



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. E394 OF 2020

THOMAS MAINA MUKUNGI.....1ST APPLICANT

RUKAGINA 44 SACCO SOCIETY.....2ND APPLICANT

VERSUS

CHRISTINE OTIENO OTEKRA.....RESPONDENT

RULING

1. The motion dated 7th October, 2020 by **Thomas Maina Mukungi** and **Rukagina 44 Sacco Society** (hereafter the Applicants) is expressed to be brought under Section 79G & 95 of the Civil Procedure Act (hereinafter CPA) and Orders 42 Rule 6, and 50 Rule of the Civil Procedure Rules (hereafter CPR). The Applicants' primary prayers seek leave to appeal out of time in respect of the judgment and decree in favour of **Christine Otieno Otekra** (the Respondent) in **Milimani CMCC No. 5862 of 2019** delivered on 30th April, 2020 and stay execution of the said judgment pending the hearing and determination of the intended appeal. The motion is premised on grounds inter alia, that the Applicants are aggrieved by the judgment of the lower court and that delay in filing the intended appeal within the prescribed occasioned by restrictions imposed by the government in respect of movement in and out of the Nairobi Metropolis due to the Covid-19 pandemic.

2. The motion is supported by the affidavit by **Ms. Waikwa**, counsel for the Applicants. The gist thereof is that she is seized of the matter pursuant to instructions by Directline Assurance Company Limited, the insurers of motor vehicle KCR 041P in respect of which the claim in the lower court arose ; that the judgment in the lower court was delivered on 30th April, 2020 and she notified her clients who were prevented from travelling to her office to give instructions due to the travel restrictions ; that she eventually received instructions to appeal after the prescribed time for filing appeal had lapsed. Further that the Respondent had attached the Applicants' motor vehicles in execution, and if stay of execution is not granted, the Applicants will suffer prejudice and substantial loss, and the motion and intended appeal will be rendered nugatory. She asserted that the intended appeal was arguable as raising pertinent issues of law and fact, and that no prejudice will be occasioned to the Respondent, as she can be compensated by way of costs and finally, that the Applicants are willing to comply with conditions as to security as may be imposed by the Court.

3. The replying affidavit was sworn by **Ms. Rashid**, counsel for the Respondent. To the effect that pursuant to the judgment delivered in April, 2020, the Applicants made no efforts to satisfy it , thus prompting the Respondent to commence execution; that the Applicants' explanation for their delay lack candour as travel restrictions were lifted around July, 2020 and that the Applicants have been jolted into action by the threat of execution. She views the intended appeal as an attempt to delay the conclusion of the matter. Counsel asserted that the Respondent is gainfully employed and able to refund the decretal sum should the appeal be successful.

4. The motion was canvassed by way of written submissions. The Applicants submitted that by dint of the material in the affidavit of **Ms. Waikwa** in support of the motion, the deponent had demonstrated her competence to swear the said affidavit. Reliance was placed on **Joseph Kangethe Kabogo & Anor v Micheal Kinyua Ngari [2012] eKLR** . Further citing the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi [2018] eKLR** and reiterating depositions in the affidavit counsel submitted that the Applicants had explained the reasons for delay in filing the appeal ; that the intended appeal raised arguable issues of law and fact; and that any prejudice to the Respondent can be compensated by an award in costs.

5. With respect to the prayer for stay of execution pending appeal, counsel relied on **Halai & Another v Thorton & Turpin (1963) Ltd [1990] KLR 365**. She submitted that the discretion of the court is governed by the three conditions in Order 42 Rule 6 (2) of the CPR which the Applicants had duly satisfied. On the limb of substantial loss, counsel cited Kenya **Orient Insurance Co. Ltd v Paul Mathenge Gichuki & Another [2014] eKLR** to assert that the decretal sum is substantial while the Respondent's means are unknown. Thus, there was every likelihood that the Applicants will be unable to recover the decretal sum on successful appeal if stay of execution is not granted, thereby rendering the appeal nugatory. Concerning timeliness, counsel reiterated explanations in the affidavit, and asserted that the Applicants have an arguable appeal, and are willing to furnish security as may be required by the court.

6. The Respondent's counsel cited the case of **Butt v Rent Restriction Tribunal (1982) KLR** concerning the prayer to stay execution. She asserted that the delay herein is inordinate, and no satisfactory explanation had been offered. In that regard, she placed reliance on the decision in **Jaber Mohsen Ali & Another v Priscillah Boit & Another [2014] eKLR**. She submitted that the Applicants have not demonstrated substantial loss and cited the case of **Samwel Kimutai Korir (Suing as personal and legal representative of the estate of Chelangat Silevia) v Nyanchwa Adventist Secondary School & Nyanchwa Adventist College [2017] eKLR**.

7. With regard to the prayer for leave to file appeal out of time, it was asserted that the Applicants have not proffered a plausible explanation to demonstrate to the Court the court that they had good and sufficient cause for not filing the intended appeal within the prescribed time and that the Respondent will be prejudiced if the motion was granted as it would amount to the denial of the Respondent's right to the fruits of her judgment. The Court was therefore urged to dismiss the motion.

