



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**MISC. CIVIL APPLICATION NO. E089 OF 2021**

**LUGZ ENTERPRISES.....1<sup>ST</sup> APPLICANT**

**HENRY MABONGA.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**ROBERT LANG'AT.....RESPONDENT**

**RULING**

1. For determination is the motion dated 2<sup>nd</sup> March 2021 by **Lugz Enterprises** and **Henry Mabonga** (the Applicants) seeking leave to file an appeal out of time and stay of execution pending the intended appeal in respect of the judgment of the lower court in **CMCC No. 7522 of 2018** delivered on 20<sup>th</sup> September, 2019. The motion is expressed to be brought under Section 1A, 1B, 3A, 3B, 79G & 95 of the Civil Procedure Act and Order 42 Rule 4, 6 & 7 of the Civil Procedure Rules. On grounds, among others, that being dissatisfied with the judgment of the lower court delivered on 20<sup>th</sup> September, 2019 the Applicants desire to appeal but the time stipulated for appeal has since lapsed. That unless stay of execution is granted the intended appeal will be rendered nugatory and the Applicants will suffer “*irreparable*” loss.

2. The motion is supported by the affidavit sworn by **Joyce Chichi**, counsel for the Applicants who deposes that being aggrieved by the decision delivered on 20<sup>th</sup> September 2019 the Applicants desire to lodge an appeal but the time within which to file appeal has lapsed. The deponent asserts that in lieu of filing the memorandum of appeal, the Applicants had engaged Robert Langat, the Respondent and the parties had embarked on negotiations to mutually agree on a lower decretal sum; that such sum was agreed upon, but along the way the negotiations collapsed whereupon the Respondent commenced execution attaching the Applicants’ motor vehicle; and that the attached motor vehicle is the Applicants’ sole source of income and if sold, the Applicants will lose their source of livelihood. She further deposes that the Applicants are desirous of prosecuting the intended appeal which raises weighty issues and has a high chance of success. Finally, the deponent states that no prejudice will be occasioned to the Respondent if the motion is allowed; that the same has been filed expeditiously and that the Applicants are willing to abide by any conditions the court may impose.

3. The motion was opposed by way of a replying affidavit sworn by **Caroline Jepkorir Kibiwott**, counsel for the Respondent. Counsel asserted that the motion has not satisfied the requirements for granting leave to appeal out of time and stay execution pending appeal; that there has been inordinate delay on the part of the Applicants in filing the instant motion whereas they have not offered any explanation for the delay; and that the appeal lacks merit as it does not disclose any arguable grounds with a chance of success and is merely an afterthought intent on denying the Respondent the fruits of his judgment. She further confirms that a year after delivery of the judgment parties were indeed engaged in negotiations on settlement of the decretal sum, but the Applicants’ settlement offer was rejected due to inordinate delay in making the same. She deposes that the Applicants have not demonstrated substantial loss and that the motion has been filed in reaction to the execution proceedings and is therefore an abuse of the court process and should be dismissed with costs.

4. The motion was canvassed by way of written submissions. Citing the provisions of Section 79G & 95 of the Civil Procedure Act, counsel for the Applicants submitted that the factors to be considered by the court in extending time to file an appeal were enunciated in **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another [2018] eKLR** citing with approval the decision in **Mwangi v Kenya Airways Ltd [2003] KLR**. Counsel submitted that even though the delay is inordinate, it was not deliberate as parties had earlier embarked on negotiations that failed. The Applicants further submitted that the intended appeal is arguable and has a high chance of success as it raises issues of law and fact and that the Respondent will not suffer any prejudice if time is enlarged to file the intended appeal.

5. Concerning the prayer for stay of execution reliance was placed on the decision in **Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR** wherein the court cited with the applicable principles as set out in **Butt v Rent Restriction Tribunal [1982] KLR**

417. Counsel reiterated that the Applicants are willing, ready and able to furnish security as a condition for stay of execution.

6. Counsel for the Respondent while underscoring the provision of Order 42 Rule 6 of the Civil Procedure Rules and citing the decisions in **Macharia T/A Macharia & Co. Advocates v East African Standard (No.2) (2002) KLR 63** and **Kenya Shell Ltd v Kibiru & Another Civil Appeal No. 97 of 1986** among others, submitted that the Applicants have not satisfied the requisite conditions for granting of an order of stay execution and that it is not sufficient for the Applicants to merely state that substantial loss will occur if stay is not granted. On delay, the Respondent called to aid the decisions in **Henry Sakwa Maloba v Bonface Papando Tsabuko [2020] eKLR**, **Jaber Mohsen Ali & Another v Priscillah Boit & Another [2014] eKLR** to submit that the Applicants are bound by statutory time frames statute and are guilty of inordinate delay.

