



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. APPLICATION NO. 5 OF 2020

PETER KAMAU NDIRITU.....APPLICANT

VERSUS

BIASHARA SACCO SOCIETY LIMITED.....RESPONDENT

RULING

Brief facts

1. The application for determination dated 20th April 2021 is brought under **Article 50 (1) and 159 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules** seeking for orders of extension of time of fourteen (14) days from the date of this application to enable the applicant deposit the sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/-) in a joint interest earning account as ordered in the ruling delivered by this court on 25th February 2021 and stay of execution granted by this court on 25th February 2021 be extended pending the hearing and determination of this appeal.

2. In opposition of the said application, the respondent has filed a Replying Affidavit dated 7th May 2021.

The Applicant's Case

3. It is the applicant's case that the court delivered its ruling on 25th February 2021 directing the applicant to deposit the sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/-) as security in a joint interest earning account within thirty (30) days from the date of the ruling and file an appeal within seven (7) days from the said ruling to which the applicant fled and served his memorandum of appeal upon the respondent.

4. The applicant contends that he was unable to deposit the said sum of money because he was trying to trace his advocate, Mr Antony Kinyua who passed away on 10th December 2020. The said advocate had moved to Thika and opened his own practice, Tony Martin Law LLP and the applicant traced the firm on 20th March 2021 where he was briefed of the ruling. The applicant further contends that he was unable to deposit the said sum due to financial constraints brought about by the pandemic which has paralyzed business operations globally. He states that he was unable to raise the amount before the deadline on 25th April 2021 but set out to look for the cash valiantly. He adds that he is a hawker in Nyeri and does not make much money and has been depending on family and friends for financial assistance given the business climate currently.

5. The applicant states that he is now able to raise the sum of Kshs. 300,000/- and is willing to deposit the said monies in a joint interest earning account. Through his advocates, the applicant has written to the respondent's advocates requesting for the relevant documents. The applicant is apprehensive that since the court had ordered for security to be deposited within thirty days, the court may fail to give his appeal audience since the period has lapsed. As such, if the orders sought are not granted, the respondent shall commence execution proceedings.

6. The applicant further states that his appeal is arguable, has a high chance of success and the same would be rendered nugatory unless this court grants the orders sought. The applicant is anxious that he shall be highly prejudiced if the application is allowed. He believes that the respondent shall not be prejudiced and can be compensated by way of costs. As such, he prays that in the interests of justice, his application be allowed.

The Respondent's Case

7. It is the respondent's case that the application is frivolous, vexatious and merely aimed at delaying the conclusion of this matter. The respondent contends that after the court granted stay in favour of the applicant, the applicant has not demonstrated any steps he took towards

prosecuting his appeal in the last 60 days.

8. The respondent argues that the application has been brought after inordinate delay as the applicant has not explained why he waited nearly 30 days after the lapse of leave to seek an extension of time. Further, the applicant has been lax as he waited till 6/4/2021 to engage the respondent's advocate on matters of compliance. Moreover, the applicant has brought this application in bad taste as he blames lack of compliance on his late advocate yet the orders were issued 3 months after the unfortunate demise of the said advocate.

9. The respondent further states that the firm of Tony Martin Law LLP came on record for the applicant on 25/9/2020 and filed submissions on the application dated 3/3/2020 on the applicant's behalf. As such, the notice of change of advocates dated 20/4/2021 and the position that the applicant had not instructed the current firm is only meant to mislead the court.

10. The respondent contends that the ruling was delivered on 25/2/2021 when the court was aware of the global pandemic and thus it took consideration of that issue when determining the amount of money was to be paid as security. The respondent further argues that the applicant cannot now turn around and use the pandemic as an excuse. Moreover, the applicant had still refused to settle the amount even before the pandemic.

11. The respondent further states that despite having obtained favour in his favour, the applicant has managed to employ clever tactics and take the respondent round in circles while abusing the court process. Further, the applicant in his application for stay had indicated his willingness to abide by the conditions set by the court and thus he should not be allowed to probate and reprobate to suit his circumstances. The respondent adds that it is a financial institution with vast assets and as such the applicant should channel the amount he has now obtained towards settling the decree to avoid the interest accruing on the debt. Should the appeal be determined in his favour, the respondent states that it is well able to refund the amount. As such, the applicant shall suffer no prejudice should he settle the decree amount. The respondent thus prays that the application is dismissed with costs.

12. Parties hereby disposed of the application by way of written submissions.

The Applicant's Submissions

13. The applicant reiterates what he has stated in his application and urges the court to exercise its discretion in the applicant's favour. The applicant refers to the case of **Shah vs Mbogo & Another (1967) EA 116** to buttress his point. The applicant submits that he relied upon his advocate, Mr. Kinyua to inform him of any progress in the matter and when the applicant's calls went unanswered he decided to visit the advocates' offices. The applicant learnt of the advocate's demise and that he has prior to his death opened a law firm in the name of Tony Martin Law LLP. The applicant states that he visited the said offices and learnt of the ruling and that the firm had been trying to contact him but to no luck. He adds that upon being informed that he was directed to deposit KShs. 300,000/ as security, he started putting together the said funds. The applicant states that due to the pandemic he suffered financial setbacks in the year 2020 and as he is a hawker he has had difficulties raising the money by the 25th March 2021, which was five days from the date he learnt of the ruling.

