



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

MISC. CIVIL APPLICATION NO. 59 OF 2019

EPHRAIM KARUOYA GITHUI.....APPLICANT

VERSUS

JENNIFER KAVINYA NGUI (Suing as the legal representative of

the late HENRY NGUI MUSYOKA (DCD).....RESPONDENT

RULING

A. Introduction

1. This is a ruling for the application dated 14th October 2019 in which the applicant seeks for orders for stay of execution of the judgment delivered in CMCC No. 19 of 2018 on the 12/02/2019 pending the hearing and determination of the intended appeal. The application also seeks for orders of leave to appeal out of time against the said judgment.
2. It is the applicant's case that his advocates on record had filed an application dated 30th August 2019 seeking stay pending appeal but the same was fixed for *inter partes* hearing on the 30th October 2019. However, the respondent has since threatened to execute and has gone ahead to obtain warrants of attachment.
3. The applicant further states that the instant application has been made without unreasonable delay and the same will not occasion the respondent any prejudice failure to which the respondent will proceed to execute against them.
4. The respondent did not file a response to the application dated 14th October 2019, however both parties herein filed submissions to dispose of the matter.

B. Applicant's Submissions

5. It is submitted that the draft memorandum of appeal attached to the instant application is arguable and raises serious points of law and fact that warrant the court's intervention in terms of allowing the applicant to file his appeal out of time.
6. In relation to the stay of execution, the applicant submits that it is not a requirement to show that the appeal has a high chance of success but rather the applicant is to show that he has an arguable appeal as was stated in the case of **Bake 'N' Bite (Nrb) Limited v Daniel Mutisya Mwalonzi [2015] eKLR.**
7. It is submitted that the delay in filing the Memorandum of Appeal was occasioned by the fact that there was a delay in obtaining a copy of the judgement and subsequently obtaining further instructions for appeal and as such the advocate on record was not in a proper position to advise the client fully and comprehensively on time to enable the client issue instructions to appeal. Consequently, the applicant submits that this constitutes a good and sufficient cause for not filing the appeal on time as was defined in the case of **Wachira Karani v Bildad Wachira [2016] eKLR.**
8. In regard to the prayer for stay of execution pending appeal, it is submitted that the applicant is willing to deposit the entire decretal amount as security in a joint interest earning account or as ordered by the court however the respondent is a person of unknown means and has not demonstrated that she is able to refund the same in the case the intended appeal is successful. Reliance is placed on the case of **Edward Kamau & Another v Hannah Mukui Gichuku & Another [2015] eKLR.**
9. It is submitted that the decretal sum of Kshs. 914,319.20 plus costs and interests constitute a substantial loss to be faced by the applicant in the case the same is paid out to the respondent and the intended appeal is successful especially considering the respondent has not demonstrated her ability to repay the same. Reliance on the issue of substantial loss is placed on the case of **Tabro Transporters Ltd v**

C. Respondent's Submissions

10. It is submitted that the applicant has not tendered any explanation as to why it took them this long to file the instant application and that this smacks as lack of interest in the matter. Reliance was placed on the case of **Dolphin Coaches Ltd v Benson Kamau Migwi & Another [2008] eKLR** where the court failed to grant leave to file appeal out of time as there was no attempt to explain the delay in filing the application for leave.

11. The respondent further submits that the applicant has not met the criteria set forth in the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR** for the extension of time.

D. Analysis & Determination

12. The issues for determination herein are whether the Applicant is entitled to an extension of time to lodge his appeal and whether stay of execution of the judgment delivered on 12/02/2019.

13. On the issue of leave for extension of time to file an appeal **Section 79G of the Civil Procedure Act** is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

“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. Therefore, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another v 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 v 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.

15. Our case law has now provided guidelines on what will be considered “good cause” for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the court to direct its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

16. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in **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 litigation or issue; and

f) The effect if any on the administration of justice or public interest if any is involved.

