



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. APPLICATION NO. 120 OF 2018

KHAN MUNEEER.....1ST APPLICANT

ROBERT DEMBA OPIYO.....2ND APPLICANT

VERSUS

MOSES ANGEHI ELEGERIZO.....RESPONDENT

RULING

1. For determination is a Motion filed on 6th June, 2018 and brought under section 79 G of the Civil Procedure Act firstly seeking an order for the enlargement of time within which the Applicants may file an appeal against the judgment delivered on 22nd January, 2018 in **Limuru SPMCC NO. 278 of 2015**. There is an additional prayer to stay execution pending the determination of the appeal.

2. The application is supported by the affidavit of **Catherine Njogu**, advocate and is based on grounds that the advocates' firm handling the matter on behalf of the Applicants had been instructed by the Applicants to lodge an appeal against the above judgement; that however the counsel seized with the conduct of the case subsequently left the advocates' firm ; and that it was only on 21st May 2018 when it was realized that no appeal had been filed.

3. Moses Angehi Elegerizo, the Respondent opposed the motion by swearing a replying affidavit. He contended that the application is devoid of merit and intended to frustrate the realization of the fruits of his judgment. Other depositions addressed the prayer for stay of execution contained in the motion.

4. The application was canvassed by way of written submissions. For their part, the Applicants relied on the considerations set out in **Mwangi v Kenya Airways Ltd. (2003) e KLR** and submitted that the application satisfied these conditions. The Applicants also urged the prayer for stay of execution pending appeal, citing among others the case of **Butt v The Rent Restriction Tribunal Civil Application No. Nai 6 of 1979** and the provisions of Order 42 rule 6 of the Civil Procedure Rules.

5. The Respondent took the position that there was no merit in the motion and arguing that the Applicants had not demonstrated the likelihood of sustaining substantial loss if stay of execution was denied. Concerning enlargement of time, the Respondent asserted that the delay of four months had not been satisfactorily explained. The Respondent asserted that the application had not been brought within the principles enunciated in **Leo Sila Mutiso v Rose Hellen Wangari (C.A. NAI No. 255 of 1977) (UR)**.

6. The court has considered the application in light of the parties' respective affidavits and submissions. Section 79G of the Civil Procedure Act provides that:

“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 order 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.”

7. The successful applicant must demonstrate **“good and sufficient cause for not filing the appeal in time.”** In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari material* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“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 general the matters which this court takes into account in deciding whether to grant an extension of time

are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

8. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor.

9. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;

6. Whether the application has been brought without undue delay.

7.”

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR.**

10. The Applicants attributed the delay in filing the appeal to the departure of counsel handling the matter from the law firm. Although no details thereof are supplied, it is not altogether an unreasonable explanation. The delay in this case is about four months. It is not inordinate. The draft memorandum of appeal attached to the supporting affidavit appears to raise arguable points. The Respondent views the application as made in bad faith to frustrate the fruits of his judgment. While undoubtedly the delayed settlement of his decree may cause him some inconvenience, such prejudice must be balanced against the Applicants’ right to appeal and can be compensated through costs and interest accruing on the decretal sum in the event he succeeds on appeal.

11. In the circumstances of this case, the Court is persuaded to grant the prayer for enlargement of time for filing of appeal. Such appeal is to be filed within 14 days of this ruling. However, the prayer for stay of execution pending appeal cannot succeed. Pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, the existence of an appeal is a condition precedent to the granting of an order for stay of execution pending appeal under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules.

12. Costs are awarded to the Respondent in any event.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 16TH DAY OF JULY 2020.

C. MEOLI

JUDGE