



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 436 OF 2019

PESTONY LIMITED.....1ST APPLICANT

CHARLES KARIUKI KATIVO.....2ND APPLICANT

VERSUS

SAMUEL ITONYE KAGOKO.....RESPONDENT

RULING

1. In their Notice of Motion application dated and filed on 31st May 2019, the Applicants sought an order for stay of execution of the judgment and decree entered against them on 27th February 2019 in **Milimani CMCC No657 of 2017 Samuel Itonye Kagoko vs Pestony Limited & Charles Kariuki Kativo** pending the hearing and determination of the appeal herein and leave to file their Appeal out of time. Their said application was supported by the Affidavit of the Legal Officer of Kenya Orient Insurance Limited who were the insurers of their Motor Vehicle Registration Number KCG 767J, Morine Wangeci. The same was sworn on 31st May 2019.

2. She contended that the said Insurer was informed of the entry of judgment against the Applicants herein but that it inadvertently failed to instruct its advocate in good time to enable them prefer an appeal within the prescribed time. She averred that both the Insurer and the Applicants herein were aggrieved by the aforesaid judgement and consequently, it was necessary that they be granted leave to file an appeal out of time.

3. They further averred that the application was made in good faith and it was in the interests of justice that they be granted an order for stay of execution so as not to suffer substantial loss and/or suffer prejudice. They added that their appeal had high chances of success and that the same would be rendered nugatory in the event the order for stay of execution pending appeal was not granted. It was their contention that they were ready and willing to comply with any reasonable conditions that may be imposed upon them.

4. In opposition to the said application, on 25th June 2019, the Respondent swore a Replying Affidavit. The same was filed on 27th June 2019. He contended that it was within his legal rights to execute as it was a lawful process. He added that the Applicants ought to have kept abreast with their case and consequently, the reason they had advanced for not having filed the appeal within the prescribed time was not reasonable.

5. It was also his averment that the Applicants had not met the threshold of being granted an order for stay of execution pending appeal. He was emphatic that the application was a delaying tactic aimed at frustrating him and denying him the fruits of judgment and pointed out that the delay would cause him great injustice. He averred that he was a man of means and that he could refund the decretal sum in the event the Applicants were to be successful in their Appeal. He thus urged this court not to allow the application herein.

6. All the parties were agreed on when the court could exercise its discretion to grant an order for stay of execution pending appeal and leave to file an appeal out of time. The court therefore found it prudent to determine whether or not the Applicants would be entitled to an order for extension of time to file an appeal out of time.

7. The Applicants submitted that they had advanced a good reason to explain the delay in filing their appeal. They relied on the provisions of Section 79G of the Civil Procedure Act Cap 21 (Laws of Kenya) and several cases amongst them **Daima Bank Limited (In liquidation) vs David Musyimi Ndeti [2010] eKLR** where the court therein relied on the case of **Mwangi vs Kenya Airways [2003] KLR 486** amongst other cases where the common thread was that a court had wide discretion to extend time within which an appeal could be filed provided that the well set principles were met first before such an order could be granted. On his part, the Respondent relied on the case of **Nicholas Kiptoo Arap Salat vs Independent Electoral & Boundaries Commission & 7 Others [2014] eKLR** in this regard which also re-stated the well set out guidelines.

8. Right at the outset, it is important to point out that 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 it reprieve to seek justice.

9. While Section 75 G of the Civil Procedure Code provides for the period of thirty (30) days for an aggrieved party to lodge an appeal, it does provide that an appeal can be admitted out of time if the appellant satisfies the court that he has good and sufficient cause for not having filed his appeal within the prescribed time. A similar conclusion was arrived at by Odunga J in **Dilpack Kenya Limited vs William Muthama Kitonyi [2018] eKLR**.

10. Further, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It 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...”

11. In the case of **Mwangi vs Kenya Airways Limited (Supra)**, it was held that the factors to be considered before extension to file suit out of time was granted included:-

- 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 was granted;**
- e. the importance of compliance with time to the particular litigation or issue; and**
- f. the effect if any on the administration of justice or public interest if any is involved.**

12. There was evidently lack of diligence on the part of the Applicants' insurer as it did not give its instructions to its advocates to file an appeal within the prescribed time. Its advocates also ought to have exercised due care and diligence in following up the matter as failure to do so greatly prejudiced the Applicants herein.

