



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISC. CIVIL APPLICATION NO. 368 OF 2019**

**MULTIPLE HAULIERS LTD.....APPLICANT**

**VERSUS**

**BENDETTA MWELU MUSYOKI.....RESPONDENT**

**RULING**

1. What remains for determination in the application dated 16.9.2019 are prayers for an order for 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 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act and Order 42 Rule 6, Order 50 Rule 6, Order 52 Rule 1 of the Civil Procedure Rules. It is supported by the affidavit of Kaminza Charles Zakayo.
2. The background to the application as gleaned from the pleadings and the annexures thereto relates to a civil suit 96 of 2017 in the Principal Magistrates Court at Mavoko where judgement was delivered on 5.7.2019. There is a copy of a draft memorandum of appeal as well as a warrant of attachment and proclamation of the decree in the suit in the trial court.
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 in which 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 is a replying affidavit dated 2.12.2019 that was deponed by the respondent who averred that the appellant was well aware of the decree and was only awakened when the proclamation was served. The deponent averred that no reason has been given why the appeal was not lodged within time. She urged the court to direct that half the decretal amount be paid to her while the balance thereof be deposited if the court is inclined to grant the order for stay.
5. The court directed that the matter be canvassed vide written submissions that have been duly filed. Vide submissions filed on 22.10.19, 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.
6. Learned counsel for the applicant in addressing the prayer for leave to file the appeal out of time placed reliance on Section 79G 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 pending the hearing of the appeal and that the applicant had an arguable appeal. He urged the court to allow the application.

7. The issues for determination in this application are firstly **whether the applicant should be granted 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 with the decision of the trial court and has a draft memorandum of appeal annexed to the application. A careful perusal of the replying affidavit does not inform the court the specific reasons why the respondent is opposed to the application save that she was not satisfied with the reason for the delay. She has indicated that she is not averse to the deposit of half the decretal amount.

12. In this case, the application was filed on 17.9.2019 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 applicant has easily met the test for grant of order for leave to file the appeal out of time.

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 since the issue of liability and quantum are disputed and which indicate ipso facto that they are triable issues. Hence 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 auctioneers have come knocking on the applicant's door and execution is imminent yet the appellant is still dissatisfied with the judgement that forms the basis of the execution.

17. The respondent has indicated willingness to accept deposit of the decretal amount and this will cater for any apprehension she has towards realizing the fruits of her judgement.

18. The Application was brought without inordinate delay as it was brought within 64 days from the date of delivery of the judgement. I find that the Applicants have met the conditions placed by Order 42 Rule 6.

19. On security I note the applicant is willing to deposit security pending the determination of the appeal. The amounts involved is substantial and that the applicant feels that the respondent might not be in a position to refund if the appeal succeeds. The respondent has not rebutted the allegation by furnishing evidence of means yet that is an issue within her means. As the issue of liability and quantum is disputed I find an order that the sums be deposited in an interest earning account pending the appeal is appropriate in the circumstances.

20. The upshot is that the Application dated 16.9.2019 succeeds and is allowed in the following terms:

**a. The Applicant is granted leave to file the Memorandum of Appeal within ten (10) days from the date hereof.**

**b. An order of stay of execution of the judgement and decree in Mavoko PMCC No.96 of 2017 is hereby granted pending the hearing and determination of the appeal on condition that the decretal sums are deposited into a joint interest earning account in the names of Advocates for the parties within thirty (30) days from the date hereof 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 **5<sup>th</sup>** day of **February, 2020**.

**D. K. Kemei**

**Judge**