



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO.64 OF 2020

LIVINGSTONE MUCHIRI.....APPLICANT

-VERSUS-

DICKSON KIMANI CHEGE.....1ST DEFENDANT

EUNICE WANJIKU NJUGUNA.....2ND DEFENDANT

RULING

1. This is a **Ruling** in respect to the Applicant's **Notice of Motion** application dated **2nd March, 2020**. It is brought pursuant to provisions of **Section 79G, 1A, 1B & 3A** all of the **Civil Procedure Act, Order 42** of the **Civil Procedure Rules** and **Article 159(2)(d)** and **259(1)(a)** and **(b)** of the **Constitution of Kenya, 2010**. By the application, the Applicant seeks the following orders:

a. Spent

b.

c. That pending the hearing and determination of the appeal herein, an order for Stay of Execution of the Judgment delivered by Honourable Nang'ea on 31st May, 2019 in CMCC No.1154 of 2015; Dickson Kimani Chege –vs- Livingstone Muchiri & Another, be granted.

d. That the Applicant be granted leave to file an appeal out of time and the annexed Memorandum of Appeal be deemed as though it were filed within the prescribed time.

e. That the cost of this application be provided for.

2. The application is premised on grounds on its face and further supported by an **affidavit** sworn by the Plaintiff on **2nd March, 2020**. He deponed that **Judgment** was entered against him on **31st May, 2019** and being dissatisfied by the same, he instructed his erstwhile advocate on record by the name **Fred Adhoch** of **M/S Ameli Inyangu & Partners, Advocates** to file an Appeal against the Judgment on his behalf. However, unknown to him the Intended Appeal was not filed, a fact he learned on **16th December, 2019** when he was served with a Notice to Show Cause. That he subsequently instructed the **Firm of Gikandi & Company Advocates** but the said law firm had to seek Leave of the Court to come on record after the former advocates failed to consent to the change of advocates. He avers that Leave was granted on **27th January, 2020** while proceedings for purposes of the Appeal were obtained on **27th February, 2020**.

3. According to the Plaintiff, the sum claimed herein is **Kshs.2,445,025/=** which is the decretal amount and if Stay is not granted, then he might be committed to a civil jail and his right to liberty curtailed. On whether Leave to appeal out time should be granted, it is argued that the delay was as a result of the former advocate and the mistake of a Counsel should not be visited on an innocent client. In the end the deponent avers that the court to preserve his right of Appeal.

4. The Application is opposed by the 1st Respondent vide the **Replying Affidavit** he swore on **9th March, 2020** and filed on the even date. To him, the application is frivolous and an abuse of the process of court for having failed to comply with the provisions of **Order 42 Rule 6(1)** of the **Civil Procedure Rules**. He avers that a Judgment Notice was sent by his advocate to the Applicant's advocates on record then, who reverted through a **Letter** dated **25th June, 2019**. In the said letter, the firm of advocates averred that they had instructions to liquidate portions of the Judgment to wit **Kshs.1,222,512.50** by monthly instalments of **Kshs.10,000/=** until payment in full. However, the Respondent was not agreeable to the terms offered by the Applicant and instead proposed that the Applicant pays a lump sum of **Kshs.500,000/=** as initial instalment and subsequent monthly instalments of **Kshs.50,000/=**. As such it is averred that the Applicant is guilty of material non-

disclosure.

5. According to the Respondent, the allegations that the Applicant instructed his former advocates to file an Appeal is untrue as evidenced by a **Letter** annexed to the **Replying Affidavit** in which the advocate had instructions to settle the decretal sum. Further that the Appeal is an afterthought and calculated to defeat the Notice to Show Cause dated **16th December, 2019**.

6. It is thus averred that the court should balance the competing right of the Appellant to appeal against the Respondent's equally weighty right of enjoyment of the fruits of a successful Judgment. That since the condition precedent to granting Stay under **Order 42 Rule 6** of the **Civil Procedure Rules** were not satisfied, the application should be dismissed.

7. Further, the Respondent avers that that the application is tinctured with laches and the delay of **nine (9) months** in bringing the application has not been satisfactorily explained. That it has not been shown what substantial loss the Applicant will suffer nor has the Applicant demonstrated the willingness to furnish security of the decretal sum. The Respondent however takes the view that depending on the decision of the court, the court has discretion to order that the Applicant pays to the Respondent half of the decretal sum and the remaining half be furnished in a joint interest earning account in the names of both advocates on record.

8. I also find it necessary to mention that the Appellant asserts the view that it is a precondition to have filed a **Memorandum of Appeal** for the orders sought to issue. Failure to have filed a **Memorandum of Appeal (Sic)** bars the court from exercising its discretion based only on an annexed **Memorandum of Appeal**.

9. Following the directions of this court, the application was canvassed by way of written submissions. Both parties obliged with the directions with the Applicants filing their submissions on **28th September, 2020** while the Respondents filed theirs on **21st October, 2020** which I have with great diligence read through and considered.

