



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APP. NO. 48 OF 2021

RICHARD MAUTI.....INTENDED APPELLANT/APPLICANT

VERSUS

JULIUS KINYAMAL.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Kimondo Gachoka Advocate for the Intended appellant/applicant

Ernest Mogaka Advocate for the respondent

R U L I N G

The applicant in a notice of motion filed in Court on 21.6.2021 is seeking the following orders:

- (1). That this Honourable Court be pleased to grant leave to the applicant/ intended appellant to appeal out of time against the Judgment of the Hon. S. K. Ngii, Principal Magistrate at The Senior Resident Magistrates Court of Kenya at Mariakani in SRMCC No. 53 of 2019 on the 14.04.2021.***
- (2). That this Honourable Court be pleased to stay further execution and proceedings of the Judgment done vide the Decree and Certificate of Costs emanating from Mariakani in SRMCC No. 53 of 2019 pending the hearing and determination of this application.***
- (3). That this Honourable Court be pleased to stay further execution and proceedings of the Judgment done vide the Decree and Certificate of Costs emanating from Mariakani in CMCC NO. 53 of 2019 pending the hearing and determination of the intended appeal herein.***
- (4). That the costs of this application abide the outcome of the intended appeal.***

In support of the motion are the grounds on the face of it and an affidavit by **Pauline Waruhiu**. The respondent opposed the application through his replying affidavit filed in Court on 14.7.2021.

Determination

There are two issues in this application. First is the vexed question of when extensions of time should be granted in a litigation. Second, whether the applicant has satisfied the criteria for grant of stay of execution pending an appeal.

The question of extension of time fell to be determined in accordance with the principles stated in **Salat v IEBC {2014} eKLR, Five Forty Aviations Ltd v Trade Worlds Aviation Ltd {2010} KLR**.

“The Courts introduced various tests to be applied in all applications for relief to sanction extension of time going forward.

- (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 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 respondent if the extension is granted.*
- (6). *Whether, the application has been brought without undue delay.....”*

In all these, the applicant must give a good cause for the extension of time by explaining why the extension is needed.

In the instant motion, the impugned Judgment was read and delivered on 14.4.2021. The applicant brief to seek extension of time was effected on 19.5.2021. According to the applicant’s affidavit, the delay to file the appeal within time was as a result of ill-health of the advocate on record. The applicant further stipulates that the intended appeal has high chances of success more so on the issue of assessment of damages.

From the affidavit evidence by **Ms. Pauline Waruhiu**, the delay in applying for leave to appeal to this Court in terms of Section 79 (G) of the Civil Procedure Act has been explained. The inadvertence of an advocate seized of the matter during the period of his indisposition is excusable to enable this Court exercise discretion in that regard.

The second issue that arises deals with the nature of the appeal. An appeal is basically a complaint against the Judgment already delivered by an inferior Court. Through the appeal process any error is deemed to be corrected or reviewed. It is worthy mentioning that a right of appeal is statutory which directly flows from the anchor of the Constitution. The Superior Courts have therefore been vested with jurisdiction to entertain appeals from subordinate Courts or tribunals. That is the right being exercised by the applicant.

Basically, the applicant in the draft memorandum is unhappy with the assessment of damages in favor of the respondent. However, his right of appeal is not absolute. The Courts have been donated with powers to exercise discretion on a case to case basis. That right of appeal conferred by the Constitution and subsequently by relevant statutes, looks at the sphere of the likelihood of the appeal being rendered nugatory.

Similarly, the order envisages the question of existence of serious and arguable appeal with high chances of success. Thus, in exercising judicial discretion on any of the stated grounds and guiding principles, the Court is expected to act judicially within the precincts of the Law, with specific reference to this case, invariably the peculiar facts and circumstances fall in the realm of that discretion being exercised in favor of the applicant. On this limb the applicant succeeds.

The second relief being sought by the applicant is on stay of execution pending an appeal under Order 42 Rule (6) of the Civil Procedure Rules. The requirements for grant of stay revolves around the following conditions:

- (1). *The application has been filed without undue delay.*
- (2). *The applicant has demonstrated substantial loss.*
- (3). *The payment of security for due performance of the decree.*

The Law is trite that an applicant must satisfy the above conditions in order to earn favor of the Court for stay of execution. The following cases are also instructive on the remedy to grant or refuse stay of execution.

