



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC CIVIL APPLICATION NO. 137 OF 2019

KIONYO TEA FACTORY CO. LTD.....APPLICANT

VERSUS

MURITHI MWANGI.....RESPONDENT

RULING

1. The significant orders sought by **Kionyo Tea Factory** (*the applicant herein*) in the application dated 6th December 2019 are:

a. Leave to file appeal out of time; and

b. Stay of execution of the Judgement/Decree in Nkubu Cmcc No. 16 of 2015 Murithi Mwaniki vs Kionyo Tea Factory.

2. The application was supported by the sworn affidavit of **Leonard Cherere**, their Managing Director. He averred that the applicant was dissatisfied with the trial court's decision and in consultation with the Kenya Tea Development Agency, it was agreed that an appeal be filed against the judgement delivered on 19th September 2019. The applicant believed that Kenya Tea development Agency would instruct an advocate to pursue the appeal. But, on 4th December 2019 it came as a surprise to the applicant when the Respondent agents proclaimed their movable properties.

3. It was then that they realised that the appeal was not filed and they immediately instructed advocates to pursue the appeal. It was their contention that disallowing the application will drive away the applicant from the seat of justice.

4. In relation to the application for stay of execution, the applicant averred that it will not be able to recover the sum from the Respondent as he has no known assets and as a result the appeal shall be rendered nugatory. That they are ready and willing to offer reasonable security for satisfaction of any resultant decree.

5. The respondent on their part submitted that the application is not supported by any affidavit from Kenya Tea Development Agency. That the applicant has not disclosed the source of such information. That the applicant was awoken from his slumber two days after the auctioneers visited his premises. That the delay in bringing the application has not been explained. That applicants have been indolent and to allow the application at this stage will be prejudicial to the respondents who has all along been active and diligent to enjoy the fruits of their lawfully obtained judgement.

Submissions

6. On 2/6/2020 this court directed the parties to canvass the appeal through written submissions. Both parties have since filed their respective submissions reiterating their averments. The appellant cited the following authorities in support of their submissions i.e **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another [2018] eklr**, **Magnate ventures v Simon Mutua Muatha & another [2018] eklr**.

7. The Respondent equally relied on the following authorities; **Meru- Misc Application No. 102 of 2006 Gerald Mwirigi M'Mbui versus M'Mbui Mwiricha & Anor**, **Meru Misc Application No. 183 of 2009 Joseline Kinanu Muriungi (Sued as the legal representative and administrator of the estate of Stanley Michieni) versus Aniceta Kajuju**, **Meru Misc Application No. 45 of 2013 Benjamin Gakula Mutua versus Geoffrey Nthuku Mutia**, **Meru Civil Appeal No. 9 of 2015 Abbas Adan Kala versus Jama Adan Jaldesa (Suing as the legal representative of Adan Jaldesa Adiko**, **Misc Application No. 60 of 2018 Laare KAMUKUNJI Stores Limited versus Charity Kaiyanania & Anor**.

Analysis and Determination

8. **Section 79G of the Civil Procedure Act** and more particularly, the proviso thereto is the guiding law on filing of appeals. It provides as follows:

“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.”

9. Enlargement of time to file appeal or admission of appeal out of time is at the discretion of the court. However, judicial discretion is not exercised anyhow. It is exercised upon defined principles of law. In **Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others, [2014] eKLR** the court stated the under-lying principles and considerations in the exercise of discretion in extension of time as follows:-

- 1. Extension of time is not a right of a 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 on 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 respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

10. The trial courts determination was delivered on 19th September 2019. The appellant ought to have filed its appeal by or on 18th October 2019. It filed its application on 6th December 2019. This was 2 months after the time of filing the appeal had lapsed. The applicant placed fault on Kenya Tea Development Agency, contending that they had agreed to instruct an advocate to file an appeal but they failed to do so. This averment was however not supported by any affidavit from the aforesaid Kenya Tea Development agency. Again, the capacity of the KTDA in relation to the appellant and these proceedings was not stated so as to render credence to their argument that they expected KTDA to instruct counsel to file appeal. I am aware that the position of KTDA in such matters is under judicial scrutiny for now. Therefore, the less I say about that aspect, the better. The said averment therefore remained hearsay and unsubstantiated.

11. Although there is no mathematical precision scale to measure inordinate delay, the circumstances of the case should be able to tell if the delay is beyond limits that the court may excuse. In **Addas Adan Akula (supra)** the court found 3 months to be inordinate delay. It also held that the deponent was not the best persons to have filed the affidavit in support of the application. It was observed that had the applicant and the counsel made an affidavit, perhaps they may have shed light to the court why the appeal had not been filed in time. In **Benjamin Gakula Mutua (supra)** the applicant had alleged that he was medically ill hence could not file the appeal on time. The court found that the author of the medical report did not attach any treatment notes. It found the documents wanting and short of giving reasonable explanation for the delay. Further in **Laare Kamukunji Stores Limited (supra)** the court held that no reasonable explanation had been offered to the delay in filing the application 16 days after the time had lapsed. It found the period as being inordinate.

12. Taking into account the time the applicant took to file the application for enlargement of time, and the reasons given for the delay, I find the delay to be inordinate.

13. I wish to distinguish the case cited by the appellant, i.e. **Samuel Mwaura (supra)**. In the said case, the application was filed barely a month after the time had lapsed. The applicant had also made a request for supply of the proceedings.

14. I have considered the grounds raised in the draft memorandum of appeal. The appellant did not however attach a copy of the judgement. Nonetheless, purely in deference to their right of appeal, I will allow them to file appeal in 30 days.

15. Before I close, I should state that the Respondent claim in the trial court arose in the year 2013. He now has a judgment. He is entitled to immediate enjoyment of the fruits thereof. Noting has been established which should keep him away from enjoying the fruits of his judgment. It has not been shown that substantial loss would occur upon the applicant. The applicant merely stated that the decretal sum if large and that the respondent may not be able to refund as he has no known assets. This averment was not substantiated especially given the fact that the respondent is a member of the appellant. I also note two important things; (1) that the delay herein was not explained by the applicant; and (2) I only allowed them to file appeal purely in deference to the right of appeal. Accordingly, I decline to order stay of execution.

16. In the upshot, the application partially succeeds as stated above. Each party shall bear own costs.

Dated, signed and delivered at Meru this 7th day of October 2020

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F. GIKONYO

JUDGE

Representation

M/s Muriithi for applicant

Kiogora Arithi for respondent – absent

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F. GIKONYO

JUDGE