



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

MISC.CIVIL APPL. NO.63 OF 2019

GRACE NJERI THEURI.....APPLICANT

V E R S U S

JOHN MBURU WAINAINA.....RESPONDENT

R U L I N G

By the application dated 2/7/2019, this court is invited to exercise its discretion under Section 3A, 79G and 95 of the Civil Procedure Act, Order 50 Rule 1 Civil Procedure Rule in favour of Grace Njeri Theuri and grant her leave to appeal against the judgment of Hon. S.M. Mwangi S.R.M. in Nyahururu Cmcc.25/2014 delivered on 29/1/2019 and costs of the application.

The grounds in support of the application are found in the body of the application, a supporting affidavit sworn by the applicant on 2/7/2019 and supplementary affidavit dated 14/8/2019. The grounds are that neither the applicant nor her counsel was aware of the delivery of the judgment on 29/1/2019; that the applicant became aware of the judgment on 12/6/2019 and being aggrieved by the said judgment, intends to appeal; that the appeal has high chances of success; that the application has been brought without delay and the respondent will not suffer any prejudice if the application is granted.

In her affidavit, the applicant deponed that judgment was reserved for 22/1/2019; that she attended court on the said date but was informed that the magistrate was indisposed and the judgment would be deferred to another date; that the judgment was subsequently delivered on 29/1/2019 without any notification of the date of delivery of the judgment and hence they were not aware of the judgment; that she was called by the respondent's advocate on 12/6/2019 informing her of a letter from counsel informing her that there was judgment entered against her for Kshs.375,508/= and payment was demanded within 14 days or attachment and execution would ensue.

The respondent filed a replying affidavit in which he deponed that the judgment was fixed for 22/1/2019 but that on 21/1/2019, notice signed by the Executive Officer John Lokwang was posted on the Court Notice Board and on Nyahururu Whatsapp Wall that Court 3 would not be sitting on 22nd and 23rd Jan, 2019 because the magistrate was indisposed and that the judgments scheduled for the two days would be delivered on the next week (JMW1); that the applicant and her counsel deliberately failed to attend court to take the judgment because the court sat the next week and read the judgment on 29/1/2019; that the magistrate noted that the applicant's counsel was aware of the delivery of judgment. It was further deponed that the applicant had a duty to establish when the judgment would be read; that having been notified of the judgment, there was no need to serve a judgment notice on the applicant; that the appeal was filed after 158 days yet the law allows an appellant to file appeal within 30 days and there has been inordinate delay and the applicant is not entitled to the exercise of the court's discretion; that this is a money decree issued on 4/6/2019; that the applicant has not demonstrated that she will suffer substantial loss or that there is sufficient cause for the court to grant an order of stay; that there is no offer of security for the due performance of the decree. It was urged that if the court were to grant the prayer, the applicant should be ordered to pay the respondent the full amount which can be refunded in the event the appeal succeeds; that without prejudice to the other prayers, the court do order that the decretal sum be deposited in court within 7 days of the court's order.

In a rejoinder, the applicant filed a supplementary affidavit in which she deponed that she cannot have been expected to file an appeal within the allowed time when she was not aware of the delivery of judgment; that she has moved this court quickly upon learning of the judgment and the court has a wide discretion to extend time to file an appeal; that she had already deposited a half of the decretal sum in court.

Both parties filed submissions on the application in which the applicant urged the court to look at the trial court's file where she insists there was no notice to the parties about the delivery of judgment and that even if the applicant and counsel were not diligent this court has wide discretion to grant the order sought on terms and conditions.

Counsel relied on the decisions in **CA.NRB.395/2017 Imperial Bank Ltd & Kenya Deposit Insurance Corporation v Alnashir Popat & Others**, **Kiambu HCC.Misc.App.108/2017 Samwel Mwaura Muthumbi v Josephine W. Nguigi and another**.

