



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. CIV. APPLN. NO. 45 OF 2020

MARGARET KAGURI1ST APPLICANT

MUSEMBI PATRICK MUTUA2ND APPLICANT

VERSUS

PURITY KAGENDO.....RESPONDENT

RULING

1. By a Motion on Motion dated 23/04/2020, the applicants sought, leave to appeal out of time and a stay of execution of the judgment and decree in **Nkubu CMCC No. 81 of 2014 (“the said suit”)** pending an intended appeal.
2. The application was brought under **Orders 42 Rule 6 and 51 Rule 1 of the Civil procedure Rules, 2010 and Section 79G of the Civil Procedure Act, CAP 21 Laws of Kenya.**
3. The grounds upon which the application was grounded upon were set out in its body and the supporting affidavit of **Margaret Kaguri** sworn on 21/04/2020. The applicants contended that they were dissatisfied with the judgment made in the said suit wherein an award of Kshs. 355,495/- in general damages was made in favour of the respondent.
4. They further contended that their advocates wrote to their insurers on 13/02/2020 informing them of the judgment. That an error occurred in the insurer’s registry resulting in the misplacement of their file. The insurer wrote to the advocates on 12/03/2020 which was received on 17/03/2020 requesting for copies to reconstruct a skeleton file. It is thereafter that the insurer gave instructions for the filing of the appeal by which time the stipulated time for appealing had lapsed.
5. The deponent further stated that as from 16/03/2020, all court operations had been temporarily suspended. That unless the application was allowed the auctioneers will proceed with attachment and sale of the applicants’ assets/property causing them irreparable harm considering they have an arguable appeal.
6. The application was opposed vide the replying affidavit of **Purity Kagendo** sworn on 11/05/2020. She deponed that the application was filed about three (3) months after delivery of the judgment. This was inordinate delay without probable reasons. That there were no triable issues in the intended appeal.
7. As for stay of execution, she contended that the applicants had not satisfied any of the three conditions set out under **Order 42 Rule 6 (2)** of the Civil Procedure Rules. In the premises, she urged that she should not be deprived of the fruits of her judgment.
8. The parties filed their respective submissions. It was submitted for the applicants that the delay in filing the appeal was not intentional neither voluntary nor willful neglect. That upon receipt of instructions, the advocates for the applicants had duly filed the present application. That the delay was not inordinate and had been sufficiently explained. The cases of **Mursal Gulied & 2 others v Daniel Kioko Musau [2016] Eklr**, **APA Insurance Co. Ltd v. Michael Kinyanjui Muturi [2016]**, **ILRAD v. Kinyua [1990] Eklr** and **Kenya Orient Insurance Ltd v. Paul Mathenga Gichuki & Another [2014] Eklr** were cited in support of those submissions.
9. The respondent submitted that the applicants’ had not met any threshold to be granted the orders they sought. That the suit had been pending for 6 years and there was no reason to prolong its life as there was no arguable appeal. The cases of **Canvas Manufacturers Ltd v. Stephen Reauben Karunditu [1997] Eklr**, **Machira t/a Machira & Co. Advocates v. East African (No.2) [2002] KLR 63**, **Simon Mbocha Kinyati & another v Phoebe Njeri Kamau & another [2019] Eklr**, **Feissal Amin Janmohamed v. Shami Trading Co. Ltd [2014] Eklr**, **Mohamed Salim t/a Choice Butchery [2013] eKLR**, **Chris Munga N. Bichage v. Richard Nyagaka Tongi & Anor [2013] eKLR** and **Runda Water Ltd & another v Timothy John Nicklin & another [2019] Eklr** were relied on in support of those submissions.

10. This is an application for leave to appeal out of time and consequent thereto, stay of execution. *Section 79G of the Civil Procedure Act* provides that an appeal from a subordinate court to the High Court should be filed within a period of thirty days from the date of the decree or order appealed against. An appeal may be admitted out of time if the appellant satisfies the court that she/he had a good and sufficient reason for not filing the same on time.

11. In this regard, the power under that section is discretionary. In *Annah Mwihaki Wairuru v Hannah Wanja Wairuru [2017] eKLR* the court quoted with approval the holding in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)* wherein it was held: -

“It is now 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.”

