



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 146 OF 2020

SHARIFF A. ABDULLA HUSSEIN

ALWI A. HASSAN SHARIFF.....APPLICANTS/DEFENDANTS

ALI SHARIFF ALWI

VERSUS

HUSSEIN SAMBUR HUSSEIN.....RESPONDENT/PLAINTIFF

RULING

1. The application for determination before the court is the **Notice of Motion** application dated **29th July, 2020** filed by the Defendant/Applicants on **30th July, 2020**. The Application is brought under the provisions of **Sections 1A, 1B, 3, 3A, 63(e), 79G** all of the **Civil Procedure Act Cap 21, Order 42 Rule 6, Order 42 Rule 32, Order 43 Rule 2, Order 50 Rule 6** and **Order 51** of the **Civil Procedure Rules 2010** and seeks for the following orders:

a. Spent.

b. Spent.

c. That the court be pleased to enlarge time and grant the Defendants Leave to Appeal out of time against the Judgment of the Honourable Resident Magistrate J. Nyariki delivered on 24th April, 2020 in Mombasa CMCC No.319 of 2019.

d. That the Honourable Court be pleased to Stay Execution in Mombasa CMCC No.319 of 2019 pending hearing and determination of the intended Appeal.

e. That costs of this Application be provided.

2. In the grounds supporting the application, it was urged that the matter before the trial court was set down for Judgment on **6th April, 2020** but on the same date the court was not sitting owing to interruptions occasioned by **Covid-19**. However, the **Judgment** was delivered on **24th June, 2020** without any Notice and in the absence of both parties hence no opportunity to seek Stay was presented at all. The Defendant then became aware of the Judgment two and half months on **14th July, 2020** within which the time for Appeal had lapsed. As such there is necessity for enlargement of time since the Defendant/Applicants are dissatisfied with the same and as of right they should be allowed to appeal.

3. Delivery of the **Judgment** without Notice to the parties is averred to have infringed on the Applicants' right to appeal. Given that the time frame lapsed way back on **24th May, 2020**, the failure to file the Appeal within the prescribed time was not intentional but the same was attributed to the failure of the court to issue and serve **Notice** of the delivery of the **Judgment** by the trial court.

4. It was submitted that the Intended Appeal raises arguable issues with high chances of success and if Stay of Execution and enlargement of time is not granted then the Defendants/Applicants stand to suffer irreparable harm, loss and prejudice.

5. The Application is supported by an **affidavit** deposed by **Eddah Kerubo**, the Legal Counsel of the Applicant, in which she buttresses the grounds in support of the application.

6. The Respondent opposed the Application by filing a **Replying Affidavit** he swore on **19th August, 2020** on the **25th August, 2020**. According to him, the application under consideration is incompetent, misconceived, bad in law and ought to be struck out. He adds that the application is solely meant to delay the enjoyment of the fruits of his **Judgment**.

7. Further, the deponent deposed that the affidavit in support of the application was sworn by an advocate whereas it relates to contentious matters which offend the rules of practice and therefore the affidavit should be struck out. He is certain of the averments by the Applicants that the Appeal is being pursued in exercise of the insurer's right of subrogation which can only be realized after the insurer has fully compensated the insured. In the instant case, there are no payment which have been made by the insurer hence subrogation cannot be argued.

8. **Mr. Hussein** also deposed that the allegation that the Applicants were not aware of the **Judgment** is misplaced and contrary to the assertions by their advocate, no Appeal has been filed. Consequently, there is no explanation tendered to explain why the Appeal was not filed on time. All what they have done is to sleep on their rights only to be awakened by the imminent execution and the application to appeal out of time should not be allowed.

9. With regard to the prayer for Stay of Execution, it is submitted that the Applicants have not met the threshold set under **Order 42 Rule 6 (2)**. That it has not been demonstrated that substantial loss will be occasioned on part of the Applicants or any presumption that the Respondent is unable to refund the decretal sum if paid to him.

10. Lastly, it was asserted that the Applicants are coming to court without clean hands and thus undeserving the equitable orders sought.

11. Directions for disposal of the Appeal by way of written submissions to be highlighted at a future date were taken on **1st October, 2020**. The record before me reflects that both sides complied with those directions by filing their respective submissions. The Defendant/Applicants' submissions are dated **10th September, 2020** and filed on **16th September, 2020** whilst the Respondent filed his on **1st October, 2020**, dated **29th September, 2020**.

12. In their submissions, the Applicants argued **six grounds**. Firstly, they submitted that **Order 50 rule 5** of the **Civil Procedure Rules** grants the court unfettered discretion to enlarge time where a time limit has been set for doing an act. Similarly **Section 79G** of the **Civil Procedure Act** provides that the court can extend the time for filing an Appeal provided that there are plausible grounds to warrant the same.