In the submissions Ms. Wanjiru, respondent's counsel submitted that the application has met the threshold for grant of stay of execution in that notices were posted varying the date for judgment of 29/1/2019, and there being no appeal on 4/6/2019, three months after judgment a decree on assessment of costs was issued and forwarded to the applicant on 12/6/2019. An application for execution was made on 20/6/2019 but that instead of paying the sum, the applicant filed this application; that the applicant has come to this court with unclean hands because it is the duty of a litigant to establish the status of their case and take the necessary steps but not just sit back; that it is mischievous for the applicant to allege that neither her nor her counsel knew of the date of judgment and the respondent had no duty to serve notice on the applicant as the notice was on the Notice Board.

Counsel also urged that the applicant has not established the principles necessary for grant of stay which are:

- (1) That substantial loss may result to the applicant in stay is not granted;**
- (2) That the application was made without unreasonable delay;**
- (3) The applicant to provide security for the due performance of the decree or order as may ultimately be binding on the applicant.**

Counsel relied on the decision of ***Focin Motorcycle & Co. Ltd & Ann Wambui Wangui & another (2018) eKLR***; counsel further urged that this being a money decree, the applicant will not suffer any prejudice if she pays the sum; that it has not been demonstrated that the applicant will suffer any substantial loss nor has any security been offered by the applicant. It was the respondent's view that if the court grants the orders, then the applicant should be asked to pay whole decretal sum to the respondent which the respondent can refund in the event the appeal succeeds; that the respondent should not be denied from enjoying the fruits of his judgment.

As to whether leave should be granted to the applicant to file appeal out of time, the respondent relied on the decision in ***Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others (2014) eKLR*** which laid down the criteria to be considered before the exercise of discretion to grant such an order; that there was unexplained and inordinate delay in filing the appeal and the application should be dismissed.

I have considered the application, the statements filed herein and the rival submissions by counsel.

I will first deal with the issue of extension of time:

The explanation given for not filing the application within 30 days is that the applicant was not aware of the date for delivery of judgment. Section 79G of the Civil Procedure Act grants the court provisions to enlarge time of filing appeal. The section provides:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

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.”

In such an application, the most important consideration by the court is that the power to extend time is discretionary and must be granted on a case by case basis. The discretion must be exercised judiciously. It is the duty of the applicant to satisfy the court that there is sufficient material to persuade the court to exercise its discretion.

The applicant relied on the case of ***Samuel Mwaura (Supra)*** which relied on the decision of ***Mwangi v Kenya Airways Ltd (2003) KLR*** where the court listed some of the factors to be considered:

- (1) The period of delay;**
- (2) The arguability of the appeal;**
- (3) The degree of prejudice which could be suffered by the respondent if the extension is granted;**
- (4) The importance of compliance with time limits to the particular litigation or issue; and**
- (5) The effect if any on the administration of justice or public interest if any is involved.**

There is no doubt that the judgment was read on 29/1/2019 and this application was filed on 2/7/2019, about five months after the judgment. Five months is quite a long time. The lower court file is not availed to me and this court cannot tell whether the applicant was aware of the date for judgment or not. What is not in dispute is that the judgment was not delivered on 22/1/2019 as scheduled but was delivered on 29/1/2019, in the absence of the applicant and the counsel as per proceedings of that date. The respondent's counsel was however present.

The respondent deponed at paragraph 4 of his replying affidavit that the judgment notice was posted on Nyahururu Advocates Whatsapp Wall of which the applicant's advocate, Mr. Kamanga is a member. I do agree with the applicant's submissions that the respondent is not a member of the said Whatsapp Group and cannot depone to matters pertaining thereto and the court will disregard that averment.

Although the applicant, as a party, has the duty to follow up her case to establish when a ruling or judgment will be delivered, proper notices should have been issued to the applicant's counsel, a call to the counsel, and probably a notice on the Court Notice Board. So far, there is no evidence that a proper notice was issued to the applicant or her counsel and it is possible that the applicant may not have been aware of the delivery of the judgment though she partially bears the blame for sitting back and not enquiring.

