



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISC. CIVIL APPLICATION NO. 302 OF 2019**

**FRANCIS MULINGE KIIO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**KAM SACCO LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**JOHN NDETI.....2<sup>nd</sup> DEFENDANT/APPLICANT**

**RULING**

1. What remains for determination in the application dated 5.7.2019 are prayers for an order for extension of time and leave to file the memorandum of appeal out of time as well as stay of execution pending the hearing and determination of the appeal. The application is brought under Section 3A, 79G and 95 of the Civil Procedure Act and Order 42 Rule 6, Order 50 Rule 6, Order 51 Rule 1 and 3 of the Civil Procedure Rules. It is supported by the affidavit of Isabella Nyambura.
2. The background to the application, as gleaned from the pleadings and the annexures thereto, relates to a civil suit 116 of 2017 in the Chief Magistrates Court at Kangundo where judgement was delivered on 28.5.2019. There is a copy of a draft memorandum of appeal annexed to the affidavit.
3. The grounds were stated briefly in the Notice of Motion and laid out in detail in the affidavit in support of the application were that judgement in the lower court was delivered and that the applicants are dissatisfied with the same. The applicant averred that there will be prejudice suffered if the orders sought are not granted.
4. In opposition to the application are grounds of opposition filed by counsel for the respondent .Counsel averred that the application was frivolous, bad in law, brought after inordinate delay and no reasons were advanced to warrant the orders sought.
5. The court directed that the matter be canvassed vide written submissions that have been duly filed. Vide submissions filed on 2.9.19, learned counsel for the applicant in addressing the prayer for leave to file the appeal out of time placed reliance on Section 95 of the Civil Procedure Act and submitted that the court is empowered to make such an order. According to counsel, the appellants are willing to deposit security for hearing of the appeal and that the applicant had an arguable appeal and urged the court to allow the application.
6. Learned counsel for the respondent submitted that the applicant has not satisfied the conditions for grant of stay of execution and reiterated the prayer that half the decretal amount be deposited. Counsel added that the prayer for leave to file the appeal out of time came as an afterthought.
7. The issues for determination in this application are firstly **whether the applicant should be granted extension of time and leave to file the appeal out of time and secondly whether the applicant has met the conditions for grant of stay of execution pending appeal.**
8. This court has the discretion, for sufficient cause, to extend time under Section 79G of the Civil Procedure Act. Sufficient cause should relate to the inability to do a particular act.

Section 79G provides as follows:-

**“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. ”**

9. The above principles were earlier considered by Duffus P in the case of **Mugo & Others v Wanjiru & Another [1970] EA 481** at p.484

where he stated thus;

*"Each application must be decided in the particular circumstances of each case but as a general rule the applicant must satisfactorily explain the reason for the delay and should also satisfy the court as to whether or not there will be a denial of justice by the refusal or granting of the application."*

10. The Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] eKLR** listed the factors which aid our courts in exercising the discretion whether to extend time to file an appeal out of time, 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.*

11. I will keep the above principles in mind as I proceed to determine this application. It is therefore not in dispute that the applicant is aggrieved by the decision of the trial court and has a draft memorandum of appeal annexed to the application. A careful perusal of the grounds of opposition does not inform the court the specific reasons why the respondent is opposed to the application save only on the issue of delay in lodging the appeal.

12. In this case, the application was filed on 8.7.2019 that is about two months after the judgement was delivered. I find the delay not to be inordinate and though the explanation is not satisfactory, I am unable to see the prejudice that the Respondent will suffer if the application is allowed. I find the applicants have easily met the test for grant of order for extension of time as well as leave to file the appeal out of time. In any case the appellant's right to lodge appeal ought not to be curtailed.

13. With regard to prayer 4, Order 42 Rule 6 provides for stay of execution pending appeal. The conditions to be met by an applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

**6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 sub-rule (1) unless—**

**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 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.**

14. The applicants have to satisfy a four-part test as was highlighted in the case of **UAP Provincial Insurance Company Limited v Michael John Beckett, Civil Application Number 204 of 2004**. They must demonstrate that:

- a. The appeal they have filed is arguable;*
- b. They are likely to suffer substantial loss unless the order is made. Differently put, they must demonstrate that the appeal will be rendered nugatory if the stay is not granted;*
- c. The application was made without unreasonable delay; and*
- d. They have given or are willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on them.*

15. I have perused the filed Memorandum of Appeal in this case as annexed to the application. I am unable to say that the grounds of appeal enumerated are not arguable as there are some triable issues therein regarding the quantum of damages. I find that the applicants have easily met that standard.

16. But what is the substantial loss that the Applicant is likely to suffer if the order is not granted? The affidavit in support is silent on the same as it has not elaborated the extend of loss likely to be suffered.

17. The respondent has filed grounds of opposition and vide submissions has indicated willingness to accept half of the decretal amount and the rest deposited into an interest earning account. The respondent failed to rebut the applicant's claim that there will be difficulty in recovering the money from him in the event of success of the appeal. It was incumbent upon the respondent to file evidence of his means and indicate that he is not a person of straw and hence the respondent's claim to be paid half of the amounts at this stage is not appropriate. I find the appropriate remedy at this stage is to order that the monies be deposited into an interest earning account in the names of both Advocates pending the determination of the appeal.

18. The Application was brought without inordinate delay as it was brought within two months from the date of delivery of the judgement and I find there was no inordinate delay.

19. The upshot is that the Application dated 5.7.2019 is allowed in the following terms:

*a. The Applicants are granted extension of time as well leave to file the appeal out of time; which shall be filed within 14 days from the date of this ruling.*

*b. An order of stay of execution of the judgement and decree in Kangundo SPMCC No. 116 of 2017 is hereby granted pending the hearing and determination of the appeal herein on condition that the decretal sums are deposited into a joint interest earning account in the names of the Advocates for the parties within thirty (30) days from the date of this ruling failing which the stay shall lapse.*

*c. The Costs of the application shall abide in the appeal.*

**It is so ordered.**

**Dated and delivered at Machakos this 6<sup>th</sup> day of February, 2020.**

**D. K. Kemei**

**Judge**