



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC. APPLICATION NO. 9 OF 2019

MBITHI DANIEL.....1<sup>ST</sup> APPELLANT/APPLICANT

THOMAS VINCENT OTIENO.....2<sup>ND</sup> APPELLANT/APPLICANT

VERSUS

SELLY CHEPKIRUI (SUING AS THE LEGAL REPRESENTATIVE

OF THE ESTATE OF ROBERT KIBET RONO (DECEASED).....RESPONDENT

*(Being an application from the judgement and decree of Hon. Gesora, SPM, delivered on 27/11/2018 in the Chief Magistrate's Court at Narok, in Civil Suit No. 132 of 2015, Selly Chepkirui (suing as the legal representative of the estate of Robert Kibet Rono (Deceased) v 1. Mbithi Daniel 2. Thomas Vincent Otieno)*

**Ruling**

**The case for the appellants**

Pursuant to section 79G of the Civil Procedure Act (Cap 21) Laws of Kenya, Order 51 Rule 1, Order 42 Rule 6 of the 2010 Civil Procedure Rules, section 1A,1B and 3A of the Civil Procedure Act and all other enabling laws, the appellant through his notice of motion seeks the following orders.

- 1) Leave to appeal out of time and the memorandum of appeal dated 31<sup>st</sup> January 2019 to be deemed to have been duly filed.
- 2) An order of stay of execution of the judgement and decree of the lower court pending the inter parties hearing and determination of the instant application.
- 3) An order of stay of execution of the judgement and decree of the lower court pending the inter parties hearing and determination of the instant appeal herein.
- 4) an order that the costs of this application be costs in the appeal.

The application is supported by four grounds that are set out on the face of the notice of motion. The major grounds are as follows. Being aggrieved by the judgement and decree of the lower court the appellants have appealed against the entire judgment that was delivered on 27/11/2018 and unless an order of stay of execution is granted the appeal will be rendered nugatory. The failure to file the appeal in time was due to an inadvertent mistake as the advocate who was previously handling the matter left the firm in disarray and it only came to their attention that no appeal had been filed on 28<sup>th</sup> January 2019.

Furthermore, the appellants stand to suffer substantial loss unless an order of stay of execution is granted. Additionally, the respondent has no known means of income which would be sufficient to refund the decretal sum if it is paid to her and the appeal turns out to be successful. The 2<sup>nd</sup> appellant is ready to deposit security in the form of a bank guarantee or any other security that the court may order pending the hearing of the appeal.

The application is supported by an eight (8) paragraphs supporting affidavit deposed to by Catherine Njogu, who is the advocate who had conduct of this application. The deponent has replicated the same matters that are set out on the face of the notice of motion. I find it unnecessary to reproduce them herein again.

### **The submissions of the 2<sup>nd</sup> appellant.**

The 2<sup>nd</sup> appellant has filed written submissions in support of his application. **Messrs Gichimu Mung'ata & Co advocates, for the 2<sup>nd</sup> appellant** cited *Mwangi v Kenya Airways Ltd [2003] e-KLR*, in which the Court of Appeal suggested the following factors which aid the court in exercising its discretion whether to extend time to allow an applicant to file an appeal out of time. These factors include the following. The period of delay, the reason for the delay, the arguability of the appeal, the degree of prejudice which could be suffered by the respondent if the extension is granted and the effect, if any, on the administration of justice or public interest, if any, is involved.

Furthermore, counsel for the 2<sup>nd</sup> appellant have submitted that the application was brought two months after the time allowed for appealing had run out. Counsel has submitted that the delay of two months is not inordinate delay. The delay was caused by failure of counsel who was dealing with the instant appeal, who left the firm in disarray. In view of this, counsel submits that the mistake of counsel should not be visited upon an innocent litigant.

Counsel for the 2<sup>nd</sup> appellant has also submitted that the applicant has met the threshold laid down in Order 42 Rule 6 of the 2010 Civil Procedure Rules. They have also cited *Butt v Rent Restriction Tribunal, Civil Application No. NAI 6 of 1979*, which laid down four conditions which an applicant has to satisfy before being granted an order of stay of execution. These conditions are as follows. An applicant has to demonstrate that he has an arguable appeal. He also has to demonstrate that he is likely to suffer substantial loss unless an order of stay is granted. Furthermore, he has to demonstrate that the application has been made without unreasonable delay. And finally, he also has to demonstrate that he is willing to provide security as the court may order for the due performance of the decree which may ultimately be binding upon him. Counsel have submitted that the applicant has satisfied these conditions and has therefore urged the court to grant the application.

### **The case for the respondent.**

Selly Chepkirui (the respondent), has deposed to a fifteen paragraphs (15) replying affidavit in opposition to the application. She has deposed following advice from her counsel, which she believes that the entry of the judgement was in accordance with the law and that the applicant has always been looking for delaying tactics to prevent her from enjoying the fruits of her judgement.

She also has deposed that ever since the death of her deceased husband almost four years ago, the going has not been easy since he was the sole breadwinner of the family. It is also her deposition that in the event the court is inclined to allow the application, it is her prayer that the court directs the applicant to deposit a half of the decretal sum with her advocates and another half to be deposited with the court.

### **The submissions of the respondent**

Messrs Shem Kebongo & Co. Advocates for the respondent filed written submissions in opposition to the application. They submitted that judgement was entered for the respondent as follows.