This is a money decree. When the matter came before this court ex-parte, the court ordered that half the decretal sum be deposited in court before temporary stay could be granted pending hearing of this application. The applicant complied. I do not find there to be serious adverse effects that an order extending time to file appeal would cause the respondent. No doubt leave to extend time to file appeal is an exercise of the court's direction. In Nicholas Kiptoo Arap Korir Salat v IEBC (2014) eKLR the question of leave to extend time was discussed at length. The court cited Paul Wanjohi Mathenge v Dancan Gichane Mathenge (2013) eKLR where the court said at paragraph 12:

“The discretion under Rule 4 is unfettered but it has to be exercised judiciously, not on 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 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.....for instance in Leo Mutiso v Rose Hellen Wangari Mwangi, C.Ap.NRB.255/1997, the court expressed itself thus “it is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary.

It is so 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 the chances of the appeal succeeding; ... fourthly, the degree of prejudice to the respondent if the applicant is granted.”

In my view, the delay in filing this appeal is excusable for the reasons I have considered above.

Whether the applicant is entitled to a stay:

The respondent relied on the decision on Focin Motor Cycle Co. Ltd v Ann Wambui Wangui & another (2018) eKLR where the court set out the principle to be established by an applicant before an order of stay is granted.

The court said: ***“The appellants need to satisfy the court on the following conditions before they can be granted the stay orders:***

(a) Substantial loss may result to the applicant unless the order is made;

(b) The application has been made without unreasonable delay; and

(c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.”

I have already addressed the issue of delay when considering the issue of extension of time. Though there has been a delay of 8 months, the same is excusable.

Whether substantial loss will be suffered if stay is not granted: In Joseph Gachie's case (Supra), Odunga J, said as follows:

“It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid. In an application of this nature, the applicant should show the damages it will suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before judgment and that would be denying a successful litigant. The fruit of judgment which should not be done if the applicant has not given the court sufficient cause to enable it exercise its discretion in granting the order of stay.”

Again in this case of Kenya Shell Ltd (Supra) the court stated:

“Where the allegation is that the respondent will not be able to refund the decretal sum, the burden is upon the applicant to prove that the respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree.”

The decretal sum in this case is Kshs.375,508/=. When the applicant approached the court ex-parte, the applicant was ordered to deposit ½ the decretal sum in court which she did. She is willing to pay the balance if the appeal does not succeed.

In Lucy Njeri Kimani v Lawrence Mburu Muthoga (2006) eKLR the court said:

“An applicant demonstrates substantial loss by showing that the respondent is not a person of means and payment of the decretal sum prior to appeal would put the same beyond reach of the applicant.”

In Socfinac Co. Ltd v Nelphat Kimotho Muturi [2013] eKLR, the court held that the appellant bears the legal burden to prove that he decree holder is a man of straw who cannot refund the decretal sum in the event the appeal succeeds and that the evidential burden shifts to the respondent to prove that he is a person of means.

The respondent insists that the applicant pays him the whole decretal sum pending the hearing of the appeal and that he will be able to refund. However, though the applicant did not specifically plead that the respondent cannot be able to refund the decretal sum, it was upon the respondent to demonstrate that he is in a position to refund the decretal sum should the appeal succeed. He did not discharge that burden.

Whereas the respondent has the right to enjoy the fruits of his judgment, yet the court has to balance that right with the applicant's right to an appeal.

In *Samvir Trustee Ltd v Guardian Bank Ltd NRB.HCC.795/1997*, the court said that the grant of stay is necessary to balance the opposing interests alluded to above.

Whether security has been provided:

In this case, the court ordered the deposit of a half the decretal sum when the applicant approached the court ex-parte. The deposit of the sum is a demonstration of good faith, that the applicant is keen on appealing.

In the end, I am satisfied that the applicant has demonstrated that she is entitled to the orders sought. The court grants the following orders:

- 1). The applicant is granted leave to file and serve the appeal within 21 days hereof;***
- 2). There be a stay of execution pending appeal and the sum deposited in court be deposited in an interest earning account of both the applicant and respondent's counsel within 14 days;***
- 3). To avoid delay, the applicant to ensure the record of appeal is ready and served within 6 months hereof.***

The costs will abide the determination of the appeal.

Dated, Signed and Delivered at NYAHURURU this 7th day of May, 2020.

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Kamanga – for applicant

Mr. Kariuki Mwangi – for respondent

Eric – Court Assistant