14. The applicant further relies on the cases of **County Executive of Kisumu vs County Government of Kisumu & 8 Others (2017) eKLR** and **Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** and submits that he has given sufficient reasons why he failed to comply with the ruling and that there has been no delay in filing the said application. Further, the applicant contends that the respondent has not demonstrated how he shall be prejudiced if the application is allowed. The applicant states that he shall be prejudiced as he has raised triable issues to be determined by the court and if the application is not allowed he stands to be highly prejudiced.

15. The applicant urges the court to be guided by the cases of **Wanyororo Farmers Co. Ltd vs Ezekiel Evans Wafula Simiyu t/a Wafula, Washike & Associates Advocates [2021] eKLR** and **Francis Ngumbi & Another vs Sellah Oyiko Aguvasu [2021] eKLR** and submits that the extension of time is an equitable remedy which the court has discretion to grant depending on a case to case basis. The applicant notes that the application was filed timeously and that it is almost 8 months now when the applicant sought extension of time to deposit half the decretal amount as ordered. The applicant believes that the respondent will not suffer any prejudice if he is granted additional time to comply with the court order in view of the difficulties attributed to the delay in complying with the conditions given by the court.

16. The applicant relies on **Order 42 Rule 6 of the Civil Procedure Rules** and the cases of **Chris Munga N. Bichage vs Richard Nyagaka Tongi & 2 Others** and **Butt vs Rent Restriction Tribunal [1979]** and submit that the applicant ought to be allowed stay of execution as the appeal raises triable issues that need to be determined by the court and that in the event the application is not allowed, it might render the appeal nugatory.

17. The applicant makes reference to the case of **R.W.W vs E.K.W [2019] eKLR** and submits that the purpose of stay of execution is to preserve the subject matter. In that regard, the applicant states that unless stay is granted, he stands to be greatly aggrieved and suffer irreparable loss.

18. The applicant relies on the cases of **Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & Another [2014] eKLR** and **Vincent Amolo Ambani t/a Fast Track Investment vs National Bank of Kenya Ltd [2021] eKLR** and submits that there was no inordinate delay in filing the instant application.

19. The applicant urges the court to exercise its discretion and award costs to him. He relies on the cases of **Cecilia Karu Ngayu vs Barclays Bank of Kenya & Another [2016] eKLR** and **Republic vs Rosemary Wairimu Munene, ex-parte Applicant vs Ihururu Dairy Farmers Co-operative Society Ltd** to buttress his point. As such, the applicant prays that the application be allowed with costs.

The Respondent's Submissions

20. The respondent reiterates what he deponed in his replying affidavit and submits that as demonstrated in his replying affidavit, the applicant has not satisfactorily explained his reasons for delay. His explanation for the demise of his advocate is wanting as his advocate on record only called upon the respondent on 6/4/2021 seeking to comply with the court orders. Further, the applicant states that he tracked the firm of Tony Martin LLP on 20th March 2021 but on record, the said firm filed a Memorandum of Appeal dated 3rd March 2021. The respondent urges the court to look at the record and the conduct of the applicant and find that it is an abuse of the court process and he has not swayed the court's discretion in his favour. As such, the respondent prays that the application be dismissed with costs.

Issues for determination

21. After careful analysis, the main issues for determination is whether the applicant should be granted an extension of time to comply with the conditional stay imposed on 25th February 2021.

The Law

Whether the applicant ought to be granted an extension of time to comply with the conditional stay of execution.

22. The court has powers to extend time upon such terms if any as justice of the case may require as provided for under **Order 50 Rule 6 of the Civil Procedure Rules:-**

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application unless the court orders otherwise.

23. In the Supreme Court case of **Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission & Others [2014] eKLR** the court outlined the principles to be considered in exercising the discretion to extend time as follows:-

- 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 by 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 a consideration for extension of time.**

24. The applicant sought for stay of execution pending appeal in his application dated 30/3/2020. On 25/2/2021, the court granted stay on condition that the applicant file its appeal in 7 days and the applicant deposit Kshs. 200,000/- as security in an interest earning account in the joint names of the advocates for the parties, in default of which the orders would be vacated. Being unable to comply with this orders, the applicant filed the instant application dated 20th April 2021 seeking enlargement of time to comply with the court order. The applicant attributes the reasons for failing to comply with the orders on the pandemic which has affected his business adversely and that his advocate died and by the time he discovered where the advocates' offices were, time was about to lapse.

25. Clearly, the decision whether or not to extend time is an exercise of discretion and the same must be exercised judiciously and not arbitrarily, whimsically or capriciously. I note that the instant application was filed without undue delay in that it was filed on 21st April 2021 following the ruling delivered on 25th February 2021. The applicant filed the application 4 days before the duration of stay lapsed. I also find that the reasons given by the applicant for delay are substantial. Further, in my view, the respondent will not suffer any prejudice if the applicant is granted additional time to comply with the court order.

26. I find that the application dated 20th April 2021 is merited and is hereby granted in the following terms:-

- a) That the time given on 25th February 2021 for deposit of the security of Kshs.200,000/= is hereby extended with fourteen(14) days to run from the date of this ruling.
- b) That in default of the deposit within the time given herein, the orders for stay of execution issued on 25th February 2021 will lapse automatically and execution shall issue.

c) That the applicant do meet the costs of this application to be costs in the cause.

27. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 4TH DAY OF NOVEMBER 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 4th day of November 2021