



REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA AT SIAYA

MISCELLANEOUS CIVIL CASE NO. E1 OF 2020

DUNCAN ONYANGO ODERA.....APPLICANT

VERSUS

MARY ADHIAMBO WASONGA.....1ST RESPONDENT

ELIUD OTIENO ODINGO (suing as the legal representative of the estate of)

BERNARD OOKO OTIENO ALIAS

BENARD OTIENO ODERO (deceased).....2ND RESPONDENT

RULING

1. By an application dated 10th September 2020 and filed in court on the even date under the Recess (High Court Recess Rules), and under certificate of urgency issued on 11/9/2020 by the duty Judge Hon. F.A. Ochieng of Kisumu High Court, the applicant Duncan Onyango Odera seeks for stay of all proceedings, Ruling dated 30/7/2020 and all the consequent orders emanating therefrom in Siaya PM Civil Suit No. 89 of 2019 pending hearing and determination of the intended appeal. The applicant further prayed for leave to be granted to appeal out of time against the Ruling delivered on 30/7/2020 by Hon. J.O. Ong'ondo, Principal Magistrate dismissing the applicant's application dated 30/6/2020. The applicant also sought for any other orders that may be just and expedient in the interest of justice and that costs of the application be in the cause.
2. The application is premised on the grounds on the face of the Notice of Motion and supported by an affidavit sworn by Isabella Nyambura on 9/9/2020 reiterating the grounds.
3. The Application was opposed by the Respondents herein Mary Adhiambo Wasonga and Eliud Otieno Odindo (suing as Legal Representatives of the Estate of Bernard Ooko Otieno alias Bernard Otieno Odero (deceased)), through a Replying affidavit sworn by Mary Adhiambo Wasonga, the first applicant herein, which Replying affidavit is sworn on 17/9/2020.
4. The Applicant's case as set out in the grounds and supporting affidavit and as argued through written submissions as filed canvassing Notice of Motion is that the matter before the trial court proceeded *ex parte* and proceeded by way of formal proof and on 20/2/2020 the lower court delivered final judgment. Subsequent thereto, a consent was entered into between the Respondent's counsel on record and the Applicant's counsel, setting aside the said *ex parte* judgment, conditional upon the Applicant herein paying Kshs. 35,000/= as thrown away costs and depositing into court a further sum of Kshs. Two Million, Five Hundred Thousand Kshs. 2,500,000, within 30 days of 10/3/2020. The consent was filed in court on 10/3/2020 meaning it was to be complied with by 10/4/2020.
5. According to the applicant's counsel, they deposited the consented amounts into the Respondent's counsel's account on 29/5/2020 which was outside the 30 days consented to and the explanation given is that the delay was occasioned by covid-19 pandemic which frustrated the applicant/Defendant.
6. It is also asserted that the delay thereof was occasioned by the Defendant/applicant's counsel which should not be visited upon the client/litigant given the circumstances.
7. The applicant also deposes that despite the delay as explained above, there was compliance with the consent but that the Respondent, sought to execute decree issued *ex parte* for recovery of the entire decretal sum in excess of 9 million.
8. The applicant's counsel did file an application seeking to vary the consent and for enlargement of time within which the consent ought to have been complied with which application dated 30/6/2020 was heard *inter partes* and vide a Ruling delivered on 30/7/2020, Hon. Ong'ondo, PM dismissed the said application for enlargement of time thereby exposing the applicant to execution of the *ex parte* decree.

