



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO.E068 OF 2021**

**ZACHEAUS OMIA JUMA.....APPELLANT/APPLICANT**

**VERSUS**

**NICHOLAS KIRANGI.....RESPONDENT**

**RULING**

**1.** This is the notice of motion dated 15<sup>th</sup> February 2021 brought under Section 1(A), 1(B), 3(A) and 79G of the Civil Procedure Act, Order 42 Rule 6 (1) and (2), Order 50 Rule 6 of the Civil Procedure Rules, 2010. The application seeks the following orders:

***i & ii Spent***

***iii.** That this honourable court be pleased to extend time within which the appellant may appeal against the ruling of the lower court delivered on 22<sup>nd</sup> May 2020 in MILIMANI CHIEF MAGISTRATE COURT CIVIL CASE NO. 594 OF 2016 and thereby grant leave to the appellant to appeal out of time.*

***iv.** That in the result, this appeal be admitted out of time and be deemed as duly and properly filed within time.*

***v.** That this honourable court be pleased to order that there be a stay of execution of the judgment and decree of the lower court in MILIMANI CHIEF MAGISTRATES COURT CIVIL CASE NO.594 OF 2016 pending the hearing and determination of this appeal.*

***vi.** That the costs of this application be costs in the cause.*

**2.** The application is supported by the grounds on its face plus the sworn affidavit of Zacheaus Omia Juma the applicant. He averred that the lower court delivered a ruling dated 22<sup>nd</sup> May 2020 dismissing his application seeking to set aside the default judgment entered against him. Annexure **ZOJ 1** is a copy of the ruling. That the matter was reserved for delivery of ruling on 11<sup>th</sup> May 2020 but was not delivered, as the corona pandemic set in and physical access to courts was restricted.

**3.** He further avers that the Chief Justice had directed the use of video conferencing and e-mails in delivery of judgments and rulings. That the judgments and rulings were to be delivered with notice to the parties and be read in open court then be sent to the parties email addresses (annexture **ZOJ 2**).

**4.** He deponed that his advocates were able to get a court assistant who upon checking the records informed them that the ruling had been delivered on 22<sup>nd</sup> May 2020 but the court file could not be traced as they had requested for the copy of the ruling. That after follow ups with the registry they were able to get the ruling on 11<sup>th</sup> February 2020 (sic) by which time the period for filing appeal had lapsed.

**5.** He further deponed that his co-defendant lodged a similar application and the same magistrate had exercised his discretion in favour of him and set aside the judgment entered against him. Annexure **ZOJ 6** is a copy of the ruling. That it is apparent from the foregoing that he did not deliberately fail to file the appeal within time and that the delay is attributed to the fact that he was not aware of the delivery of the ruling.

**6.** He deponed that that there is no stay of execution in place and the respondent had already commenced execution against him by way of notice to show cause. The same would at any moment resume execution and risk having his liberty taken away. He further depones that should the appeal be admitted out of time the same is bound to be rendered nugatory unless execution of the said judgment and decree is

stayed as the respondent has no means of refunding the decretal sum should the same be paid to him and his appeal eventually succeeds.

7. He averred that he is ready and willing to furnish security for due performance of the decree in the form of deposit of the decretal sum in court or in such other form the court may order. Further, that in the circumstances of this matter he is bound to suffer more prejudice and injustice unless stay of execution pending appeal is granted.

8. A replying affidavit sworn on 10<sup>th</sup> June 2021 by Ms. Beatrice Muriithi the Legal Claims Officer of the respondent filed in opposition to the application. She averred that the judiciary had embraced a virtual filing and tracking system known as judiciary e-filing system, one that can track the status of any ongoing case. That the case activities in this matter have always been updated and one has the advantage of seeing what happened after every court session on the judiciary e-filing platform.

9. She deponed that the appellant is guilty of laches as he brought this application eight (8) months after the application dated 23/07/2019 was dismissed. That he has not given any reasons as to why it took him close to one year to follow up on his application which only points to his indolence. She averred that the affidavit of service dated 15<sup>th</sup> April 2016 demonstrates that the appellant was served at his workplace after being identified by the security guard.

10. It is her averment that the draft defence does not raise any triable issues and the same is a sham and consists of mere denials. That a case is tried on its own merits and one cannot question the court's discretion in determining matters. She further avers that the respondent is likely to suffer prejudice if the application is allowed, as this suit has been in court for over 5 years and he continues to incur costs attending and summoning its witnesses who may not be able to be traced or may be deceased.