8. The Court has considered the rival affidavit material and submissions made in respect of the motion. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the Civil Procedure Rules. Although the provision does not expressly say so, this can be inferred from the rule. Further an analogy can be drawn from Order 42 Rule 6 (4) of the Civil Procedure Rules which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given. Equally, Order 42 Rule 6 (6) of the Civil Procedure Rules states:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.” (emphasis added).

9. It would seem the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the Civil Procedure Rules). Until the memorandum of appeal is filed, the court may be acting in *vacuo* by considering the Applicants' prayer for stay of execution pending a non-existent appeal.

10. I am fortified on this position by the pronouncement of the Court of Appeal in the case of **Equity Bank -Vs- Westlink MBO Limited [2013] eKLR**. Commenting on Rule 5 (2) (b) of the Court of Appeal Rules, whose wording is substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules, and on Order 42 Rule 6 (6) of Civil Procedure Rules, the Court of Appeal left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also **Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR**). There is no provision for the filing of a notice of intended appeal in the High Court, from a decision of the subordinate court. Order 42 Rule 1 of the CPR provides that an appeal to the High Court shall be in the form of a memorandum of appeal

11. More recently, the Court of Appeal in **Abubaker Mohamed Al-Amin v Firdaus Siwa Somo [2018] eKLR** while citing with approval the decision of the High Court in **Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased) [2017] eKLR** stated as much. In the circumstances, the prayer for stay of execution pending the intended appeal has no legal anchor.

12. Turning now to prayer 3, the power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, under section 95 of the Civil Procedure Act. The Applicants claim that after delivery of the subject judgment on 30th April, 2020, the government of Kenya imposed movement restrictions in and out of the Nairobi Metropolis due to the Covid-19 Pandemic, and they were therefore unable to travel to counsel's offices to instruct with regard to the judgment and further submitted that, counsel's offices were closed until June 2020 due to the Covid-19 pandemic and that subsequently attempts to communicate with the Applicants were unsuccessful until October 2020 when they eventually gave instructions.

13. The Respondent through counsel countered that the Applicants' explanation lacks candour citing the fact that the stated Covid-19 restrictions were lifted months before October, 2020 and that by their depositions, the Applicants were in communication with counsel and could have availed themselves of technology to communicate instructions.

14. The principles governing the grant of leave to appeal out of time are settled. The successful applicant must demonstrate “*good and sufficient cause*” for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** 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 general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

15. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of **Telkom Kenya Limited V. John Ochanda And 996 Others [2015] eKLR** that:

“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court's discretion in curing the pleadings before it. This Court's position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has

not taken place....

It is this Court’s position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not irrelevant but are the handmaidens of justice that facilitate the right of access to justice in the terms of Article 48 of the Constitution....”

See also **Patrick Wanyonyi Khaemba V Teachers Service Commission & 2 Others [2019] eKLR.**

16. Section 79G of the Civil Procedure Act provides that:

“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.”

17. The Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

- 1. Extension of time is not a right of any 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 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.**
- 7.”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR.**

18. The delay in this case is about six (6) months. In the circumstances of this case, the delay is inordinate and has not been explained in any plausible manner. A party seeking extension of time must not be seen to presume on the Court’s discretion. The court therefore agrees with the Respondent that indeed the Applicants have not demonstrated *good and sufficient cause* why they failed to file the memorandum of appeal within prescribed time. Admittedly, the Applicants were promptly informed of delivery of the judgment on 30th April, 2020. In this age of instant electronic communication and money transactions no party can be taken seriously when he claims that he had to travel (from an unidentified location) to Nairobi to instruct his advocate. What peculiar circumstances necessitated the physical attendance of the Applicants in the advocate’s offices Nairobi? The assertion that the advocate’s office was closed sometime after the judgment was not included in counsel’s affidavit but first raised in submissions and appear an afterthought introduced to shore up the Applicants’ rather limp case.

19. Parties own their cases, and in this instance, the Applicants did not even deem it necessary as a sign of good faith to swear an affidavit setting out the peculiarities of their alleged handicap in instructing counsel. Hence the Respondent may be accurate when she protests that the Applicants were roused from slumber by execution proceedings. In addition, the court notes that this file is replete with certificates of urgency by the Applicants who further took almost four months to comply with directions to file written submissions in support of their motion. This slovenly manner does not evidence any seriousness on the part of the Applicants and may well portend a sign of things to come, that is, further delay and prejudice to the Respondent who has a judgment in her favour.

20. In the circumstances, the court is not satisfied that the Applicants have demonstrated *good and sufficient cause* for failing to file their appeal within the prescribed time. In the result, it seems to me that the justice of the matter lies in dismissing the motion with costs. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 7TH DAY OF OCTOBER 2021.

C.MEOLI

JUDGE

In the presence of:

Applicants: MS. Waikwa

Respondent: MS Rashid

C/A: Carol