9. The applicant was aggrieved by that Ruling of 30/7/2020 and believed that her advocates on record had orally sought before the trial court and obtained leave of the lower court to appeal against the said Ruling.
10. The applicant however, alleges that her counsel got wrong information from the advocate Mr. Ochieng who held their brief on the ruling date and who advised them that leave had been granted only for the advocates upon perusal of the court file and seeing the Respondent's response which was after they had filed an appeal, to discover that no such leave had been obtained or granted by the lower court.
11. The applicant's counsel therefore withdrew the appeal and filed this application to regularize the record; and by the time the current application was made, 30 days for filing of an appeal had already lapsed.
12. The applicant laments that unless the orders for leave to appeal out of time are granted, she stands to be condemned unheard which is contrary to the basic tenets of justice.
13. Concerning the order of stay granted, it is deposed that unless stay sought is granted, the Respondents will execute decree which will render the application herein and the intended appeal nugatory.
14. The applicant further deposes that she will be greatly prejudiced if execution issues and that she is willing to abide by such reasonable conditions that the court may impose so that she is accorded an opportunity to be heard in the main suit on its merits by considering the consent as having duly been complied with. It was asserted that the Respondents would in no way be prejudiced by the orders sought herein as they can be compensated by way of reasonable award of costs.
15. It was asserted that this court has power to enlarge time within which to comply with the terms of the consent which terms were fulfilled albeit outside the stipulated consented to timelines due to the covid-19 pandemic.
16. Opposing the application for stay and leave to appeal out of time, the Respondents filed a Replying affidavit sworn by Mary Adhiambo Wasonga on 17/9/2020 together with written submissions which were adopted as opposing the applicant's application. According to the Respondents, the consent dated 10/3/2020 having been adopted as the order of the court and having provided for consequences of non-compliance with Clause 1(a) and (b) thereof on timelines of depositing of thrown away costs of Kshs. 35,000/= and part of the Exparte decretal sum amounting to Kshs. 2,500,000/=, the exparte judgment would revert.
17. The Respondents were firm that the applicant having defaulted on the consent of 10/3/2020, the exparte judgment which had been conditionally set aside automatically reverted. Reliance was placed on **CA 293/2014 Board of Trustees National Social Security Fund Vs Michael Mwalo** where the Court of Appeal held that a consent judgment would not be amenable for varying except in circumstances such as would provide a good ground for varying or rescinding a contract between parties and further that to impeach a consent order or judgment, it must be shown that it was obtained by fraud or collusion or by agreement contrary to the policy of the court.
18. The Respondent supported the decisions of the trial court declining to interfere with the consent and in dismissing the application for enlargement of time to comply with the terms of the consent Order dated 10/3/2020.
19. Further contention was that as the judgment of 20/2/2020 had reverted due to non-compliance with the consent order; and that as the applicant does not seek to set aside that judgment which is in place, this application ought not to be allowed.
20. The Respondent urged this court to dismiss the Notice of Motion dated 17/9/2020 with costs.
21. The written submission by the Respondents are a reiteration verbatim of the depositions in the Replying affidavit hence it would be superfluous to reproduce them here save that they are considered as reiterating the depositions opposing the application by the applicant.
22. In her written submissions dated 24th September, 2020, the applicant through her counsel Ms. Kimondo Gachoka & Company Advocates submitted relying on **Halai & another vs Thornton & Turpin (1963) LTD [1990] KLR 365** cited in **Industrial Cause No. 1715 of 2011 Elena Doudoladova Korir v Kenyatta University [2014]e KLR** where the Court of Appeal at Nairobi held that:

“the high Court's discretion to order for a stay of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”
23. The applicant's counsel submitted that she had made the above conditions for stay pending appeal. It was submitted that on substantial loss, the appeal as intended is meritorious and arguable with high chances of success and that as the case in the lower court proceeded exparte, if execution is allowed to proceed, the applicant will suffer as the appeal shall be rendered nugatory as the applicant will have been condemned unheard against the tenets of justice and rule of law.
24. It was further submitted that the application had been filed without unreasonable delay as the impugned ruling was delivered on 30/7/2020 and the applicant moved to this court seeking leave to appeal out of time and that the reasons for delay have been explained by the supporting affidavits and grounds on the face of the application.
25. The applicant's counsel also submitted that their client was willing to furnish security as may be ordered by this court and that the Kshs 2.5 million already deposited in court secures the Respondent's decree in exchange for decree pending appeal as intended.
26. It was further submitted that as the appeal as intended is arguable and with high chances of success, execution of decree will render the

said appeal nugatory and the applicant will suffer irreparable loss and damage since she shall be condemned unheard. The court was urged to balance the rights of parties and grant the orders sought in the interest of justice.