11. She further depones that this application is misconceived and is an abuse of the court process which is bent on denying the respondent the fruits of his judgment and therefore prays that it be dismissed with costs.

12. In the supplementary affidavit sworn on 5<sup>th</sup> July 2021 by the appellant/applicant he reiterates that the ruling was to be delivered on notice to the parties but no notice was served on either of the advocates or the respondent's advocates or even sent to his advocates' email address. He averred that for the e-filing system besides its technical challenges, it was a novel one though the case tracking system took a long time before it was fully integrated.

13. He avers that the respondent failed to disclose to the court that he was also totally unaware of the ruling until the applicant filed this application. He depones that had he been aware that the application was dismissed he would have proceeded with the execution proceedings that had been stayed to pave way for the applicant's application in the lower court.

14. The application was disposed of by written submissions. Mr.Ngugi for the appellant/applicant in his submissions gave a brief background of the matter and identified the issues for determination as follows:

*i. Whether the applicant should be granted extension of time to appeal and leave to appeal out of time.*

*ii. Whether an order for stay of execution pending appeal should be issued.*

15. On the first issue counsel cited section 79G of the Civil Procedure. He further relied on the case of **Francis Mwanza Mulwa v Kanji Vaniian & 2 Others (2018) eKLR** where the court stated as follows:

*“It is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion This being an exercise of judicial discretion, like any other judicial discretion must on (sic) fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in *Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633*, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held 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.”*

16. On whether or not to grant leave to appeal out of time, counsel submitted that it is a matter of judicial discretion which is exercised on the basis of the material placed before the court and that the principles to be considered are as follows:

*i. The length and explanation if any for the delay*

*ii. The merits of the intended appeal*

*iii. Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favour of the applicant.*

17. On the first principle, counsel submitted that the applicant ran out of time to file the appeal due to no fault of his own. That the flow of

information from court was compounded by the effects of the corona pandemic which led to closure of courts and limited judicial staff working at the premises. On this he relied on the case of **Edward Njane Nganga & another v Damaris Wanjiku Kamau & another (2016) eKLR** where the court stated as follows:

*“For the reasons given in the application herein, to wit, judgment was delivered in the absence of the applicant’s counsel and that the applicant was unable to obtain the documents required to prepare the record of appeal in the stipulated time, the intended appeal was not filed within the time stipulated by law.*

13. *The applicant has annexed to his supporting affidavit a letter dated 20<sup>th</sup> July, 2015 addressed to the Deputy Registrar of this Court requesting for a certified copy of the proceedings. Through a letter dated 22<sup>nd</sup> September, 2015 the applicant also applied for a certified copy of the order in the decision/judgment hereto. There is evidence of payment in respect of the documents requested. Counsel for the applicant informed the court that there was delay in obtaining the documents required to prepare the record of appeal and explained that the delay in obtaining those documents is not attributable to the applicant*

14. *I have considered the peculiar circumstances of this case. The judgment appealed from was delivered in the absence of the applicant/his counsel; there was no inordinate delay in bringing the application; other than arguing that this court lacks jurisdiction to grant the orders sought, the respondents have not demonstrated what prejudice, if any they would suffer if the application is allowed. I am, therefore, inclined to exercise the discretion vested in this court in favour of the applicants as no substantial prejudice will be occasioned on the respondent.”*

18. Counsel further relied on the following authorities :

a) *Tabro Transporters Limited v Francis Njenga [2018] eKLR*

b) *Efraim Yossef v Rosemary W Kihiu [201] eKLR*

c) *Rose Nyaruru Kiarie v Zipporah Sentura [2021] eKLR*

19. Counsel contends that communication on delivery of judgments should be communicated to the parties in advance because failure to do so may lead to a miscarriage of justice. On this argument counsel relied on the case of **Kenya Power & Lightning Company Ltd v Rose anyango & another [2020] eKLR** where it was held that:

*“This court takes judicial Notice that between 16th March 2020 to the date of filing of this application, there has been downscaling of court services owing to Covid 19 pandemic and which threw all persons in a spin of uncertainty as to how services were to be rendered.*

19. *No doubt, the 30 days fell in the Covid 19 pandemic situation and therefore the delay in filing the intended appeal was not inordinate.”*

20. On arguability of the appeal, counsel submitted that the applicant was required to demonstrate that the appeal is arguable and not frivolous as the law does not require him to demonstrate that the appeal has a high chance of success. To support this he relied on the case **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR** where the court stated that:

*“Lastly, looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is in-arguable. Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is not required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.”*

