REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 13 OF 2020

TARMAL WIRE PRODUCT LTD...APPLICANT

VERSUS

FREDRICK MECHA NYARIKE aka **FREDRICK NYARIKE......RESPONDENT**

Coram: Hon. Justice R. Nyakundi

Mogaka Omwenga & Mabeya Advocates for the applicant

Kagwima Karanja for the respondent

RULING

The applicant is aggrieved with the Judgment of the lower court in **SRMCC NO. 85 OF 2018** at Kaloleni in which the Learned trial Magistrate awarded a sum of Kshs.2,232,330 plus costs and interest on 27.11.2019. Apparently, the first order on stay was granted immediately upon delivery of Judgment on the same day.

Following the dissatisfaction of the entire decision, the applicant has strong intentions to have it overturned on appeal subsequently, from the notice of motion filed in court on 31.1.2020, the applicant 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 seeks the following orders:

> **1. That there be a temporary stay of execution of the Judgment of the trial court pending the hearing and determination of the intended appeal.**
>
> **2. On the other hand, there be enlargement of time to within which to lodge an appeal against the aforesaid Judgment.**

Suffices to say that the application is supported with an affidavit sworn by **Mary Thuku** and the grounds in the body of the motion on the propriety and regularity of the application.

The respondent **Fredrick Mecha** filed a replying affidavit in court on 10.2.2020. The application was also disposed of by way of written submissions by both counsels setting the two trajectories they view the application towards the expected outcome to meet their stated legitimate expectation. In any hearing and determination of this notice of motion I will mirror their submissions as submitted and filed.

Analysis and determination

The essence of the first prayer on enlargement of time as elaborated in the affidavit of **Mary Thuku** is brought into position the *locus standi* to lodge the intended appeal which had been lost due to expiry of the statutory timeline set of thirty (30) days for one to prefer an appeal to the High Court pursuant to Section 79G of the Civil Procedure Act.

In determining whether the applicant should be granted extension of time to file an appeal or not, I am guided by the principles in the case of **Paul Wanjohi Mathenge v Duncan Gichane Mathenge {2013} eKLR** where the court substantially grounded its decisions upon making reference to various other authorities in the same subject matter as enlargement of time. In this regard the court pronounced itself as follows:

> **"The discretion under Rule 4 is unfettered but it has to be exercised judicially."**

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of 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. In Henry Mukora Mwangi v Charles Gichina Mwangi – Civil Application No. Nai 26 of 2004, this court held:

“It has been stated time and again that in an application under rule 4 of the Rules the learned single judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi v Kenya Airways Ltd. {2003} KLR 486 in which this Court stated: - “Over the years, the court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso –vs- Rose Hellen Wangari Mwangi – Civil Application No. Nai. 255 of 1997 (unreported), the Court express itself thus:-

“It is not well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

Secondly in a recent decision by the supreme court in **Salat v Independent Electoral & Boundaries Commission and 7 others A SCA No. 16 of 2014** the re-oxygenated the principles in **Paul Wanjohi** case by stating as follows:

“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:

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

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

3. Whether the court should 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. The delay should be explained to the satisfaction of the Court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

The reason conveyed in the affidavit that warranted the delay was on the time taken to seek instructions to file an appeal from the appellant. So in the instant application, I must ask whether to extend time is in order to achieve justice depending on the peculiar circumstances of the case. It is however settled that in administration of justice time is of essence and accordingly, monitoring and compliance with scheduled timelines in the statute should thus be observed unless sufficient cause is shown for non-compliance. In the persuasive authority of **Ralnam v Cumarasamiy {1965} 1WLR** the court held:

“The rules of court must, prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion if the Law were otherwise, a party in breach would have an unqualified right to an extension of time, which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

However, the underpinning jurisdiction of the court is based on exercise of unfettered discretion to extend time if the justice of the matter demands that enlargement of time be granted. In the same comparative jurisdication in **Tokal Maru {1998} 3 SLR** the Court of Appeal of Singapore summarized the principles in the context of this motion as follows:

“Both the appellants applications for extension of time and the respondents application to strike out the appellants defence are inextricably linked in that the appellants defence would naturally be struck out if the application to extend time is refused.

(a) Both applications should therefore be considered together in determining what justice requires and the case is best viewed in the round.

(b) The rules of Civil Procedure guide the courts and litigants towards the just resolution of the case and should of course be adhered to.

Nonetheless, a litigant should not be deprived of his opportunity to dispute the plaintiff’s claim and have a determination of the issues on the merits as a punishment for a breach of these rules, unless the other party has been

made to suffer prejudice which cannot be compensated for by an appropriate order as to costs.

(c) Save in special cases or exceptional circumstances, it can rarely be appropriate then, on an overall assessment of what justice requires, to deny a defendant an extension of time, where the denial would have the effect of depriving him of his defence because of a procedural default which, even if unjustified has caused the plaintiff no prejudice for which he cannot be compensated by an award of costs.

From the above cases the underlying principle is that in pursuit of justice, the procedure is a servant and not a master. With the new constitutional dispensation, the overriding objective is to direct sufficient judicial resources and discretion towards substantive justice. Where the power to exercise or cure non-compliance is for the trial on the merits for the ends of justice to be met.

