



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISC. CIVIL APPLICATION NO. 21 OF 2019

MEHMOOD SHAUKATALI JAGANI.....APPLICANT

VERSUS

PIETRO CANNOBIO.....1ST RESPONDENT

ABDALLA ALI.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

BETWEEN

PIETRO CANNOBIO.....1ST PLAINTIFF

ABDALLA ALI.....2ND PLAINTIFF

VERSUS

MEHMOOD SHAUKATALI JAGANI.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Mogaka Omwenga & Mabeya Advocates for the Applicant

Odhiambo S. E. Advocates for the 1st and 2nd respondents

RULING

This is a notice of motion expressed in terms of Section 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 and Order 50 Rule 5 of the Civil Procedure Rules seeking the following orders:

- (i). There be stay of execution of the decree in Civil Case Kilifi SPMCC No. 6 of 2016 pending the hearing and determination of the appeal.***
- (ii). There be an extension of time within which to file and serve the Memorandum of appeal from the aforesaid decree issued on 7.1.2019.***

The application is premised on the following grounds on the face of the notice of motion.

- (a). Judgment was delivered on 07th January, 2019 in Kilifi SPMCC NO. 6 OF 2016 and no Stay of Execution was granted.***
- (b). The Stay of Execution was not granted in Kilifi SPMCC NO. 6 OF 2016 as Judgment was delivered in the absence of parties yet no notice was served on the parties and by the time the Applicant learnt of the delivery of Judgment, it was way past the period of filing an appeal.***

(c). That it was not deliberate that an appeal was not filed on time.

(d). That the respondents are at liberty to file warrants in the primary suit any time and the appellant will be executed if a stay is not granted and the application herein will be rendered nugatory.

(e). No prejudice shall be suffered by the respondents because the appellant can give security if need be.

(f). The applicant is desirous to exercise his right of appeal against the decision of 07th January 2019 in Kilifi SPMCC NO. 6 OF 2019.

(g). The applicant has a meritorious and arguable appeal.

Subject to the above grounds, the applicant further filed an affidavit in support dated 10.7.2019.

Learned counsel for the respondent opposed the application stating that there is no urgency and if the court is inclined to grant stay of execution, security for due performance of the decree totaling to Kshs.800,000/= he deposited in a joint interest earning account of both counsels pending the determination of the appeal.

Further Learned counsel for the applicants submitted that it can be deduced from the record that the applicant is aggrieved with the entire Judgment of the Lower Court. Learned counsel further submitted that the impugned Judgment was read in absence of the parties and having regard to the outcome, the court below misdirected itself on the award of damages. First, that if stay of execution pending appeal is not granted, the applicant is likely to suffer substantial loss.

Learned counsel cited and placed reliance on the following authorities: **Housing Finance Co. of Kenya v Sharon Kher Mohamed, Ali Hirji & Another [2015] eKLR, JMM v PM [2018] eKLR, Dilpack Kenya Ltd v William Muthama Kilany [2018] eKLR.**

With respect and in answer to the submissions by the applicant, Learned counsel for the respondents submitted that the cases cited by the applicant counsel have defined what constitutes the parameters for grant of extension of time and stay of execution pending an appeal. On the basis of the facts, the respondent counsel submitted that applying the principles, the court does exercise discretion to respond to the demands of justice in the matter.

Learned counsel submitted that the attendant principles on the exercise of court's discretion must be within Order 42 Rule 6 and Order 50 Rule 1 of the Civil Procedure Rules.

The Law

I conceptualize this notice of motion on two fronts. **First, whether the applicant has satisfied the criterion for this court to exercise discretion to extend time to file an appeal out of time. Secondly, whether in considering the application, conditions donated by Order 42 Rule 6 of the Civil Procedure Rules have been met by the applicant in balancing the conflicting rights of the parties the court exercise discretion is to obviate and advance the interest of justice.**

Issue No. 1

It is trite that time is a crucial element in the dispensation of justice, in the court's view under Article 159 (2) (b) of the Constitution time is made of essence by the maxim that justice shall not be delayed. Suffice therefore to say that under Section 1A, 1B of the Civil Procedure Act, and Section 79 G of the Act and Order 50 rule 5 of the Civil Procedure Rules the discretion of the court to enlarge time is unfettered where the applicant demonstrates sufficient cause and good reasons in deserving the equitable remedy. The legal principles that guides the court when considering the exercise of discretion to extend time are now very clear and beyond peradventure.

The Supreme Court pronounced itself on this aspect in the case of **Salat v Independent Electoral & Boundaries Commission & 7 others {2014} KLR** where it restated the Law as follows:

“(1). Extension of time is not a right of a party. It is equitable remedy that is only available to a deserving party at the discretion of the court.

(2). A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court.

(3). Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis.

(4). Whether there is a reasonable reason for the delay which ought to be explained to the satisfaction of the court.

(5). Whether there would be any prejudice suffered by the respondents if the extension was granted.

(6). Whether the application had been brought without undue delay and

(7). Whether in certain cases, like Election Petitions, public interest ought to be a consideration for extending time.”