Liability	Less 30% contribution by the plaintiff
General damages	Kshs 6,172,000.00
Less 30% contribution	<u>Kshs 1,851,600.00</u>

Kshs 4,320,400.00

The respondent has submitted that the applicable law is Order 42 Rule 6 of the 2010 Civil Procedure Rules; which lays down the conditions an applicant has to meet before being granted an order of stay of execution of the decree and order of the lower court. These conditions include the requirement that the applicant has to demonstrate that he will suffer substantial loss unless stay of execution is granted and that the application to should be prosecuted without unreasonable delay.

Counsel further submitted that under section 79G of the Civil Procedure Act, an appeal to the High Court from the subordinate court has to be lodged within thirty (30) days, from which period is excluded any time the lower court may certify as being necessary for the preparation and delivery to the appellant of a copy of the decree or order.

And according to counsel, stay of execution pending an appeal can only be granted where there is a valid appeal pending the court, citing *Kendindia Assurance Co. Ltd v Charles Ngunjiri Kariuki [2005] e-KLR*, as the basis of his submission.

Furthermore, counsel submitted that the applicant has to prove that substantial loss will result unless an order of stay of execution is granted. Counsel cited *Masisi Mwita v Damaris Wanjiku Njeri [2016] e-KLR* and *Antoine Ndiaye v African Virtual University [2015] e-KLR* in support of the submission that an applicant has to demonstrate that he will suffer substantial loss unless stay of execution is granted. Counsel submitted that the applicant has failed to demonstrate that he will suffer substantial loss.

Counsel has also submitted that there has been inordinate delay in filing and prosecuting this application.

Finally, counsel submitted that the applicant has to provide security for the due performance of the order or decree that ultimately may be found to be binding upon him. In this regard, citing *Masisi Mwita v Damaris Wanjiku Njeri, supra*, counsel submitted that the applicant has failed to demonstrate that he has complied with Order 42 Rule 6 of the 2010 Civil Procedure in relation to the provision of security. They have therefore urged the court to dismiss the application.

## **Issues for determination**

I have considered the affidavits of the parties, the submissions of both counsel and the applicable law. As a result, I find that the following to be the issues for determination.

- 1) Whether the applicant has made out a case for the grant of an order for leave to appeal out of time.
- 2) Whether the applicant has made out a case for the grant of an order for stay of execution.
- 3) Who bears the costs of this application?

### **Issue 1.**

The affidavit of the applicant shows that judgement appealed against was delivered on 27<sup>th</sup> November 2018. It also shows that the instant application was filed on 11<sup>th</sup> February 2019. It is clear that there is delay of slightly over two months. The explanation advanced by the applicant for the delay is that the advocate who was dealing with this matter left the firm in disarray. It was after his departure that they learned that no appeal had been filed. This averment has not been controverted by the respondent.

I find that this delay of over slightly two months has been adequately explained. I therefore find that the applicant has established sufficient cause to warrant his being allowed to file his appeal out of time. I further find that filing of the instant application is not intended to deny the respondent from enjoying the fruits of her judgement.

In the premises, I find that the applicant has made out a case for the grant of an order to appeal out of time. And for that reason the 2<sup>nd</sup> appellant's draft appeal being *Civil Appeal No. 9 of 2019, between 1. Mbithi Daniel & Thomas Vincent Otieno v Selly Chepkirui (suing as the legal representative of the estate of Robert Kibet Rono (Deceased))*, is hereby deemed to have been duly filed.

### **Issue 2**

In terms of Order 42 Rule 6 of the 2010 Civil Procedure Rules, an applicant has to demonstrate that unless stay of execution is granted he will suffer substantial loss. In the instant application the loss that the applicant may suffer include his appeal being rendered nugatory. And the appeal is the substratum of the instant application. It is what is intended to be preserved pending the hearing and determination of the appeal. The aggrieved party is given the right of appeal by section 79G of the Civil Procedure Act. And for the aggrieved party to exercise that right, it becomes necessary to preserve it.

The preservation of the right of appeal and its exercise is for the benefit of the applicant. This of necessity denies the respondent from enjoying the fruits of her judgement, pending the determination of the appeal. It is for this reason that Order 42 Rule 6 requires the applicant to provide security for the due performance of the order that may ultimately be binding upon him. It is also for this reason that the law requires that appeals be dealt with expeditiously.

And by virtue of the foregoing order and in view of the provisions of article 159 of the 2010 Constitution the decision of the court in *Kendindia Assurance Co. Ltd v Charles Ngunjiri Kariuki*, is inapplicable.

I therefore find that the applicant has made out a case for the grant of an order of stay of execution of the judgement and decree from which an appeal has been preferred in terms of Order 42 Rule 6 of the 2010 Civil Procedure Rules.

### **Issue 3**

This is an interlocutory application and for this reason costs of the instant application will be costs in cause.

In the premises, the applicant's application succeeds with the result that the costs of this application will be costs in cause.

The applicant's application is hereby granted in terms of prayer No. 1,2,3and 4 of the notice of motion dated 31<sup>st</sup> January 2019 on condition that he deposits in this court Kshs 4,320,400.00 within thirty days (30) days from the date of this ruling; failing which the orders will lapse.

Ruling signed, dated and delivered at Narok this 21<sup>st</sup> day of May, 2020 in the absence of both counsel vide posting the instant ruling in the e-mail of both counsel.

**J. M. BWONWONG'A.**

**J U D G E**

**21/05/2020**