the same is inordinate; that she is a person of means and well capable of paying repaying back the decretal sum in the event the appeal succeeds; that the Applicant has not demonstrated the hardships it will suffer in the event the stay orders are not granted; that no security has been furnished to warrant the applicant being granted the orders sought and that in the event the court allows the said application then the applicant be ordered to deposit the decretal sum to the Respondent as security.
6. Parties were directed to dispose of the application by written submissions. The Respondent complied but the applicant did not file written submissions. The filed submissions reiterate the respondents' grounds.

7. The only issue for determination is whether the application meets the standards for stay of execution and the filing of an appeal out of time. It is for the applicant to lay a basis that will satisfy the court and persuade it to exercise its discretion to extend time.

8. In this regard, the Court of Appeal in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others** held as follows on extension of time:

*“(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.*

*(5) Whether there will be any prejudice suffered by the respondent of the extension is granted.*

*(6) Whether the application has been brought without undue delay; and*

*(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”*

9. Section 75G of the Civil Procedure Act on appeals from the subordinate court provides that:

*“79G. 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.”*

10. According to Paragraph 3 of the Notice of Motion, the lower courts “Decision” in respect of which leave to appeal is sought was delivered on 2<sup>nd</sup> October 2020. However, the Respondent’s Replying Affidavit paragraph 3 indicates that the judgment was delivered via electronic mail on 16<sup>th</sup> April 2020, and the advocates duly notified via electronic mail, and that it was the decree and certificate of costs that was served on the applicant on 2<sup>nd</sup> October, 2020.

11. The respondent on her part attached a letter dated 24<sup>th</sup> July 2020 requesting the Engineer Law Courts to issue a Decree and Certificate of Costs:

*“for the amount awarded on 16/4/2020”.*

12. This critical conflict of facts would have been resolved had the applicant attached a copy of the decision sought to be appealed against. Instead, they attached a Warrant of Attachment issued on 17<sup>th</sup> November, 2020 by which an attachment:

*“was ordered by decree of this court passed on the 2<sup>nd</sup> day of October 2020”*

13. On the prayer for stay of execution of judgment or decree of the trial court pending the hearing and determination of the intended appeal, **Order 42 Rule 6 (2)** of the **Civil Procedure Rules** which is applicable provides that:

*“No order for stay of execution shall be made under sub-rule (1) unless-*

*a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.” (Emphasis added)*

14. This court has discretion to grant stay of execution of decree pending appeal. In **JMM v PM [2018] eKLR** it was stated as follows:

*“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”*

In exercising such discretion, the court must therefore balance the prospect of negating appeal proceedings with the prospect of depriving a judgment creditor the fruits of the judgment.

15. In **Pullin Harakchand Shah v Southern Credit Banking Corporation Limited [2016] eKLR** the Court of Appeal at Nairobi cited, with approval, the authority of **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231** which set out the principles that guide this Court in such an application. The principles are 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 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.”* (Emphasis added).

16. The length of delay must be explained with plausible reasons. To this effect, the High Court in **Andrew Kiplagat Chemarigo v Paul Kipkorir Kibet [2018] eKLR** stated:

*“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.”*

17. A record of appeal should be filed within 60 days of the lodging of the notice of appeal. However, where a party makes an application for typed proceedings, the time taken to assemble the proceedings is exempted in the computation of the 60 days. The Deputy Registrar of the relevant court issues a certificate of delay for verification of the period to be excluded by the court and the parties. No certificate of delay has been tendered by the Applicant. In the instant case the notice of appeal and memorandum of appeal was lodged on 10<sup>th</sup> December 2020.

18. The respondent has relied on the authority of **Dilpack Kenya Ltd v William Muthama Kitonyi 2018** to support the argument that a party seeking enlargement of time must show that he has a good cause for doing.

### **Disposition**

19. I have carefully perused all the material before me. Ultimately, I find that the failure of the applicant to demonstrate the date on which the judgment was rendered, and to explain the delay in relation to such date makes it impossible for this court to exercise its discretion for stay pending execution and for extension of time

20. Accordingly, the application is dismissed with costs to the respondent.

### **Administrative directions**

21. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

22. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

23. Orders accordingly.

**DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 8<sup>TH</sup> DAY OF JULY, 2021.**

**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Wairegi for the Applicant
2. Wanjiru for the Respondent
3. Court Assistant - Quinter Ogutu