



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL MISC. APPLICATION NO. 84 OF 2019

NAIPOSHA LITILUU.....APPLICANT

VERSUS

ROBERT KAMAU GIKONYO.....RESPONDENT

RULING

1. By a motion dated 11th December 2019 and filed on the same day, the applicant sought two prayers. First that he be granted leave to appeal out of time, and two, that there be stay of execution of the judgment delivered on 1st October 2018 in CMCC No. 191 of 2011, pending the hearing and determination of the intended appeal.
2. The motion is brought under sections 3A, 63(e) and 79G of the Civil Procedure Act, (Cap 21 Laws of Kenya) and Order 51 Rule 11 of the Civil Procedure Rules, 2010 and all enabling provisions of the law.
3. The motion is premised on the grounds on its face and the applicant's affidavit sworn on 26th November 2019. According to the grounds and affidavit, the applicant judgment was delivered on 1st October 2018 but his advocate came to know about the judgment on 4th December 2018 after lapse of the time allowed for appealing. The applicant states that his intended appeal has high chances of success and that he should not suffer injustice due to faults not of his own as failure to file appeal on time was occasioned by the court not informing of his advocate the date for delivery of judgment. He also states that the respondent will not suffer any prejudice.
4. In the affidavit the applicant deposes that the case was heard on diverse dates between 2017 and 2018 and was fixed for mention on 10th July 2018 on which date the trial court (Hon. Chesang) told parties that she no longer had jurisdiction to hear the matter. The applicant further states that on 29th August 2019 the Chief Magistrate (Hon. Shitubi) directed the trial court to proceed with the matter and deliver judgment.
5. According to the applicant, the trial court delivered judgment on 1st October 2018 without notice to parties and thereafter proceeded on transfer. His advocate later requested for a copy of the judgment but it was not typed. He again applied for proceedings and judgment on 28th January 2019. He states that lapse of period of appeal should not be blamed on him.
6. The respondent filed grounds of opposition dated 4th February 2020 and filed on 5th February 2020. He contends that the applicant is guilty of unreasonable delay; that she has not demonstrated that her appeal has chances of success; that she has not complied with Order 42 Rule 6(2) and that she has not demonstrated the loss she will suffer this being a money decree. He also states that it will deny him enjoyment of fruits of his judgment.
7. During the hearing of the motion, Mr. Ochako counsel for the applicant, moved the motion and urged the court to grant it. He reiterated the grounds on the face of the motion and the depositions in the supporting affidavit. There was no representation on the part of the respondent though his advocate had been served.
8. I have considered the application, the supporting affidavit and the response thereto, I have also considered submissions by counsel for the applicant. The motion seeks leave to file appeal out of time. The motion is predicted under sections 3A, 63(e) and 79G of the Civil Procedure Act.
9. The judgment sought to be appealed against was delivered on 1st October 2018, while the application for leave to appeal and stay of execution was made on 11th December 2020.
10. The applicant has urged the court to exercise its discretion and grant both leave to appeal and stay of execution. The respondent on his part has opposed grant of both orders, arguing that the applicant has not shown good reason why the application should be allowed and is guilty of inordinate delay.

Leave to Appeal

11. The law grants every person who is aggrieved with a judgment, the right of appeal. Section 65 of the Act allows appeals from subordinate courts to this court. On the other hand, section 79G sets the time within which an appeal to this court should be filed. It provides:

“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.”

12. It is plain that section 79G gives the court discretion to extend time within which to lodge an appeal should there be good reason or sufficient cause to do so. Decisions are also clear that the court’s discretion to extend time for appeal may be granted on certain where the court is satisfied that it is just to do so. Just like the proviso to section 79G, the decisions emphasize the principle that an applicant must satisfy the court that he had good and sufficient cause for not filing his appeal on time. The court should always exercise its discretion judiciously.

13. The judgment to be appealed against was delivered on 1st October 2018. The applicant argues that judgment was delivered without notice to parties. His advocate learnt of the judgment in December 2018 and he tried to get proceedings to enable him file his appeal but could not do so because the trial court proceeded on transfer and they could not get proceedings on time.

14. The applicant has attached a copy of letter dated 28th January 2019 applying for copies of typed proceedings and judgment. He has not however stated when he finally got the typed proceedings.

