



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. E411 OF 2019

PAUL KIMANI WAMATANGI.....1ST APPELLANT/APPLICANT

NICHOLAS KIMANI T/A

PRIME AUTO & GENERAL

TRADING ENTERPRISES2ND APPELLANT/APPLICANT

PRIME AUTO & GENERAL

TRADING ENTERPRISES.....3RD APPELLANT/APPLICANT

VERSUS

DERRICK A. BELLORESPONDENT

RULING

1. Through the application dated 10th September 2019, the applicants seek orders for leave to appeal out of time and to stay the execution of the judgment/decree of the Chief Magistrates Court (Honourable P. N. Gesora) delivered on 23rd March 2017 in Milimani CMCC No. 1769 of 2011 pending the hearing and determination of the intended appeal.

2. The application is supported by the affidavit of the applicant's advocate, Mr. Allan Kinyanjui, and on the grounds on the face of the application. The applicants' case is that they were dissatisfied with the judgment/decree of the lower court and the instructed their counsel to lodge an appeal against the said judgment but that their advocate failed to do so and never informed them of this failure. They state that they only recently learnt of their advocates' failure to act on the instructions and contend that their former advocates inadvertent mistake should not be visited on them. They further state that the respondent has commenced the execution process and that such execution will highly prejudice them if not stayed.

3. The respondent opposed the application through his replying affidavit sworn on 2nd October 2019 wherein he avers that the applicants are truly indebted to him in the sum of Kshs 945,000/= being the proceeds of the sale of a motor vehicle and that the applicants admitted owing him kshs 160,000/-.

4. He states that the applicants have not come to this court with clean hands as their previous numerous applications to stay execution before the lower court were all dismissed and that the intended appeal has no chance of success. He further states that application herein is an afterthought and faults the applicants for failing to provide any explanation for the delay.

5. Parties filed their respective written submissions to the application which I have carefully considered. The only issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application.

6. Sections 79G and 95 of the Civil Procedure Act stipulates as follows:

79G. 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 or orders 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.

Section 95 provides thus

95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

7. Order 42 Rule 6 of the Civil Procedure Rules stipulates as follows.

Stay in case of appeal.

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

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

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

Delay

8. In the present case, the judgment whose execution the applicant seeks to stay was delivered on 23rd March 2017 and the instant application filed more than 2 years later on 12th September 2019. The applicants faulted their previous advocates on record for the failure and the delay in the filing of the appeal. Courts have taken the position that mistakes by an advocate should not be visited on the client. This was the finding in *Lucy Bosire v Kehancha Division Land Dispute Tribunal & 2 others* [2013] eKLR wherein it was held:

“It is true that where the justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined in its merits. See Philip Keipto Chemwolo & Another vs Augustine Kubende [1986] KLR 492; [1982-88] I KAR 1036 at 1042; [1986-1989] EA 74.”

9. Guided by the dictum on the above cited case, I find that the applicants herein should not be punished for the mistakes/inadvertence of their lawyers and that the explanation given for the delay is plausible.

Substantial loss

10. I note that the judgment/decreed which the applicants intend to appeal against is for the sum of Kshs 1,877,827. The applicants did not address this court on the loss, if any, that they will suffer if they paid decretal sum or if the respondent herein is a man of straw such that he will not be able to refund the decretal sum to the applicants should the appeal be successful. In *James Wangalwa & Another v Agnes Naliaka Cheset*, [2012] eKLR it was held: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect

or negate the very essential core of the applicant as the successful party if the judgment is set aside. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein Vs Chesoni..... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. In the instant case, I find that the applicants have not demonstrated that they will suffer substantial loss of stay is not granted.

Security for costs.

12. The applicants did not offer any security for costs in the application or affidavit in support thereof. However, at the hearing of the application. Mr. Kinyanjui, learned counsel for the applicants submitted that the applicants will abide by any orders that the court will make on security for costs.

13. Having regard to the circumstances of this case and notwithstanding my finding on the issues of delay and substantial loss, I note that courts have taken the position that in applications for stay of execution pending appeal, it is necessary to balance the interests of the applicant/judgment debtor to its right of appeal and the respondent/decree holder, to the fruits of his judgment. In effecting this delicate balance, I will allow the instant application on the following terms:

a) The applicant is granted leave to appeal, out of time, against the whole judgment and decree of the Chief Magistrate’s court delivered on 23rd March 2017 in Milimani CMCC 1769 of 2011.

b) The said appeal shall be filed and served within 30 days from the date of this ruling.

c) There shall be stay of execution of the judgment/decree of the Chief Magistrate court delivered on 23rd March 2017 in Milimani CMCC 1769 of 2011 pending the hearing and determination of the appeal on following conditions:-

i. That the applicants shall pay the respondents half of the decretal sum being Kshs. 870,000 within 30 days from the date of this ruling

ii. That the balance of the decretal sum (Kshs 870,000/=) to be deposited, within 30 days from today’s date, in a joint interest earning account to be held by counsel for both parties in a banking institution of repute.

iii. In the event of failure to comply with orders in C (i) and C(ii) hereinabove, orders of stay of execution issued hereinabove shall lapse and the respondent shall be at liberty to proceed with the execution.

d) I grant the respondents the costs of this application.

Dated, signed and delivered via Microsoft Teams at Nairobi this 11th day of June 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Baraza for Allen Kinyanjui for applicant

Mr Nyakiandana for respondent

Court Assistant: Sylvia