Further, the Court of Appeal in an earlier decision in the case of **Paul Wanjohi Mathunge v Duncan Gichane Mathunge {2013} eKLR** had taken the following position that:

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on where, sympathy or caprice. I take note that in exercising my discretion I ought to be grounded by consideration of the factors stated in the previous decisions of this court including but not limited to the period of the delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted and whether the matter raises issues of public importance. (See also Leo Sila Muaso v Rose Hellen Wangare Mwangi Civil Application Number 255 of 1997 UR).

In the instant application as deduced from the affidavit in support, one can observe that delivery of Judgment was scheduled to be pronounced on 21.9.2018 by the trial court. However, for reasons not provided by the court in answer to the letter by the applicant counsel it appears to have been delivered in absence of the applicants or their legal representatives on 7.1.2019.

In considering the matter upon receipt of Judgment, the applicants apparently are aggrieved with the outcome of the claim and are desirous of exercising the right of appeal in this specific respect.

In the averments deposed within the affidavit in support, **Mr. Omwenga Mwebi** has exhibited several copies of letters illustrative of the fact that the outcome of the adjudication process was never brought to his attention as legal counsel for the applicants. To this assertion, in advancing his case for extension of time he contends that the availability of judgment is of decisive importance upon which to determine the necessity of an appeal.

On the question of prejudice the applicants are aggrieved with the decree in which the Learned trial Magistrate awarded a quantum of Kshs.800,000/= plus costs and interest. The state of affairs as regards the chances of an appeal succeeding is exhibited in the annexed draft Memorandum of appeal. Whilst the draft Memorandum of appeal is not evidence for this court to gauge the merit of appeal but the contents are such that the applicants are determined to challenge the decree and findings by the trial court on appeal. One factor that is relevant as deposed by the applicants is whether if this court declines to enlarge time there would be prejudice in the sense that the appeal would be rendered nugatory.

Further, this court is aware of the doctrine on overriding objective enacted by parliament under Section 1A and 1B of the Civil Procedure Act to enable civil courts to deal with dispensation of justice justly, expeditiously, proportionately and affordable resolution of the civil disputes. The effect of this at this juncture is whether discretionary power invoked by the applicants can be availed by this court.

Applying the settled principles in the **Nicholas Salat case (supra)** to the applicants notice of motion, the length of the delay and reasons for has been adequately explained in the corresponding affidavit and attached annexures. Whereas, it is true that the applicants approached the court beyond the 30 day period, the contention that the delay was caused by the absence of the notice on delivery of Judgment is to me sufficient cause.

The important words in Article 50 4 (b) of the Constitution that a party to a proceedings has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by Law is applicable to this notice of motion. This being the case, the application to extend time to file an appeal out of time in that regard is hereby allowed.

Issue No. 2

An order for stay of execution pending an appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules. The question is whether the applicants have satisfactorily laid a basis to warrant the court to grant stay of execution of the Judgment of the Lower Court.

Pursuant to Order 42 Rule 6, the applicant has to demonstrate to have satisfied the following conditions:

- “(1). That the application has been filed without undue delay.***
- (2). That without stay of execution, the applicant would suffer substantial loss.***
- (3). It is also essential that the applicant provides security for due performance of the decree.***

As a starting point, I echo the passage by the superior court of Jamaica in **Combi (Singapore) PTE Limited v Ramuath Sriram & Another [1997] EWA 2164** where the court emphasized an essential factor for the court to seek to impose the interest of justice in granting or refusing stay of execution by **Philips L. J.** where he held:

“In my Judgment, the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered, but no similar detriment to the defendant, if it is not, then a stay should not normally be ordered. Equally, if there is a risk if a stay is not ordered, but not similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal if it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives the order to decide which of them is less likely to produce injustice.”

From the above case Law it will be convenient to restate the basic principles relating to stay of execution as enunciated under Order 42 Rule 6 of the Civil Procedure Rules.

It is trite that the applicant herein upon being aggrieved by the Judgment of the trial court does not enable him from denying the respondent the benefit of the fruits of the Judgment. The primary considerations therefore is for the applicant to discharge the burden of proof that the case is deserving of equitable remedy of stay of execution pending an appeal.

On the other hand, the court has also to bear in mind in making the order to grant or refuse stay there is equally a risk of the appeal rendered nugatory by the due process of the Law on attachment and execution to realize the fruits of the Judgment by the victorious litigant. The rule under Order 42 Rule 6 emphasizes the appropriateness of filing the application without undue delay. The whole essence of granting stay of execution is to preserve the subject matter of the appeal until the main appeal is heard and determined.

It would therefore, be illogical for the court that to consider the essence of time, the aggrieved litigant has been able to approach and seek stay of execution.

In the instant case, on perusal of the applicants' affidavit and submissions, there is evidence that the applicant immediately being notified of delivery of Judgment, an application to extend time and appeal for stay of execution was filed without unreasonable delay as the impugned Judgment was delivered on 7.1.2019. The applicant aggrieved with the decision filed the instant motion.