DETERMINATION

27. I have considered the Notice of Motion dated 17/9/2020, the grounds thereof, supporting affidavit and annexures and submissions in support thereof. I have given equal consideration to the opposing affidavit and submissions by the Respondent's counsel. The main issues, in my humble view, for determination in this application are two:

(1) whether this court should grant leave to the applicant to appeal out of time the Ruling of the trial court delivered on 30/7/2020 dismissing the applicant's application for enlargement of time to comply with terms (read 'timeliness') set out in the consent dated 10/3/2020 which was adopted as an Order of the court on 10/3/2020.

(2) Whether this court should order for stay of proceedings, Ruling dated 30/7/2020 and execution of decree in Siaya PM CC 89/2019 pending hearing and determination of the intended appeal.

28. ***On whether this court should grant leave to the applicant to appeal out of time;*** the commencement point is the legal position. The Notice of motion dated 10/9/2020 filed under Certificate of Urgency is specifically brought under the provisions of Sections 1A, 3A & 75 of Civil Procedure Act, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Order 42 Rule 6 and Order 43 Rule 1(2) of the Civil Procedure Rules; Article 159(2)(d) of the Constitution of Kenya and all other enabling provisions of the law.

29. It should however be noted that none of the provisions above cited relate to leave to appeal out of time. The cited provisions being Section 75 of the Civil Procedure Act relates to leave to appeal from an order as opposed to leave to appeal out of time. The procedural Rules to Section 75 of the Civil Procedure Act is Order 43 of the Civil Procedure Rules which lists the a-z, orders from which automatic appeal lies and any provision that is not set out thereunder means that for one to appeal from an order, one has to seek leave of the trial court (not appellate court to appeal).

30. In the instant case, the order sought to be appealed from is one dismissing the applicant's application for enlargement of time. A reading of Section 75 of the Civil Procedure Act and Order 43(1)(y) of the Civil Procedure Rules clearly reveals that one can appeal from an order made pursuant to an application for enlargement of time which falls under Order 50 Rule 6 of the Civil Procedure Rules.

31. That being the case, the applicant did not have to belabour seeking leave of the trial court to file an appeal from the Ruling of 30/7/2020 as an appeal from an order declining to enlarge time under Order 50 Rule 6 of the Civil Procedure Rules is a matter of right.

32. Furthermore, where no right of appeal would automatically lie. the trial court and not this court would be clothed with relevant jurisdiction to grant such leave to appeal.

33. However, the applicant's application appears to be trying to confuse this court into granting leave to appeal and not necessarily leave to appeal out of time. This is so because Section 79G of the Civil Procedure Act is clear that an appeal from the judgment or Order of the lower court to the High Court lies within 30 days from such order/judgment/decre. However, the proviso thereof is clear that where such period of 30 days has elapsed before filing such appeal, then this court is empowered, on application, and for sufficient cause being shown by the applicant, to extend such time for filing of an appeal out of time.

34. In this case, the applicant's counsel was confused between several positions of the law. They appear to be unsure whether an appeal lies as a matter of course from the Ruling sought to be impugned while at the same time, they are seeking to appeal out of time to cover both leave to appeal and leave to appeal out of time.

35. Having found that an appeal to this court from a ruling concerning enlargement of time lies as a matter of right, the question that I must answer, quite substantially is whether the applicant, having failed to file such appeal within 30 days of 30/7/2020 as stipulated in Section 79G of the Civil Procedure Act, deserves extension of time (pursuant to the proviso to Section 79G of the Civil Procedure Act) to lodge such an appeal.

36. The applicant has explained that counsel who held briefly on 30/7/2020, Mr. Ochefu was instructed to seek leave to appeal from the unfavourable Ruling but he did not, and misled counsel for the applicant that he had obtained such leave. As a result, an appeal was allegedly filed but that upon realization that the same was filed without leave, they withdrew the appeal from court.

37. The above position confirms my finding that counsel for the application did not do their homework to establish whether their client had an automatic right of appeal from the Ruling of 30/7/2020 or whether they required leave to appeal from the said ruling.

38. I have nonetheless clarified that such automatic right of appeal does exist under Order 43 of the Civil Procedure Rules and Section 75 of the Civil Procedure Act.

39. And having so found, I observe that the applicant's counsel did not have to withdraw the appeal which was filed within time (30 days of 30/7/2020) but withdrawn, quite erroneously.