21. On the possible prejudice and award of costs, he submitted that the respondent puts forth no prejudice other than the fact that he may have to wait longer and the same can be compensated by an award of costs. To support this submission, he cited the case of **George Kianda & another v Judith Katumbi Kathenge & another (2018) eKLR**

*“The Respondent has not stated that she cannot be adequately compensated in costs for any prejudice that she may suffer as a result of a favourable exercise of discretion in favour of the applicant. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See **Waljee’s (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.**”*

22. On stay of execution, counsel submitted that the power of the court though discretionary is not unfettered, it is fettered by 4 conditions which were stated by the Court of Appeal in the case of **Carter & Sons Ltd v Deposit Protection Fund Board & Others (Civil Appeal No.291 of 1997) (1997 LLR 2142 (CAK))** the court stated as follows:

*“The Superior Court’s discretion is fettered by three conditions. Firstly 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. The application must, of course, be made without unreasonable delay.”*

The conditions are summarized as follows:

- (a) The application must be made without unreasonable delay.
- (b) The applicant must satisfy the court that substantial loss may ensue to him if stay is declined.
- (c) The applicant must establish sufficient cause.
- (d) The applicant must furnish security.

23. On the condition of delay, counsel submitted that the application was filed five days after the applicant was furnished with the ruling and that cannot be said to be inordinate delay. He therefore urges the court to find that the applicant acted swiftly and reasonably once he became aware of the ruling and the delay had been explained.

24. On the condition of substantial loss, he submitted that the respondent has failed to discharge the evidential burden towards his capacity to repay the decretal sum once paid to him while the appeal succeeds and that the applicant will therefore suffer substantial loss.

25. Counsel relied on the following authorities:

- a) *National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another* [2006] eKLR
- b) *Kenya Posts & Telecommunications Corporation v Paul Gachagua Ndarau* [2001] eKLR
- c) *Alhyder Trading Company Limited v Lucy Jepngetich Mibei* [2016] eKLR

26. On the issue of security, he submitted that the applicant had deponed that he is ready and willing to furnish security for due performance of the decree in the form of deposit of the decretal sum in court or as the court may order.

27. Kairu and McCourt advocates for the respondents in their submissions gave brief facts to the matter and identified three issues for determination as follows:

- 1) Whether this application is incompetent.
- 2) Whether the applicant has given sufficient reason to extend the period of lodging an appeal.
- 3) Whether the applicant's period of lodging an appeal should be extended.

28. On the first issue, counsel submitted that the applicant's present application is seeking enlargement of time within which he can file an appeal against the ruling delivered on 22<sup>nd</sup> May 2020 but he has not availed this court with a copy of the said typed ruling sought to be appealed from. On this counsel relied on the case **Lawrence Nguthiru Riccardahw v George Ndirangu (2015)eKLR**

*“It is apparent here that a decree or order appealed from is a pertinent and an inextricable part of an appeal filed in the High Court against a decision from the subordinate court; without the decree or order appealed from there is, in effect, no appeal. It is clearly for this reason that **section 79G** provides a window for extension of time to file the appeal if the decree or order appealed against could not, for one reason or another, be secured within the period which an appeal ought to be filed. It therefore follows that the preparation and delivery of the decree or order for the purpose prescribed in **section 79G** of the Act is a mandatory condition precedent to the institution of any or any valid appeal in the High Court against a decision of the subordinate court.”*

29. On the second issue, he submitted that the applicant stated that the reason for delay in filing a memorandum of appeal is because the ruling was delivered on 22<sup>nd</sup> May 2020 in his absence. It had earlier been scheduled for delivery on 11<sup>th</sup> May 2020. He further submitted that due to the covid 19 pandemic litigants were informed that the ruling would be delivered on notice and despite the pandemic the court delayed delivery by 11 days only.

30. Counsel contends that even if the applicant could not locate the file, he should have diligently followed up at the registry and provided proof of the action taken. He only availed one letter sent to the court 7 months after the ruling.

31. Counsel submits that it is the practice that where an appellant intends to lodge an appeal outside the statutory period he/she must file a certificate of delay. On this argument counsel relied on the case of **Lawrence Nguthiru Ricchrdahw v George Ndirangu (2015) eKLR** where the court stated that:

*“This means that whenever one intends to file an appeal under **section 79G** of the **Civil Procedure Act**, it is incumbent upon the intended appellant to apply for an order or a decree which he will file together with the memorandum of appeal; apart from the memorandum of appeal and the decree the applicant must obtain and file a certificate of delay certifying the time taken to prepare and deliver the order or the decree should it be found that his appeal can only be filed outside the 30 day time limit”*

32. On the third issue, he cited Section 79 of the Civil Procedure Act while referring to the case of **County Executive of Kisumu v County**

**Government of Kisumu & 8 Others (2017) eKLR** which set out the principles a court should consider in assessing delay in a matter of this nature.