13. However, it is trite law that 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.

14. This court was satisfied that the reason for not filing the appeal within the stipulated time was excusable. Further, a period of three (3) months from the date the judgment was delivered and the date of filing the present application could not be said to have been inordinate.

15. The Applicants submitted that the Learned Trial Magistrate erred in having awarded the Respondent damages that were manifestly excessive warranting interference by the appellate court which was strenuously resisted the Respondent herein. The question of whether the Learned Trial Magistrate arrived at a correct conclusion was arguable and it was important that the same be heard and determined by the appellate court to establish whether or not she arrived at the correct conclusion. It was not a frivolous ground of appeal.

16. This court fully associated itself with the holding of Joel Ngugi J in the case of **Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another [2018] eKLR** where, in allowing an application for extension of time that had been filed thirty one (31) days after the lapse of the time for lodging an appeal, he rendered himself as follows:-

“...all the Applicants have to show at this stage is arguability- not high probability of success...”

17. 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 Applicants be granted leave to file an appeal out of time so that their appeal could be heard and determined on merit. Indeed, there was more prejudice in them being denied their right to have their dispute determined as compared to the prejudice the Respondent would suffer for the delay in the conclusion of the appeal herein.

18. Having arrived at the aforesaid conclusion, there was need to issue preservative orders so as not to render the intended appeal nugatory. These orders were not, however, automatic for the reason that certain conditions had to be met by an applying party before it could be granted an order for stay of execution pending appeal.

19. Notably, an applicant has to demonstrate the following conditions that have been set out on Order 42 Rule 6(2) of the Civil Procedure Rules, 2010:-

- a. That substantial loss may result unless the order is made.**

b. That the application has been made without unreasonable delay.

c. Such security as the court orders for the due performance of the decree has been given by the applicant.

20. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “**and**”. It connotes that all three (3) conditions must be met simultaneously.

21. The court carefully considered the Written Submissions and the case law that each of the party relied upon and determined that the Respondent had not filed an Affidavit of Means to demonstrate that she was financially able to refund the Applicants the decretal sum if the same was paid to him before the intended appeal herein could be heard and determined.

22. In the absence of proof to demonstrate his ability to refund the Applicants the decretal sum, this court was satisfied that they would suffer substantial loss. They had thus satisfied the first condition of being granted a stay of execution pending appeal.

23. As this court had hereinabove determined that the present application was filed without undue delay, the Applicants had satisfied the second condition for the granting of an order for stay of execution pending appeal.

24. They were ready and willing to comply with any conditions for the due performance of the decree as could be binding upon them. They had demonstrated that they had complied with the third condition of being granted an order for stay of execution pending appeal.

DISPOSITION

25. For the foregoing reasons, the upshot of this court’s decision was that the Applicants’ Notice of Motion application that was dated and filed on 31st May 2019 was merited and the same is hereby allowed in terms of Prayers Nos (c) and (d) therein in the following terms:-

1. The Applicants are hereby directed to file and serve their Memorandum of Appeal within fourteen (14) days from the date of this Ruling.

2. The Applicants are hereby directed to file and serve their Record of Appeal within forty five (45) days from the date of this Ruling.

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 Applicants comply with the timelines within which to file their Record of Appeal as aforesaid.

4. THAT there shall be a stay of execution of the decree in Milimani CMCC No 657 of 2017 Samuel Itonye Kagoko vs Pestony Limited & Charles Kariuki Kativo pending the hearing and determination of the Appeal on condition the Applicants shall deposit into an interest earning account in the joint names of their counsel and counsel for the Respondent, the sum of Kshs 1,805,578/= within thirty (30) days from the date of this Ruling.

5. For the avoidance of doubt, in the event, the Applicants shall default on Paragraph 25(4) hereinabove, the conditional stay of execution shall automatically lapse.

6. Either party is at liberty to apply.

7. Costs of the application will be in the cause.

26. It is so ordered.

DATED and DELIVERED at NAIROBI this 7th day of May 2020

J. KAMAU

JUDGE