13. In the circumstances of the instant case, it is submitted that the delay of **2^{1/2} months** was not intentional. That the same was occasioned when the trial court failed to notify the parties of the **Judgment**, a duty conferred under **Order 21 rule 1** of the **Civil Procedure Rules**.

14. It is worth noting that emphasis has been laid on the fact that **Notification** of delivery of **Judgment** touches on the integral right to be heard which a party is entitled to before it is condemned. If the Applicants are not granted the right to appeal, it is argued that they will be prejudiced since the trial Magistrate therefore failed to consider their submissions and erred in awarding the Respondent sum of **Kshs.700,000/=**.

15. According to the Applicants, the Respondent will not be prejudiced if the prayer for extension of time is allowed. In support of those submissions, reliance is placed on the cases of, **Paul Musili Wambua...Vs...Attorney General & 2 Others [2015]eKLR**, **Rose Araka Mbeche...Vs...David Kihumba Mathai [2018]eKLR**, **Ngoso General Store Ltd...Vs...Jacob Gichunge [2005]eKLR** and **Butt...Vs...Rent Restriction Tribunal [1979]eKLR**.

16. Secondly, on whether the Applicants have established a case under **Order 42 Rule 6** of the **Civil Procedure Rules** worth the grant of orders for Stay of Execution, it was submitted that the conditions were met. The third to the six issues submitted on are the prerequisite requirements on grant of orders for Stay. In that case, it was submitted that the Appellants will suffer substantial loss in the event that Stay is not granted because the Respondent has not demonstrated whether he has means of refunding the decretal sum if it is paid to him. He ought to have provided bank statements or income statements to prove the ability of refunding the said sum.

17. It was further submitted that the Application has not been made within unreasonable delay given that the **Judgment** was delivered without Notice to the parties.

18. Lastly, on whether the Applicants have offered any security, it is contended that that they (the Applicants) are willing to deposit the decretal sum in a joint interest earning account in the names of the both advocates on record. Thus, in so doing, the court will have to balance the interests of both parties.

19. In response, the Respondent submitted on three grounds namely, the Propriety of the **affidavit** in support of the application, failure to meet the threshold for grant of the orders sought and lastly on balancing the parallel propositions.

20. On the first issue, it was submitted that the deponent in the **Supporting Affidavit** sworn on **29th July, 2020**, being an advocate has sworn to contentious matters which were not in her knowledge and ought to be struck out. If then the affidavit is struck out, then the application cannot stand alone and the same ought to fail. Here the cases relied on were, **East African Foundry Works (K) Ltd...Vs... Kenya Commercial Bank Ltd [2002]1 KLR 443** and **Heywood Ochieng' Asego...Vs...**

Jackson Kimeu Mulinge & 2 Others [2013] eKLR.

21. Secondly, on whether the application meets the conditions for grant of orders for Stay, the Respondent reiterated that the Applicants must first meet the threshold under **Order 42 Rule 6** of the **Civil Procedure Rules**. It was urged that the application was made **95 days** after the delivery of **Judgment**. As such the delay is inordinate and cannot be assumed as court in the case of **Joseph Ngigi Ibare...Vs...Myovi**

James & Another [2016] eKLR, held that even a delay of two days ought to be satisfactorily explained for the court to exercise its discretion in granting leave to file Appeal out of time. For the argument, emphasis is laid on the principle that justice delayed is justice denied.

22. According to the Respondent, the Applicants have not shown the substantial loss that will result if the Stay is not granted so that the application ought to be dismissed. Even when the Applicant alleges that the Respondent is unable to repay the decretal sum, the burden of proving the same still lies with the Applicant to prove the same by placing real evidence before the court.

23. Lastly on the issue of whether the Applicants have offered to furnish security, it is submitted that this condition has not been met since the Applicants' have only stated that they are willing to furnish some security but have not stated what form of security.

24. As for whether the application met the threshold for extension of time, the Respondent has relied on the principles set in the case of Nicholas Kiptoo Arap Korir Salat...Vs...Independent Electoral & Boundaries Commission & 7 Others [2014]eKLR. More specifically, the Respondent's Counsel argues that the delay has not been satisfactorily explained and thus the conduct of the Applicants in this matter is wanting as they have approached the court with unclean hands. He pleads with the court to dismiss the application since it is meant to deny him the fruits of the Judgment.

Analysis and Determination

25. It behooves the court to make a determination at the earliest opportune time on a pertinent question raised by the Respondent which is whether the Plaintiffs'/Applicants' Counsel in deponing in the **Supporting Affidavit** contentious issues so that the affidavit is declared fatally defective and un-maintainable.