12. In this regard, the matters the court has to take into consideration in an application for leave to appeal out of time are; the length of the delay, the reason for the delay, chances of the appeal succeeding and the prejudice to be suffered, if any. The first consideration is the length of the delay. The judgment the applicants seek to appeal against was delivered on 12/02/2020. The application was lodged on 22/04/2020. This was 40 days after the thirty (30) day timeline given for appealing. That in my view is inordinate and required an explanation for the delay.

13. According to them applicants, the delay was due to the delay in the insurers giving instructions to their advocates to appeal. They alleged that their file with the insurer had been misplaced.

14. It is imperative to note that whereas the advocates for the appellants were very diligent in having communicated the outcome of the case only a day after the judgment, the insurers waited until the last day for appealing, 12/03/2020, to respond. The correspondence between the two took up to 17/4/2020 when instructions to appeal were received.

15. The question that arises is whether the Court has to wait for a negligent litigant (insurer) to decide whether to take a legal step or not. For 30 days the insurer took no action. It only remembered that it should review the judgment, and decided whether to appeal, on the last day of the time given for appealing. Even then, the insurer did not give instructions to appeal but for reconstruction of their file to enable them decide whether or not to appeal.

16. I do not think that at this time and age, when the Courts are struggling to clear backlog of cases they should allow themselves to be tied down by the inefficiencies of 3rd parties. *Article 159 of the Constitution* enjoins this Court to ensure that justice is dispensed with without any delay. To my mind, the inefficiency and lack of concern on the part of an insurer to give its advocates instructions is not sufficient reason under *section 79G of the Civil Procedure Act*.

17. In my view the applicants have a remedy against their insurers for indemnity. On the other hand, the respondent who was successful, after 6 years, was all this time waiting for the applicants or their insurers to make good the judgment. I am not satisfied that there was any sufficient cause shown for the delay.

18. As to the chances of success of the intended appeal, I note that what is intended to be challenged is the exercise of discretion on the part of the trial Court. It is intended to urge that the quantum of damages awarded was excessive. That may or may not be arguable. Having however, come to the conclusion that there was no sufficient cause that had been shown, whether the appeal has chances of succeeding or not, the issue does not matter.

19. As regards prejudice, I am of the view that the respondent will suffer prejudice for being kept out of the fruits of her judgment unnecessarily.

20. Accordingly, the application for extension of time within which to appeal is hereby declined.

21. The foregoing should have disposed off the entire application, but this not being the final Court of appeal, I am required to express my view on the prayer for stay.

22. Order 42 Rule 6(2) of the Civil Procedure Rules sets out the conditions applicable when considering whether or not to order a stay. The Court has to consider if the application has been made without undue delay, that the applicant must show that the he/she will suffer substantial loss and that adequate security should be given.

23. I have already held that making the application 70 days after the decision being appealed against was made is inordinate. I have also found that the reasons advanced for the delay are not reasonable.

24. On substantial loss, the applicants contended that the respondent is an individual with no known assets or property or any known source of income. That in the event the decretal sum is paid over to her, she will not be able to refund it, if the appeal is successful thereby rendering the appeal nugatory.

25. Despite the said positive averment that the respondent was a lady of straw, she did not deny that fact. She only alluded to the long delay of the case for 6 years. To my mind, that is no good answer to the allegation raised by the applicants. It was incumbent upon her to show that in the event the monies decreed in her favour was paid over to her, she will be capable of refunding the same if the appeal succeeds.

26. It is therefore clear that if the stay is not granted and the money is paid over to the respondent, the same would be out of reach of the applicants in the event the appeal succeeds thereby rendering the same nugatory. Obviously therefore, the applicants have shown that they will suffer substantial loss if a stay is not granted.

27. The last issue is security for the performance of the decree. The applicants swore that they were able, ready and willing to give such security as shall be required by the Court. Accordingly, I am satisfied that save for the delay, the applicants satisfied the conditions for the grant of an order for stay of execution.

28. However, since the applicants were unsuccessful in the prayer for extension of time within which to appeal, the application is without merit and is hereby dismissed in its entirety with costs.

DATED and DELIVERED at Meru this 10th day of June, 2020.

A. MABEYA

JUDGE