15. I have considered each party’s arguments on this limb. As already stated, the law grants the applicant a right of appeal. He was to file his appeal within thirty days but he did not. He has blamed the court for not informing him the date of delivery of the judgment and got to know about the judgment after time for appeal had lapsed. He also blames the court for not supplying him with proceedings to enable him file his appeal. The respondent has not argued that he date for delivery of judgment was communicated to parties and, if so, when.

16. That notwithstanding, the law gives this court wide discretion when it comes to extension of time to appeal. However, when exercising this discretion, the court should try and render substantive justice to parties. This will be achieved if the court allowed the applicant to challenge the impugned judgment even though he could not say when he got proceedings to enable the court determine whether the application suffers from inordinate delay.

17. I also note that the respondent has not stated what prejudice he will suffer if leave is granted to meet the ends of justice. For that reason, it is my view that the ends of justice would be better served if leave is granted to the applicant to lodge his appeal out of time.

Stay of execution

18. The applicant has also sought stay of execution pending the filing and determination of his intended appeal. The applicant has not cited the provisions for seeking stay under the Civil Procedure Rules. He did not also depose of state in his grounds on the motion, that he will suffer substantial loss if stay is not granted. The respondent has opposed grant of stay, arguing that there was not only inordinate delay but also that there is no evidence that the applicant will suffer substantial loss in terms of Order 42 rule 6(2). The respondent further argues that he equally has a right in the judgment delivered in his favour and the court should consider this right too.

19. Whether or not to grant stay calls for exercise of discretion. There are well settled principles upon which stay should be granted. The law is clear that mere lodging of an appeal does not act as stay of execution. In that regard, Order 42 Rule 6 provides for grounds upon which the court exercises its discretion to grant or decline an application for stay.

20. First, an applicant must show that he will suffer substantial loss if stay is declined. The trial court delivered judgment in favour of the respondent for Kshs. 549,000/= with interest. The applicant has not argued that she will suffer substantial loss if stay of execution is not granted. She has also not shown how she will suffer the loss if execution proceeds.

21. In *James Wangalwa & another v Agnes Naliaka Cheseto* [2012]eKLR, the Court observed;

“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 under Order 42 Rule 6 of the CPR. 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 in the appeal....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”

22. In *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR, the Court again stated that *the only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent, that is; execution is carried out, in the event the appeal succeeds, the respondent would not be in a position to pay back or reimburse the decretal sum because he is a person of no means.*

23. In Butt v Rent Restriction Tribunal Civil App No. NAI 6 of 1979, the court of Appeal stated as follows:

i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

ii. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

24. And in Machira t/a Machira & Company Advocates v East African standard (N0. 2) (supra), the court cautioned thus:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”. (emphasis)

25. The applicant has not, apart from praying for stay, shown that she will suffer substantial loss and how that would likely be the case. It was not enough to just pray for stay without showing the substantial loss she would suffer to persuade this court to exercise its discretion in her favour.

26. As this court stated in Kenya National Highways Authority v Ahmednasir Maalim Abdullahi [2020] eKLR

“[21] It must be clear to an applicant seeking stay of execution that the law places a duty on him to demonstrate to the satisfaction of the court that he will suffer something special and that he may not be put back to the original position he was in before execution and, therefore, deserves exercise of the court's discretion in his favour.”

27. The applicant was required to go further and satisfy the court that she would indeed suffer something special that would amount substantial if stay was not granted. This, she has failed to do.

28. The applicant is also required to show that the application has been made without delay. Judgment was delivered on 1st October 2018 and the application was not made until 11th December 2019. There can be no argument that the application was made timeously. The applicant has not attempted to satisfy the court that there was good reason for not filing the application for stay timeously.

29. A party seeking the court's discretion in his favour must satisfy the court that he/she deserves that discretion. In the present circumstances, the applicant has not shown that she acted diligently. She has not shown that she is not to blame for the delay and how her plea for stay should be balanced with the respondent's right by virtue the judgment delivered in his favour. She has not shown that the respondent is an impecunious man who cannot refund the decretal sum if it was paid and that she will for that reason suffer substantial loss.

30. Having considered the application and response, and flowing from what I have stated above, the application can only partially succeed. I therefore make the following orders.

a. Leave is hereby granted to the applicant to file an appeal out of time.

b. Appeal be filed within fourteen (14) days from the date of this order.

c. The prayer for stay of execution is declined.

d. Costs of the application to abide by the result of the intended appeal.

Dated, Signed and Delivered at Kajiado this 2nd day of October, 2020.

E. C. MWITA

JUDGE