In **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Another {2015} eKLR** the Court had the following to say:

“The principles governing the exercise of the Court’s jurisdiction under rule 5 (2) (b) of the Rules are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. We need only restate these principles from Reliance Bank Ltd (In liquidation) vs Norlake Investments Ltd – Civil Appl. No. Nai 93/02 (UR), thus:-

“Hitherto, this Court has consistently maintained that for an application under rule 5 (2) (b) to succeed, the applicant must satisfy the court on two matters namely:-

1. *That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
2. *That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”*

Lastly, both limbs must be demonstrated to exist before one can obtain relief under rule 5 (2) (b). (See Republic v Kenya Anti-Corruption Commission & 2 others {2009} KLR 31)....

We are further guided by this Court’s decision in Carter & Sons Ltd v Deposit Protection Fund Board & Two Others – Civil Appeal No. 291 of 1997, at page 4 as follows:

“.....the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security and the application must, of course, be made without unreasonable delay.”

In **Edward Kamau & Another v Hannah Mukui Gichuki & Another {2015} eKLR** the Court stated as follows:

“The commanding preamble provisions of Order 42 Rule 2. No order for stay of execution shall be made under Sub Rule (1) unless Imply that the three conditions are inextricable. They must all be met for an applicant to be granted the order of stay of execution pending appeal. However, those conditions are guidelines which the courts follow in the exercise of the discretion to grant or refuse to grant orders of stay of execution pending appeal. In making any orders under the said provisions, this Court is enjoined to consider the justice of the case for both parties. Having found that the right of appeal is intrinsically linked to a right to fair hearing and a right to access justice, while appreciating that the respondent should not be denied the enjoyment of the fruits of her lawfully obtained Judgment, under Article 159 of the Constitution, justice shall be done to all irrespective of status, which right has to be balanced out against the right of the appellant not to be ousted from the seat of justice by denying them a stay since justice is a two way traffic. This court appreciates that the applicants being a party seeking favourable exercise of the court’s discretion is under a legal duty to place some material before the Court upon which such discretion should be exercised. In other words they should prove that the respondent is so impecunious that if the decretal sum is paid then they will not recoup should the appeal succeed, thereby rendering it nugatory.”

Conclusion

In considering the substantiality of the reasons advanced in the affidavits offered by the applicant the proceedings leading to the impugned Judgment focused on liability and assessment of damages. The judicial discretion of Court to grant or deny stay of execution is dependent on that Judgment. Thus in this regard, the intended appeal emphasizes that the exercise of discretion on assessment of damages was erroneous. The appeal’s Court would therefore be addressing the issue of that discretion to determine whether it was exercised judiciously. It is nevertheless, a question of fact with the exercise of discretion to award damages to the respondent. Therefore, this application falls on the grounds that the applicant has an arguable appeal with high chances of success. That in the circumstances if stay is refused the appeal would be rendered nugatory.

The other consideration is on substantial loss. In a bid to enforce the Judgment, the respondent is bound to attach the assets owned by the appellant to satisfy the decree. Being dissatisfied with the Judgment, and leave to extend time having been granted it would obviously occasion substantial loss not remediable by way of damages.

In reply to the applicant there is no rebuttable evidence that the respondent has the resources to payback the decretal sum in the event the appeal is rendered successful against the decision subject matter of execution. Considering the application along the lines of the issues raised in this Ruling persuades me to grant stay of execution pending the hearing and determination of an appeal on the merits. In granting this stay I order that the applicant does deposit security of the decretal sum in a joint earning interest account of both counsels within thirty (30) days from today’s date. The costs of the application to be taxed at the end of the determination of the appeal.

DATED, SIGNED ON 15TH DAY OF SEPT 2021 and DISPATCHED via email ON 15TH DAY OF SEPTEMBER 2021

.....

R. NYAKUNDI

JUDGE

(ernestmokaya@gmail.com, info@kglaw.co.ke)