40. Nonetheless, there is no appeal pending in court therefore I will proceed to determine the question of whether the applicant deserves the discretion found in Section 79G of the Civil Procedure Act to be granted leave to appeal out of time.

41. As earlier stated, the reasons for filing this application is due to confusion and ignorance on the part of the applicant's counsel. They

should have proceeded to process the appeal as filed but which they later withdrew. In the intervening period, the time for filing of the appeal lapsed.

42. Section 79G of the Civil Procedure Act provides: -

“Time for filing appeals from subordinate courts:

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.”

43. In the instant case, what clearly emerges is that the applicant had an automatic right of appeal from the Ruling of 30/7/2020 dismissing her application for enlargement of time to comply with the terms of consent dated 10/3/2020. However, his counsel went round the process trying to understand whether or not the order was appellable as a matter of cause until the time for filing of such appeal lapsed on 30/8/2020 hence this application.

44. Although the Respondent’s counsel’s vehement opposition to the application focuses on the merits and demerits of the intended appeal, the view of this court is that delving into the depths of the merits or demerits of the intended appeal amounts to pre-determining the appeal which then prejudices each of the parties’ positions and therefore determining a non-existent appeal. It suffices to state that the question of whether the trial court and therefore this court as a first appellate court has jurisdiction and power to enlarge time for complying with the terms of the consent dated 10/3/2020 which compliance is alleged to have been affected or frustrated by the outbreak of covid-19 pandemic is an arguable one and not a frivolous question that this court would be glad to determine on its merits once the appeal is admitted on record.

45. For now, the only thing that this court can do is to determine the merits or demerits of an application for leave to appeal out of time. In doing so, having regard to the facts disclosed in this application, the question is whether the applicant has satisfied this court that he has good and sufficient cause for not filing the appeal in time, as contemplated in Section 79G of the Civil Procedure Act (the proviso thereof).

46. *What does ‘good and sufficient cause mean?’* In **HCC 19/2013 originating summons between FWMN Vs SMM**, the High Court at Nairobi citing the Court of Appeal of Tanzania in the case of the **Registered Trustees of the Archdiocese of Dar es Salaam Vs The Chairman Bunju Village Government & Others** where the court discussed what constitutes sufficient cause stated:

“It is difficult to attempt to define the meaning of the words, ‘sufficient caus. It is generally accepted, however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant.” (Emphasis added). In **Daphene Parry V Murray Alexander Carson**, the court stated:

“Though the court should no ‘doubt’ give a liberal interpretation to the words ‘sufficient cause’, its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy...”

47. From a reading of Section 79G (proviso) of the Civil Procedure Act, the power of the court to allow an application for filing of an appeal out of time is a discretionary power. In exercising judicial discretion, the court’s concern is to do justice to the parties and in doing so, the court will not impose considerations on itself to fetter the wide discretion given to it by the Rules.

48. Thus when deciding whether there is good and sufficient cause, or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on decision impugned before it. (See **Parimal Vs Veena**). In **Attorney General Vs the Law Society of Kenya & Another C.A. (Appl. No. 133 of 2011 VR, Musinga, J.A stated:**

“sufficient cause or good cause in law means:

“...the burden placed on a litigant (usually by court, rule or order) to show why a request should be granted or an action excused.”

49. As earlier stated, the applicant has claimed that it was mistake of counsel that led to the delay in filing the appeal, which ‘appeal’ was initially filed but withdrawn because no leave of the lower court to appeal had been sought and obtained.

50. No doubt, no such leave was initially required as explained above. However, this court is satisfied that counsel for the applicant confused the difference between leave to file an appeal from the Ruling of 30/7/2020 and Leave to appeal out of time. Having so failed to appreciate the wide differences, they delayed in filing the appeal, which I find was a mistake of counsel going round the law and as a result prejudicing the client.

51. In my humble view, this is a case where this court can exercise discretion to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, as there is no evidence that the applicant has invoked the discretion of this court with a view to deliberately assisting the applicant who has sought, by evasion or otherwise to obstruct or delay the case of justice (see **Shah V Mbogo**).

This is because the applicant has not come to court after unreasonable delay and even if that were to be case, the delay has been adequately explained to the satisfaction of this court.