33. Counsel therefore asks the court to find that the appellant/applicants have not given satisfactory reasons to make it extend his period of lodging an appeal and that the same should not be allowed.

#### **Analysis and Determination**

34. Having keenly considered the application, grounds, affidavits, submissions and authorities I find the main issue for determination to be whether the applicant has met the required principles for grant of (a) *leave to file appeal out of time* and (b) *stay of execution pending the hearing and determination of an intended appeal*.

35. The principles to be considered in exercising the discretion whether or not to enlarge time were considered in the case of **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65**. 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.

36. The statutory provision dealing with the requisite period for filing appeals from the subordinate courts to the high court is **Section 79G Civil Procedure Act** which provides:

*“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.”*

37. It is not in dispute that the impugned ruling, was delivered on 22<sup>nd</sup> May 2020 dismissing the applicants’ application seeking to set aside the default judgment entered against them. That the court had reserved the matter for delivery of the ruling on 11<sup>th</sup> May 2020 but due to the corona pandemic physical access to courts was restricted and the ruling was not delivered as scheduled. That the applicants would not have filed an appeal because they were not aware of the delivery of the said ruling.

38. The reasons given by the applicants for the delay are that they had no knowledge that the ruling had been delivered since no notice was issued for the new date. Further that the court file could not be traced initially. It was later traced and the ruling was furnished to them on 11<sup>th</sup> February 2020 which appears to be a typing error. It should read 20<sup>th</sup> February 2021 from the material or record.

39. On the other hand the respondent argues that the appellant/applicant was indolent and had failed to check the judiciary e-filing platform for any activity on the matter. The respondent contends that appellant/applicant lacks any interest in prosecuting the suit since it took him close to 9 months to realize there was a ruling against his application.

40. The respondent submits that the appellant/applicants are guilty of laches as they brought this application 8 months after the application dated 23/7/2019 was dismissed. Further that despite the pandemic the court was dutiful enough to delay the delivery of the said ruling by only 11 days.

41. The considerations to be made in a request for leave to file appeal out of time are found in several decisions. The same were suggested in the case of **Mwangi v Kenya Airways Ltd [2003] KLR**. They include the following:

- (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 litigant or issue; and*
- (f) *The effect if any on the administration of justice or public interest if any is involved.*

42. Order 42 Rule 6 of the Civil Procedure Rules, provides as follows:

*Rule 6 “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such*

*application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(2) 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.*

**43.** I have had a chance to look at the Ruling delivered on 22<sup>nd</sup> May 2020 (annexture **ZOJ I**) despite counsel for the respondent submitting that it had not been availed to the court. This Ruling had been scheduled for delivery on 11<sup>th</sup> May 2020 which was not done. The respondent has argued that the applicant should have checked the e-filing portal for the updates. He has not however told this court whether him or his counsel were served with a notice for delivery of the ruling. There is also no evidence presented to this court to confirm that indeed there was a notice uploaded in the Judiciary e- filing portal notifying the parties of the new Ruling date.

**44.** Given the circumstances would one really blame the appellant/applicant? The covid – 19 pandemic is real and what was happening in the courts at the time especially in Nairobi is common knowledge.

**45.** Considering all these happenings I don't think that the delay was deliberate, despite the period taken. I have further looked at the memorandum of appeal filed. It raises issues for determination by this court. I find the said issues to be arguable and I can't dismiss them for being idle. The applicant should be given an opportunity to articulate them before the appeal court.

**46.** Upon considering all these facts, I find merit in the application on both prayers. The upshot is that the application dated 15<sup>th</sup> February 2021 is allowed on the following conditions:

**a)** Leave to appeal out of time is granted.

**b)** The memorandum of appeal dated 15<sup>th</sup> February 2021 is hereby admitted and deemed as duly and properly filed within time.

**c)** There shall be stay of execution of the Judgment and decree of the lower court pending appeal on the following conditions:

**i.** The applicant to deposit 150,000/= in court within 30 days

**ii.** The balance of the decretal sum amounting to Kshs.267,897/= to be secured by way of a bank guarantee from a reputable bank within 30 days.

**iii.** Costs in cause

Orders accordingly

**Delivered online, signed and dated this 8<sup>th</sup> day of October, 2021 in open court at Milimani Nairobi.**

**H. I. ONG'UDI**

**JUDGE**