26. As regards the contention that Counsel for the Applicants has deponed to contentious matters, the Respondent has raised a blanket objection not specified to particular paragraphs of the **Supporting Affidavit**. The Applicants on the other hand remained silent on the issue and did not submit on it. However, it must be noted that a party is supposed to present its case in a precise manner and in completeness lest the court be left to speculate on what the contentions of the parties were. Such is the case here, as the Respondent ought to have pin-pointed the specific paragraphs of the **Supporting Affidavit**, that were contentious and the Respondent appears to allude to the fact that the Plaintiffs' Counsel would not by any way depone to the entire **Supporting Affidavit**.

27. Nonetheless, it is rudimentary trite law established by judicial practice that it is undesirable for Counsel to depone to contentious matters when the client is available to depone to the same. Such was the holding by a court of concurrent jurisdiction in the case of Janet Osebe Gchuki...Vs...Commissioner of Customs & Excise & Another [2007] eKLR, which though not binding on this court, it was stated therein that the correct position in judicial practice is that the role of Counsel in proceedings is not to be partisan but to be as impartial as far as they can go in order to bring on board all the relevant issues involved in the case to enable the court arrive at a just decision in the matter for ends of justice to be realized for all the litigants involved. Where a partisan stand is taken there is a likelihood of personalizing proceedings hence lowering standards of professionalism called for in the conduct of court proceedings.

28. Lastly, there is a risk of requiring Counsel to be cross examined on the deponents thus throwing not only the affected Counsel but all those involved in the proceedings in an awkward position of having to call upon Counsel to handover the brief to another Counsel.

29. This court has revisited the **Supporting Affidavit** in a bid to determine whether the contents are contentious or not. I have seen nothing deponed that concerns the clients (Applicants) in their personal capacity. The emphasis laid to a telephone conversation between Counsel has nothing contentious since it is a normal way of conducting business by Counsel involved in the same matter or on behalf of those who are involved in the matter. In other words, the issues deponed to in the **Supporting Affidavit** need not to be cross examined upon and neither is there need to invite the deponent for cross-examination. What it invites, if incorrect, is a response from the named Counsel through a further affidavit as the absence of a controverting deponent leaves the position standing as being correct. This court has not seen any material facts that may require the deponent to be cross-examined on. Accordingly, the objection by the Respondent fails and the **Supporting Affidavit** is upheld.

30. I now proceed to consider if the application is merited as regards the prayers sought. After going through the Application, the Supporting Affidavits and submissions filed, I find the issues are:-

a. Whether the extension of time application is merited?

b. Whether the Stay pending Appeal is merited?

c. What is the just orders to make in the circumstances?

31. It is important to consider the relief sought to appeal out of time prior to considering whether Stay of Execution should be granted.

Whether the present Application has merit in its prayer for Orders of Enlargement of Time to Appeal.

32. The **Civil Procedure Rules** grants the courts unfettered discretion to enlarge time. **Order 50 Rule 6** of the **Civil Procedure Rules** provides the courts powers to enlarge time where a limited time has been fixed for doing any act or taking proceedings under these rules or by summary notice or by order of the court. Extension of time to file an Appeal out of time is stipulated in **Section 79G** of the **Civil Procedure Act** which provides thus;

“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 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”

33. In the circumstances of the present case, the **Judgment** the Applicants intends to Appeal against was delivered on the **24th April, 2020**. The instant application was filed on **30th July, 2020**. It has been explained that the **Judgment** was delivered without Notice in the absence of the parties. The Applicants averred that they learnt of the **Judgment** on **14th July, 2020**. The Respondent on the other hand does not object that the **Judgment** was delivered without Notice to the parties but asserts that his advocate communicated to the Applicants’ advocate about the delivery of the **Judgment**. He reiterates that the delay was occasioned by laxity on the part of the Applicants.

34. The court has not had a chance to confirm what actually transpired since it was not presented with the Lower Court Record. The said explanation is not rebutted by the Respondent. This Court is therefore satisfied that the Applicants were not able to file the Appeal within time following the mistake of the trial Court. The court finds that there are sufficient reasons for the Applicants not being able to file the Appeal in time. It is not worthy that after the Applicants learnt of the delivery of the **Judgment**, there was no inordinate delay in filing the instant application and therefore this court exercises its discretion in favour of the Applicants.

Whether the Stay pending Appeal is merited?

35. The principles governing grant of an order of Stay of Execution are set out under **Order 42 Rule 6(2)** of the **Civil Procedure Rules 2010** which provides:-

“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.”

