



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 167 OF 2019

KENYA POWER AND LIGHTING COMPANY LIMITED.....APPLICANT

VERSUS

IO (minor suing through next friend and father

GIO.....RESPONDENTS

RULING

INTRODUCTION

1. The Applicant's Notice of Motion application dated 19th December 2019 and filed on 21st February 2019 was brought pursuant to Sections 79G and 95 of the Civil Procedure Act, Order 50 Rule 6 and 51 Rule 1 of the Civil Procedure Rules 2010 and all enabling provisions of the law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. That the Appellant be granted leave to appeal out of time against the judgment of the Honourable B.J. Ofisi Resident Magistrate delivered on the 19th day of December 2018 at Nairobi.

4. The costs of this application be provided for.

2. The Applicant's Written submissions were dated 25th June 2019 and filed on 27th June 2019 while those of the Respondent were dated and filed on 15th July 2019. The Respondent's List of Authorities was dated 16th April 2019 and filed on 17th April 2019.

3. Parties asked this court to render its decision based on the Written Submissions they had relied upon in their entirety. This Ruling is therefore based on the said Written Submissions.

THE APPLICANT'S CASE

4. The Applicant's application was supported by the Affidavit of Caroline Warui that was sworn on 19th February 2019.

5. She stated that judgment was delivered in **CMCC No 2308 of 2017** at Nairobi on the 19th December 2018 and that the Respondent had threatened to execute against the Applicant. The Applicant was apprehensive that in the event the stay of execution was not granted, then it would be prejudiced and suffer irreparable loss.

6. The Applicant further stated that it was dissatisfied with the entire judgment of the Learned Trial Magistrate which was delivered without its advocates' knowledge as the same was to be delivered on notice. It stated that it instructed its advocates to file an appeal. It was emphatic that its proposed appeal had raised fundamental issues of law and facts and had high chances of success.

7. It was its contention that it was in the interests of justice that the application be allowed in such terms and conditions that the Honourable court would deem expedient as power to enlarge time was vested upon it by the law. It pointed out that it was willing to deposit the entire decretal amount in a joint interest earning account.

8. It therefore urged this court to allow its application.

THE RESPONDENT'S CASE

9. In opposition to the said application, the Respondent's advocate, Otieno Oluoch, swore a Replying Affidavit on 13th March 2019. The same was filed on 14th March 2019.

10. He averred that on 19th October 2018, the Honourable court reserved judgment of 14th December 2018. However, the judgment was postponed to 19th December 2018 as the same was not ready on 14th December 2018. It was his contention that on both occasions, the Applicant's advocates did not attend court. He stated that on 14th January 2019, his firm notified the Applicant's advocates of the entry of judgment.

11. He added that in the lower court, the Applicant did not call any evidence. He also pointed out that he had not taken any step to realise the judgment and that no decree had been extracted to warrant execution.

12. It was therefore his submission that the application ought to be dismissed with costs to him.

LEGAL ANALYSIS

13. Both the Applicant and the Respondent were agreed on the conditions of the granting of an order for stay of execution pending appeal. Whether or not the Applicant had met the threshold for being granted an order for stay of execution pending appeal was a different matter altogether.

14. Having said so, the court carefully considered the Applicant's application and noted that its prayer for an order for stay of execution was spent as it had sought the said order pending the hearing and determination of the application herein. Notably, courts ought to grant only what has been sought by the parties and not imagine, presume or assume that a party would want a particular order granted. In our jurisdiction, litigation is adversarial in nature. Courts must therefore not descend into the arena of disputes because in granting an order for stay of execution pending applicant herein, this court would in fact be prosecuting the case on behalf of an applicant to the detriment of a respondent.

15. It was therefore this court's opinion that whereas it noted the parties' submissions as far as the order for stay of execution was concerned, it could not grant the said order due to the aforesaid reasons.

16. Turning to the prayer for leave to file an appeal out of time, the Applicant stated that it only became aware of the entry of judgement when it received the Respondent's advocates' letter dated 14th January 2019, a position it stated was reaffirmed by the Respondent in Paragraph 11 of his advocate's Replying Affidavit.

17. In this regard, the Applicant relied on the case of **Abdul Transporters Ltd vs Francis Njenga [2018] eKLR** where Odunga J held that parties are entitled to a notice of the date of delivery of judgement and where such notice is not given, that omission may well amount to sufficient reason for the purposes of enlargement of time to appeal if the applicant were to move the court for regularisation of his position expeditiously. This position had been emphasised by the Court of Appeal in the case of **Ngoso General Contractors Ltd vs Jacob Gichunge [2005] 1 KLR 737**.

18. It added that Section 79G of the Civil Procedure Act provides that an appeal shall be filed into a period of thirty (30) days from the date of decree or order from and that an appeal may be admitted out of time if the appellant satisfies the court that it had a good and sufficient cause for not having filed the appeal on time.