Analysis and Determination

10. I have carefully considered the application, the affidavits sworn in support and in rebuttal thereof, the submissions by both parties as well as the authorities they have relied on. I am of the view that it is important to consider the relief sought for appealing out of time prior to considering whether Stay of Execution should be granted. The obvious reason is that if I find the prayer for extension of time unmerited, then it would not be necessary to consider whether or not to grant Stay of Execution since it is pegged to the Appeal.

11. The principle to be considered in extending time within which 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 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 a well settled position in law and as buttressed by a long line of authorities by this Court that the decision of whether or not to extend time for filing an appeal is an exercise of this Court's discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; **the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and the degree of prejudice to the Respondent if the application is granted.**

13. The Judgment the Applicant intends to appeal against was delivered on **31st May, 2019**. This application was filed on **2nd March, 2020** and therefore the Application has been filed **nine (9) months** after delivery of the Judgment. It has been explained that the Applicant had instructed his advocate to appeal against the said Judgment but the same was never done. The Applicant has blamed his advocate for the delay by failing to file the Appeal as instructed and asserts that a mistake of an advocate should not be visited on him. The delay is attributed to the **Firm of M/S Ameli, Inyangu & Partners, Advocates** for failing to file the Appeal and failing to expeditiously consent to **Firm of M/S Gikandi & Company, Advocates** coming on record for purposes of filing the appeal on behalf of the Applicant.

14. The Respondent is of a contrary view. He avers that the Applicant had instructed his former advocates to settle the decretal sum and not to file any Appeal. Therefore, this Appeal is an afterthought calculated to further delay the matter and deny him the fruits of the Judgment.

15. Much as the Applicant has attempted to shift the blame to his former advocates, nothing has been exhibited to confirm that indeed the advocate failed to act as instructed. My view is that whereas litigants instruct Advocates to act for them, the cases belong to litigants and they have a duty to monitor progress of their cases.

16. **Section 79G** of the **Civil Procedure Act** requires that before the Court enlarges the time for appealing the Applicant must satisfy the court that he had good and sufficient cause for not filing the Appeal in time. In the case of **Alibhai Musajee...Vs...Shariff Mohammed Al-Bet, Civil Appeal No.283 of 1998**, the Court of Appeal held that whereas the **Civil Procedure Act** allows for extension of time for filing an Appeal, if good and sufficient cause is shown, failure to act does not constitute a good or sufficient cause. Further in the case of **Berber Alibhai Mawji...Vs...Sultan Hasham Lalji & 2 Others [1990-1994] EA 337**, the Court held that inaction on the part of an advocate as opposed to error of Judgment or a slip is not excusable.

17. I am therefore not satisfied that the delay or default on the part of the Applicant has been satisfactorily explained. Accordingly, having

taken all of the required factors into account in the exercise of my discretion under **Section 79G** of the **Civil Procedure Act**, I have come to the conclusion that the application for extension of time fails.

18. That notwithstanding, as regards the Prayer for Stay of Execution, the Applicant ought to meet the threshold for granting Stay as envisaged by the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules**. This court has also occasionally held that the power to grant an application for Stay of Execution pending Appeal is a discretionary one on sufficient cause being shown, **where the Applicant may suffer substantial loss; the application is made without unreasonable delay and on provision of such security as the Court may impose.**

19. To grant or refuse an application for Stay of Execution pending Appeal is discretionary in that the Court when granting Stay has to balance the interests of the Applicant with those of the Respondent. In this application, the Applicant's contention is that, if the Stay is not granted, the amount being substantial, the Applicant might be arrested, committed to civil jail and his right to liberty curtailed. He adds that his right to liberty should be protected by this Court.

20. However, I am of the view that it should be known to any litigant that depending on the final Judgment of the court, there arise mutual obligations for parties therein to comply with. In this case, the Applicant bears the obligation to pay the decretal sum, a duty that cannot be whitewashed by the Applicant's right to liberty. In addition, it is not sufficient to merely state that the decretal sum is a lot of money and the Applicant would sufferer loss if the money is paid.

21. In an application of this nature, the Applicant should show the damages he would suffer if the Order for Stay is not granted since by granting Stay would mean that the *status quo* should remain as it were before the Judgment and that would be denying a successful litigant the fruits of his Judgment which should not be done if the Applicant has not given to the court sufficient cause to enable it exercise its discretion in granting the Order of Stay.

22. It follows that the Applicant has failed to satisfy me that he stands to suffer substantial loss if the Stay sought is not granted in the event that the Appeal succeeds.

23. Apart from proof of substantial loss the Applicant is also enjoined to provide security as a precondition for grant of Stay under **Order 42 Rule 6**. In this case, the Applicant has not offered any security at all which is one of the mandatory tenets under which the application is brought. I am also agreeable that the offer for security must come from the Applicant as a price for Stay. In the end, for the reasons highlighted above, it is also clear that the prayer for stay of execution also fails.

24. In the resultant, I find that the application dated **2nd March, 2020** lacks merit and the same is dismissed with costs to the 1st Respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 9th day of DECEMBER, 2020.

D. O. CHEPKWONY

JUDGE

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