



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT MISC. CIVIL APPL. NO. E051 OF 2021

NIC BANK LIMITED.....APPLICANT

VERSUS

PHILIP WAMBUA MASILA.....RESPONDENT

RULING

1. The application dated 3/2/2021 principally seeks orders that **this Honourable Court be pleased to grant the Applicant leave to lodge an Appeal out of time against the entire Judgment of the Honourable G. A. Mmasi (SPM) delivered on 19th September, 2018 in Milimani CMCC No. 1430 of 2014.**
2. Secondly, that **this Honourable Court do order a stay of execution of the Judgment entered against the Applicant herein on 19th September, 2018 in Milimani CMCC No. 1430 of 2014, the resultant decree and all consequential orders pending the hearing and determination of the intended Appeal.**
3. The application is premised on the grounds set out in the application and the supporting affidavit. The Applicant's position is that Judgment was delivered in Milimani CMCC Number 1430 of 2014 on 19/9/2018 without notice to the Applicant. That the Applicant learnt of the delivery of the Judgment after being served with a demand for payment by the Respondent on 30/7/2020 and on 5/10/2020. That the Applicant went to the court registry to peruse the court file but the same could not be traced. It is further averred by the Applicant that the outbreak of Covid – 19 Pandemic made it difficult to access the court file.
4. The Applicant is aggrieved by the Judgment and wishes to Appeal. It is stated that the intended Appeal is arguable with high chances of success. The Applicant is apprehensive that if the decretal sum is paid, the Respondent may not be in a position to refund the same in the event that the intended Appeal is successful. That the Applicant stands to suffer substantial loss. The Applicant is ready to deposit security for the due performance of the decree.
5. In the replying affidavit filed in opposition to the application, it is deponed that the application is an afterthought aimed at scattering the Applicant's efforts to execute the Judgment and enjoy the fruits of the Judgment. That the delay of 867 days before the filing of the instant application has not been explained satisfactorily. That the Applicant has not explained what steps it took to follow up on the delivery of the Judgment. That even after the Applicant became aware of the Judgment, it did not immediately take any steps to make it's application. That the delay is inordinate and inexcusable and the Applicant is undeserving of the exercise of the court's discretion in it's favor. The court was urged to dismiss the application.
6. I have considered the application, the response and the submissions filed by the respective advocates for the parties.
7. On enlargement of time, the principles applicable were set out by the Supreme Court of Kenya in the **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** as follows:

“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:

- 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 consideration for extending time.”

8. The Judgment of the Lower Court was delivered on 19/9/2018. The demand for payment was first made in July and October 2020. According to the Applicant, that is when the delivery of the Judgment was brought to it's attention. It has not been explained why the Applicant did not follow up on the delivery of the Judgment with the court. However, this court accepts that the outbreak of the Covid – 19 Pandemic made the access to the court files more difficult. I therefore accept the explanation for the unreasonable delay herein.

9. The well settled principles guiding the grant of a stay of execution pending appeal are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

No order for stay of execution shall be made under subrule (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.

10. This court has already addressed itself on the issue of delay and will turn to the question of substantial loss.

11. The Applicant's contention that the Respondent may not be capable of refunding the decretal sum has not been addressed by the Respondent.

12. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another:**

“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 – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

13. The Applicant is willing to furnish security for the decretal sum.

14. To balance the competing interests of the parties, I allow the application on condition that the Applicant do deposit the decretal sum in a joint interest earning bank account of the Advocates for the parties or in court within 30 days from the date hereof.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY, 2021

B.THURANIRA JADEN

JUDGE