17. Looking at all the factors in totality, I do note that the applicant herein filed an application dated 26th July 2019 seeking leave to appeal out of time from the judgement in Embu CMCC No. 19 of 2018 which was delivered on the 12/2/2019 however the same was not heard as it was deemed not to comply with the vacation rules. The applicant subsequently filed another application dated 30th August 2019 seeking similar orders and the same was fixed for hearing on the 30th October 2019 but before this time the respondent commenced execution proceedings prompting the instant application which is dated the 14th October 2019 and was filed on the 15th October 2019.

18. Firstly, it is not in dispute that the instant application was brought more than seven months after judgement was delivered however I also take cognisance of the fact that the delay has been sufficiently explained. Article 159 of the Constitution as well as the overriding objectives of the Civil Procedure Act demand that justice should be done without regard to technicalities. Accordingly, it is my considered view that the applicant has given sufficient cause on the delay in instating the instant suit.

19. Secondly, I do not find any substantial adverse effects granting this order will have on the respondent other than permitting the Applicants to exercise a preciously cherished right of appeal.

20. Thirdly, looking at the draft memorandum of appeal filed, I am of the opinion that the intended appeal is arguable. 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. A demonstration that the appellant has plausible and conceivably persuasive grounds of either facts or law has been shown.

21. Lastly, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in a case. However, timelines serve the interests of parties in attaining expeditious disposal of cases.

22. On the orders sought of stay of execution, **Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010** provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

1. Substantial loss may result to the applicant unless the order was made;

2. The application was made without unreasonable delay; and

3. 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.

23. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “**and**”. It connotes that all three (3) conditions must be met simultaneously.

24. As for substantial loss, it is sufficient if an applicant seeking a stay of execution demonstrates that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.

25. As can be seen hereinabove, there was no affidavit evidence by the Respondent on her ability to refund the decretal amount if the same is advanced to him as put forth by the applicant. This therefore left the court in a quagmire especially as regards the ability of the Respondent to pay back the decretal sum in the event the applicant was successful in his intended Appeal herein. In the absence of proof of her ability to pay back the said sum, this court is satisfied that the applicant would suffer substantial loss. He had thus satisfied the first condition of being granted a stay of execution pending appeal.

26. On the second issue, it is my considered view that sufficient cause has been shown as to the prolonged delay in filing the instant suit.

27. The Applicant has demonstrated his willingness to furnish security demonstrated in their supporting affidavit as well as their submissions.

28. In the case of **Ujagar Singh vs Runda Coffee Estates Limited [1966] EA 263**, the court therein invoked its jurisdiction and ordered the preservation of the *status quo* pending the hearing and determination of the appeal. The court therein observed thus: -

“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”

29. As this very court held in the case of **Siegfried Busch vs MCSK [2013]eKLR**,

“A superior court to which an application has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”

30. Accordingly, having considered the parties’ pleadings, affidavits, written submissions and the case law relied in support of their respective cases, it is the considered view of this court that the applicant has meet the conditions warranting grant of orders of stay of execution provided for under Order 42 Rule 6(2) of the Civil Procedure Rules.

31. Further, this court is alive to the fact that the applicant is entitled to exercise his right of appeal, it is in the interests of justice that a stay of execution pending the hearing and determination of the intended appeal be granted so as not to render the appeal nugatory.

32. The upshot of the above is that I find the application dated 14th October 2019 to be meritorious. It is hereby ordered that: -

a) The applicant is granted leave to appeal out of time against the judgement of Honourable Court in Embu CMCC No. 19 of 2018 delivered on the 12/02/2019 within seven (7) days.

b) Failure to comply with the timelines will lead to automatic vacation of the order herein.

c) There shall be a stay of execution on the judgement of Honourable Court in Embu CMCC No. 19 of 2018 delivered on the 12/2/2019 pending the hearing and determination of this appeal.

d) The applicant shall deposit the whole decretal sum in a joint interest earning account in the name of advocates on record for both parties within thirty (30) days failure to which the orders for stay shall be vacated.

e) Costs to be in the cause.

33. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Mugendi for Respondent

Ms. Kiai for Muhoro for Applicant