52. ***In addition, the intended appeal is not frivolous. For the above reasons, I hereby allow the applicant's application and grant him leave to file his appeal from the Ruling of 30/7/2020 out of time.***

53. ***The said appeal as intended shall be filed and served within seven (7) days of the date of this Ruling.***

54. On the second issue of whether this court should grant stay of Execution of decree of the lower court or proceedings or Ruling of 30/7/2020, I observe that the consent dated 10/3/2020 was to be complied with by 10/4/2020. The applicant complied with the consent on 12/6/2020 by paying into court Kshs. 2,500,000/= and to the Respondent's counsel thrown away costs of Kshs. 35,000/= as ordered by the trial court adopting the filed consent between the parties on 10/3/2020. This was done out of time and hence the request before the trial court for enlargement of time. The decretal sum in the lower court was Kshs. 9,853,024 inclusive of costs and interest.

55. In my humble view of the Respondent is left to execute the decree to recover Kshs. 9,853,024 before the intended appeal is heard and determined, it will defeat the whole purpose of the appeal which will be rendered nugatory and the applicant will be rendered a pious explorer in the judicial process.

56. The purpose of stay of execution of decree pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the applicant, as the appeal would be rendered nugatory if there is no stay.

57. The decretal sum now amounting to over 10 million inclusive of interest and costs in my humble view, is a substantial sum which if paid out to the Respondents and the intended appeal succeeds, there is no guarantee on the part of the Respondents that they are in a position to refund the whole amount considering the fact that the consent of 10/3/2020 only allowed depositing of Kshs. 2,500,000/= into court to allow setting aside of ex parte judgment so that the suit as filed can be heard and considered inter partes and on its merits. In **Stanley K. Wainaina & Another V Ridon Anyangu Mutubwa [2016] eKLR** the court held that the onus is on the Respondent to prove that he is able to refund the decretal sum were the applicant to succeed on appeal.

58. As was correctly held in **Kenya Hotel Properties Ltd Vs Wilesden Properties Ltd, Civil Application No. Nai 322/2006 - and reiterated in HFCK V Sharok Kher Mohammed Ali Hirji & Another [2015] eKLR**, even in an application involving a money decree a stay of execution pending appeal may be granted so as to alleviate any undue hardship the applicant would suffer if stay is refused.

59. Albeit the impugned Ruling was made on 30/7/2020 and this application was filed on 10/9/2020, this court has already pronounced itself that the delay is explained to the satisfaction of the court and it is not, in any event, inordinate.

60. In **Florence Hare Mkaha Vs Pwani Tawakal Mini Coach & Another [2014] eKLR** the court allowed an application for stay of Execution pending appeal which application was lodged nearly one year after the impugned judgment.

61. In my humble view, the application was made without unreasonable delay, the applicant has offered to deposit security as required under the rules and already Kshs 2.5 million is in court as earlier deposited. The argument that the judgment of the lower court already reverted after noncompliance with the consent is neither here nor there as this court has power to stay execution of that judgment and decree on terms herein set.

62. On furnishing of security for the due performance of decree, Order 42 Rule 6(2) of the Civil Procedure Rules places on the court the duty to ensure this is done by the party seeking for stay of execution.

63. The applicant in those proceedings is ably represented by counsel appointed by the Insurance Company, to protect his and their interests. The respondents too are entitled to equal treatment and protection of the law. I however, observe that Kshs. 2,500,000/= is already deposited in court pursuant to the consent of 10/3/2020 which sum can serve as security. Nonetheless, this court has power to make other further orders to ensure the interests of both the Respondent and the appellant as intended are protected.

64. ***For that reason, I hereby allow the prayer for stay of execution of decree pending the filing and prosecution of the intended appeal conditional upon the applicant depositing into this court a further sum of Kshs. One million Five hundred Thousand (1,500,000) as security within 14 days of the date hereof and in default, the stay granted to lapse.***

65. ***The Applicant shall also bear costs of this application assessed at Kshs. 40,000/= payable within 14 days of today to the respondent's counsel and in default, leave to execute for recovery is granted.***

66. Orders accordingly.

Dated, signed and delivered at Siaya this 14th Day of October, 2020

R.E. ABURILI

JUDGE