7. On extension of time to file the appeal the Respondent cited **Paul Musili Wambua v Attorney General & 2 Others [2015] eKLR** and **Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** to contend that there has been inordinate and unexplained delay in filing the motion, and thus the motion ought to be dismissed with costs.

8. The Court has considered the rival affidavit material and submissions made in respect of the motion. It is evident on a plain reading of Order 42 Rule 6(1) of the Civil Procedure Rules that an order to stay execution pending appeal presupposes the existence of an appeal. 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. 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. 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** concurred and adopted the foregoing reasoning.

10. Earlier, the Court of Appeal in the case of **Equity Bank -Vs- Westlink MBO Limited [2013] eKLR** while 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**). Order 42 Rule 1;

**“(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.**

**(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”**

11. Order 42 Rule 1 of the Civil Procedure Rules provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, an appeal is yet to be filed and there is therefore no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous cause. If the Applicants desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in the appeal cause followed by the relevant motion.

13. The prayer for stay of execution pending hearing and determination of the intended appeal, in this miscellaneous cause, is misplaced. In my considered view, the words that *“an appeal may be admitted out of time”* in Section 79G of the Civil Procedure Act, appears to admit both retrospective and prospective applications. So that leave under the section may be sought before or after a memorandum of appeal is filed. However, it may be more prudent for a party who also seeks stay of execution in the same motion for leave to have filed the memorandum of appeal in advance. In the circumstances, the prayer seeking stay execution of the judgment delivered on the 20<sup>th</sup> September, 2019 pending the hearing and determination of the intended appeal has no anchor and is disallowed.

13. Turning now to the prayer seeking leave to file the memorandum of appeal out of time, the power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, and generally, by Section 95 of the Civil Procedure Act. The Applicants invoke these provisions. 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.”**

14. The principles governing 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] 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 their 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. 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] eKLR**.

17. The delay in the present matter is about eighteen (18) months and the Applicants through counsel have asserted that it was occasioned by the fact that after the judgment, the parties had embarked on negotiations to mutually agree on a lower decretal sum. Thus, after the said negotiations failed the Applicants promptly moved the court with the present motion. The Respondent challenged this explanation pointing out that the Applicants began negotiations a year after delivery of the judgment and failed to expeditiously follow through on the same and have only been prompted into action by the commencement of execution proceedings.

18. A party seeking leave to appeal out of time should not presume on the Court’s discretion, regardless of the period of delay. The period of delay and explanation therefore are twin considerations in an application of this nature. In the absence of an explanation, the Court would find it difficult to exercise its discretion in the Applicant’s favour. In this instance, notwithstanding the negotiations, nothing prevented the Applicants from filing the appeal immediately after judgment was delivered and in the intervening period engage the Respondent in negotiations to compromise the decretal sum and or appeal. Eighteen months is a long time, and a prudent judgment debtor would have secured their interests by filing an appeal even as negotiations took place. Counsel was at all material times alive to the provisions of Section 79G of the Civil Procedure Act and the importance of complying therewith.

19. As has been stated many times over by the appellate and superior courts, that the rules of procedure are handmaidens of justice which are

intended to facilitate the expeditious administration of justice. Counsel for the Applicant does not explain why she did not deem it necessary to comply with the provisions of Sections 79G, yet the Applicants were allegedly aggrieved with the judgment of the lower court. It is incumbent upon the Applicants to fully explain the circumstances leading to the inordinate delay in filing the intended appeal. It is not enough to allege that parties were negotiating; indeed, the Respondents have countered that the negotiations broke down due to tardiness on the part of the Applicants and that the Applicants only moved this court because execution commenced thereafter. Such an indolent party cannot expect the court to exercise its discretion in his favour. In the result, the court agrees with the Respondent that the Applicants have not demonstrated “*good and sufficient cause*” for not filing the appeal in time to justify the prayer for extension of time to appeal. The motion dated 2<sup>nd</sup> March 2021 has no merit and is therefore dismissed with costs.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 9<sup>TH</sup> DAY OF DECEMBER, 2021**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**Applicant: N/A**

**Ms. Kamau h/b for Ms Chirchir for the Respondent**

**C/A: Carol**