36. I must hasten to add here that the conditions set out in **Rule 6(2) (supra)** only serve as guidelines which the court can use as beacons in exercising its unfettered discretion in deciding whether or not to grant Stay of Execution pending Appeal depending on the circumstances of each case. However, the Applicant must satisfy the court that he/she stands to suffer substantial loss if Stay is not granted and that the application has been filed without unreasonable delay. The Applicant must also show that he/she is willing to offer such security as may be ordered by the court. Since the application invokes the discretionary powers of the court, it must be exercised judiciously. The application must therefore meet the threshold for the granting of the Stay of Execution.

37. Based on the aforesaid principles, the first consideration is whether the Applicants have demonstrated that they will suffer substantial loss. The Applicants submit that the Respondent may not have the ability to repay the decretal sum if Stay is not ordered. On the other hand, the Respondent has argued that there is no material evidence that has been placed before the court to establish that he is not capable of repaying the decretal sum.

38. I have considered the authorities that have been relied on by the Respondent with regard to who bears the burden to establish his (the Respondent’s) inability of repay the decretal sum. I note that they are authorities of courts with concurrent jurisdiction and not binding on this court. I will however borrow from a decision of the Court of Appeal in the case of **National Industrial Credit Bank Limited...Vs... Aquinas Francis Wasike & Another 2006 eKLR**, while considering a scenario similar to one at hand, the court held as follows:-

“This court has said before and it would bear repeating that while the local duty is on an applicant to prove the allegation that an Appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum the evidential burden must then shift to the respondent to show resources he has since that is a matter which is peculiarly within his knowledge.” (Emphasis added)

39. It therefore goes without saying that the Respondent bears the burden to disprove that he is a man of straw and incapable of repaying the decretal sum in the event that the Appeal succeeds. In the instant suit, the Respondent has not disclosed that he has means to refund the decretal sum or not reducing Applicants to mere explorers in the judicial process if they pay the decretal sum.

40. Thus, in a money decree like in the case here, substantial loss lies in the ability of the Respondent to refund the decretal sum should the Appeal succeed. It matters not the amount involved as long as the respondent cannot pay back. The Court of Appeal in the case of **Kenya Hotel Properties Limited...Vs...Willesden Properties Limited, Civil Application Nai 322/2006** reiterated in the case of **Housing Finance Company of Kenya...Vs...Sharok Kher Mohamed Ali Hirji & Another (2015) eKLR**, and stated that 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. I am satisfied that the Applicants have met this requirement.

41. The second consideration is whether the Appeal was filed without unreasonable delay. The decision of the trial magistrate was delivered on **24th April, 2020**. The reason for the delay as explained by the Applicants has been considered by this court in the preceding paragraphs. Therefore the court will not belabor on the same issue again but proceed to make a finding that the delay was not as a result of deliberate actions of the Applicants and is not inordinate in the circumstances.

42. Finally, the other consideration is the issue of security. The Applicants have submitted that they are willing to furnish security by

depositing the decretal sum in an interest earning account in the name of the Advocates on record within **thirty (30) days**. The Respondent on the other hand argued that the Applicants are not specific on what form of security they are willing to offer and in any event nothing has been holding them from making the deposit. The answer to Respondent's concerns are provided for under **Order 42 rule 6(2)(b)** which states that it is the Court which is required to determine the security, thus:-

“Such security as the court orders for the due performance of such -----”

43. This provision implies that once the court grants an order for Stay, it will determine the kind of security that the applicant will provide. This court further reiterates that where the Applicant proposes to provide security as the Applicants has done, it is a mark of good faith that the application for Stay is not just meant to deny the Respondent the fruits of his Judgment.

44. Lastly, I find that the question as to whether the Appeal is arguable or frivolous is not a ground for consideration when dealing with an application for Stay. Such a consideration would prejudice the hearing of the actual Appeal.

Conclusion

45. The upshot of the foregoing is that, I find the application dated **29th July, 2020** has merit. In the interest of Justice and in a bid to balance the two competing interests of the parties herein, court the court makes the following orders;-

a. Appeal shall be filed and served within 14 days from the dates of the Ruling herein.

b. There be a Stay of Execution of the Judgment of the trial Magistrate in Mombasa CMCC No.319 of 2019 and all consequential orders pending the hearing and determination of the Appeal

c. The Stay is granted on condition that Kshs.588,384/= is deposited in an interest earning bank account in one of the reputable banks in the joint names of the advocates on record for the parties.

d. Costs to the Respondent in any event.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 3rd day of NOVEMBER, 2020.

D. O. CHEPKWONY

JUDGE

3/11/2020

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE

3/11/2020