19. It was its further contention that the process of typing the judgment took time and it was not therefore able to give the instructions to its lawyers within the stipulated time because its insurer wanted to peruse the judgment and make an informed decision.

20. It placed reliance on the case of **Samuel Mwaura Muthumbi vs Josephine Wanjiru Njgi & Another** where Justice Joel Ngugi relied on the case of **Mwangi vs Kenya Airways Ltd (2003) KLR** where the factors that court should consider when exercising its discretion whether to extend time to file an appeal out of time included 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 the Respondent would suffer if the extension was granted;

e. the importance of compliance with time limits to the particular litigation or issue; and

f. the effect if any administration of justice of public interest, if any is involved.

21. It was its submission that granting leave to appeal out of time was a matter of judicial discretion and having demonstrated that it did not

go to sleep after delivery of judgment by the lower court, it ought to be granted the orders sought.

22. On its part the Respondent also relied on the case of **Samuel Mwaura Muthambi vs Josephine Wanjiru Ngugi & Another** (Supra). He submitted that the court should not entertain an indolent party. It was its submission that the Applicant's advocates failed to attend court when the judgment was delivered and failed to take steps to establish the outcome of the case but that instead, it sat back until it was notified of delivery of the judgment.

23. He further stated that upon being informed delivery of judgment, it asked for the account details to facilitate payment but it did not deposit the same. It was emphatic that the conduct the Applicant estopped it from raising objections at this stage having represented to him its willingness to satisfy the judgment.

24. He further pointed out that the Applicant did not call any evidence during the trial and in the circumstances, his appeal was not arguable. He was categorical that he was entitled to the fruits of his judgment and that any delay to the enjoyment caused by the fault of the Applicant would be unfair to him.

25. Notably, no party should be penalised just because there was a blunder particularly by his or her advocate. Indeed, in the case of **Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR**, it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

26. Further, in the case of **Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet [2018] eKLR**, it was held that the law does not set aside the maximum and minimum period of delay and all that was required was for the delay to be satisfactorily explained.

27. In exercising its discretion to allow an application seeking extension to file an appeal out of time, a court has to be satisfied that the omission or commission was excusable. In other words, there must be a plausible explanation for the delay in doing an act. It must also consider the length of the delay, the reason for the delay, the injustice that will be caused to the party applying for extension and the prejudice the Respondent would suffer if the said application was allowed.

28. Although this court found that the Applicant's advocates did not conduct themselves diligently as they ought to have followed up the delivery of the judgment, failure to do so was not an entirely unexpected omission. It was normal occurrence. This was a plausible, good and satisfactory explanation for the delay in filing the appeal out of time.

29. It was evident that the present application was filed without undue delay. Judgment was delivered on 19th December 2018. The appeal ought to have been filed on or before 14th February 2019 noting that Order 50 Rule 4 of the Civil Procedure Rules provides that time stops running from 21st December to 13th January both dates inclusive. A delay of seven (7) days showed that there was no inordinate delay in the filing of the present application.

30. Notably, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give him reprieve to seek justice. Whereas Section 75 A of the Civil Procedure Code provides for the period of thirty (30) days for an aggrieved party to lodge an appeal, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act.

31. Order 50 Rule 6 of Civil Procedure Rules stipulates as follows:-

“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”.

32. Taking into consideration all the factors hereinabove, it was the considered view of this court that the Applicants ought to be given an opportunity to have their Appeal heard on merit as it would suffer great prejudice if it was denied an opportunity to fully present its Appeal to be heard on merit.

33. On the other hand, the Respondent did not stand to suffer any prejudice. There was nothing in the application that seemed to suggest that the Applicants wished to have a stay of execution pending appeal. Their application was clear that the order for stay of execution had only been sought pending the hearing and determination of the application herein. For the reasons stated herein, this court did not therefore grant the same.

34. Accordingly, having considered the affidavit evidence, the Written Submissions and the case law that were relied upon by the parties herein, this court found and held that the duty of the court to do substantive justice demanded that the Applicant's present application be considered favourably as the Respondent would suffer no prejudice particularly because there was no stay of execution of the judgment that was delivered.

DISPOSITION

35. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application that was dated 19th February 2019 and

filed on 21st February 2019 is hereby allowed in terms of Prayer No (3) therein in the following terms:-

- 1. The Applicant is hereby directed to file and serve its Memorandum of Appeal within fourteen (14) days from the date of this Ruling i.e. by 26th February 2020.**
- 2. The Applicant is hereby directed to file and serve its Record of Appeal within forty five (45) days from the date of this Ruling i.e. by 26th March 2020.**
- 3. The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the expeditious typing of the proceedings in the lower court to enable the Applicant comply with the timelines within which to file its Record of Appeal as aforesaid.**
- 4. Either party is at liberty to apply.**
- 5. Costs of the application will be in the cause.**

36. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2020

J. KAMAU

JUDGE