Trading on this principle even where an aggrieved party fails to satisfy the threshold criteria of sufficient cause and reasons for the delay, the incorporation criterion on the interest of justice would prevail at the end of it all.

With that the application on extension of time by the applicant succeeds.

The second question to be answered is whether the applicant has satisfied the conditions under Order 42 Rule 6 for stay of execution to issue in its favour?

The constitution founded a regime of systems of courts and one such golden right is that of approaching superior courts on appeal. That right of appeal goes hand in hand with right to access courts under Article 48 of the Constitution.

However, to enable the realization of the two rights, the court must be satisfied that a litigant seeking to stay an enforcement of a valid Judgment is not doing so to avoid the Judgment debt. Therefore, the nature of the claim, the final determination and the decree pursuant to the orders in such cause of action, would be of great importance at this interlocutory stage enroute to the appeal court. I think the courts should guard against an overzealous litigant who adjudicate claims to ensure a successful party is denied the fruits of his or her Judgment.

The unyielding proposition is that under Order 42 Rule 6 of the Civil Procedure Rules. The judgment debtor, mover of the motion for stay of execution has to satisfy the following conditions:

(a) That the application has been brought without undue delay.

(b) That in commencing the stay proceedings, with regard to the outstanding Judgment debtor he or she would suffer substantial loss if ultimately the application is denied.

(c) That security for due performance of the Decree is provided for to be acting as security pending the appeal proceedings.

The meaning to be given to the above conditions should entail the principles in **Ramnath Sriram and Another {1997} ENA 2164** that also informs the subject as appreciated by the court in the following passage:

"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, the stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered, but no similar determine to the plaintiff if a stay id 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 in order to decide which of them is less likely to produce an injustice.

It was the case for the applicant that the facts of the motion satisfies all the conditions under Order 42 Rule 6 and the additional factor on the interest of justice.

In the various cases there is significant clarity on the approach taken to decline or grant stay of execution. In **Kiambu Transporters v Kenya Breweries {2000} eKLR** it re-emphasizes the traditional factors of the application being made without undue delay, the substantial loss that will result to the applicant unless such order is made and security for the due performance of the decree has been given by the applicant. It is also incumbent on the applicant to show that if stay of execution is not granted, if successful on appeal, it would be rendered nugatory.

The test is subjective as stated in **Reliance Bank Ltd v Norlake Investments Ltd {2002} CEA 227.** For completeness of this analysis would also mention the court decision in **Global Tours & Travels HC Winding up Cause No. 43 of 2000** where the court held:

"That whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so on what terms it should be granted in deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order."

Stay as an order therefore imposes a stop to the proceedings. Relatedly under Order 42 Rule 6 of the Civil Procedure Rules, the applicant has

the burden to doubtless to have satisfied all the three traditional conditions and any other that is imminent for the fair administration of justice. In **Kenya Shell Ltd v Kibiru Banker CA No. 97 of 1986**. The court stated with clarity:

> **"If there was no evidence of substantial loss to the applicant either in the manner of paying damages awarded which would cause difficulty to the applicant itself or because it would cost its money if payment was made since the respondents would be unable to pay the money."**

In the instant application, there is absence of evidence to the contrary that the applicant would suffer substantial loss if the deemed decretal sum is payable to the respondent.

The Law will thus not ascribe to mere statement of averment in the affidavit that substantial loss will be suffered. It must be shown both factually and evidentially that signifies the appropriate degree of substantial loss.

There is therefore no proof of substantial loss that would not be compensated by way of damages. However, on its side the applicant has established that the application has been filed without undue delay, that its willing to provide security for due performance of the decree which may be ultimately be binding on it in the event the appeal is lost and further if the stay is denied, the appeal if successful would be rendered nugatory.

When all is considered the discretion to stay the Judgment of the trial court must be exercised judiciously and on higher threshold. For an appeal prima facie shall not operate as a stay of execution. I observe that the applicant raised a number of issues but failed to point out and prove exceptional circumstances to merit the stay of the entire Judgment and decree of the trial court.

There is of course no absolute constitutional right to an appeal. The right to appeal becomes evident only when an aggrieved party answers certain underlying questions, about the nature of the appeal, the essential elements of an appeal and a party's right to appeal as a feature of due process of the Law.

To this effect, the Law implies from the outset that a party can only be denied right of appeal in very exceptional circumstances which by content and nature runs contra to the spirit of the laid down principles.

In this appeal, I am constrained in equal measure to exercise discretion to grant stay of execution pursuant to Order 42 Rule 6 of the Civil Procedure Rule but at a more fundamental level make the following final orders:

(1) That the applicant has leave of this court to file an appeal out of time.

(2) That the leave so granted behooves on the applicant to file and serve the record of appeal within thirty (30) days from today's date.

(3) That the court below Judgment is hereby partially stayed of execution on conditional terms of:

(a) Having part of the portion of awarded damages of Kshs.800,000/= be paid to the respondent forthwith but not later than fifteen (15) days from today's date.

(b) That the balance of the decretal sum be deposited in the joint earning interest of both counsels in a preferred financial institution or in the alternative with the Deputy Registrar of the High Court, Malindi within thirty (30) days from today's date as security for due performance of the Decree pending the appeal.

(c) That the costs of this application to abide the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF FEBRUARY, 2020

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R. NYAKUNDI

JUDGE