There is no evidence of prejudice which the respondent will suffer as the process of execution and enforcement of the Judgment is yet to be commenced.

It may be observed that this is a claim which arose out of malicious prosecution by the respondents against the intended appellants. Though, I am not sitting on appeal the impugned Judgment of the Learned trial Magistrate is being challenged on the strength of excessive award of Kshs.800,000/= in the court on competence of the application funds merit on this ground.

In so far as filing an appeal does not entitle stay of execution of the Judgment. The issue is whether if a writ of attachment is to be issued, against the respondent, he would be able to repay the decretal sum post successful appeal.

The dicta by the Court of Appeal of **Solomon Island** in the case of **Giles Prince CAS Trustees {2003} CA NO. 004 OF 2003** respectively stated as follows:

“I start with the undisputed position that the court does have an unfettered discretion to grant a stay or not to do so.” (See Attorney General v Emmerson 1890 24QBO 56) I also restate the principle “That a Judgment creditor is entitled to reap the fruits of his Judgment.” (See the Amoe Lyle {1886} 11 P. D. 114)As against that principle is the contrary principle that the court may order a stay where refusing to do so would render the appeal nugatory. (pointless). So, there has to be a balance between the rights of the Judgment creditor and the rights of the Judgment debtor. The scale is likely to tip in favour of the Judgment debtor if he can prove special circumstances in his favour. A case of special exceptional circumstances would be where serious injury would be done to the Judgment debtor if execution takes place pending an appeal especially where the appeal has got merits to it. The first is where execution would ruin the Judgment debtor beyond simply causing hardship (See Linotype – Hell Finance Ltd v Baker {1993} IWL 321).”

This view is consistent with the one taken by the superior courts in our jurisdiction where it is also indisputable that the applicants seeking stay of execution ought to demonstrate substantial loss. See **JMM v PM {2018} eKLR, Equity Bank Ltd v Rose Kuria Nairobi Civil Case No. 224 of 2001, Machira T/a Machira & Advocates v East African Standard eKLR {2002} KLR 63**. The foregoing authorities show that the applicant seeking stay of execution under Order 42 Rule 6 of the Civil Procedure must answer to the question of substantial loss. It is to be observed that the identification of potential substantial loss to be relied upon by the applicant must be furthered by sufficient evidence for exercise of discretion on the merits of the application.

I have given full consideration to this notice of motion and the purported draft memorandum of appeal which would be revisited at the hearing of the appeal once filed by the applicant.

So far, I am persuaded that the Law as applied to the test on substantial loss is determinant. I refer to the decisions by the Court of Appeal in **National Industrial Credit Bank Ltd v Aguinias Francis Wasike & Another CA NO. 238 OF 2005** and High Court decision in **Stanley Karanja Wainaina & Another v Ridon Anyangu Mutubwa {2016} eKLR** where the both court where the later court held that:

“This court has said before and it would bear repeating itself that while the legal duty is on the applicant to prove the allegation, that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiar within his knowledge (See Section (111) of the Evidence Act Cap 80 of the Laws of Kenya)

In this scenario, the questions for the intended appeal are set out in the draft memorandum of appeal. In essence in reference to substantial loss not countered by the respondent in his submissions or affidavit evidence that expresses the position that he would not repay back the decretal sum if paid out at the end of it all the determination of the appeal is not favourable. So dependent is this condition so as not to render the appeal nugatory and leave the successful appellant financially ruined.

This leads me to the last condition for the court to grant stay of execution under Order 42 Rule 6 of the Civil Procedure Rules the rule imposes the condition for payment of security for due performance of the decree. So far the respondents have obtained a valid Judgment and a money decree of Kshs.800,000/= on the merits of the claim. The assumptions should be in the context of the Law, there is need for the appellants to satisfy the judgment and decree of the court.

In my view, the applicant ought to deposit security for due performance of the decree in terms of the quantum awarded by the trial court of Kshs.800,000/=.

In the circumstances, the applicants notice of motion dated 10.7.2019 succeeds with the following orders in place:

- (1). That the applicants shall have conditional leave to appeal out of time to the High Court from the decision of the Magistrate court in Kilifi SPMCC NO. 6 OF 2016.*
- (2). That the applicants shall have 30 days to lodge and serve the record of appeal upon the respondent and the Deputy Registrar of the High Court at Malindi.*
- (3). That the applicant by this leave to file an appeal out of time an order of stay of execution is hereby granted against the Judgment of the trial court delivered on 7.1.2019 pending the hearing and determination of the appeal.*
- (4). That, simultaneously with Clause (2) above the applicants shall deposit the decretal sum of Kshs.800,000/= within thirty (30) days from delivery of this Ruling in a joint interest earning account in a preferred financial institution by both counsels.*
- (5). That in default of Order No. 2 as read conjunctively with Order 4. The reliefs granted on extension of time and stay of execution lapses and any appeal filed is rendered nugatory.*
- (6). The costs of this application to abide the outcome of the appeal.*

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JANUARY 2020.

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Bunde for Odhiambo for the 1st and 2nd respondent