



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MISC. APPLICATION NO. 27 OF 2017

LUCY ANN WANGUMI NJAGI.....PLAINTIFF

V E R S U S

FRANCIS MIANO.....DEFENDANT

RULING

1. The applicant Francis Miano has filed an application dated 11/07/2017 seeking stay of execution of the judgment delivered on 23/03/2017 pending hearing and determination of the application interparties. That the Honourable court grants leave to the applicant to appeal out of time.

2. The grounds are that Judgment was delivered on 23/03/2017 and thereafter the applicant's advocates sent their clerk to obtain copy of the judgment which took a long time to obtain. Being aggrieved with part of the judgment, the advocates sent an opinion regarding possible appeal to their client and by the time the instructions to appeal were received, the time limit within which to appeal had already lapsed. That they were in agreement with part of the judgment except Kshs.100,000/= awarded for diminished earnings since the same was never proved and have already paid the decretal sum of Kshs.587,182/= which is undisputed plus costs. That the applicant has a good and arguable appeal with chances of success. That no prejudice will be occasioned to the respondent.

3. In response, the respondent stated that they duly informed the applicant's advocates of the judgment on 24/03/2017. That the reasons for delay reek of sheer laxity and bad faith. That the applicant has not explained why it took long to obtain copy of the judgment given that the typed judgment was available to the parties on 23/03/2017. They believe that the applicant's advocates were only woken up by their letter informing them of the lapse of stay period and expression of intention to proceed with execution. That the applicant has not met the threshold for grant of stay.

4. The applicants submits that **Order 42 rule 6 Civil Procedure Rules** is the foundation of the jurisdiction of the Court in granting stay of execution and the provision specifies the circumstances and or conditions under which either the court or an appellate court may order Stay of execution of a decree or order pending an appeal. **Order 42 rule 6 (1)** provides:-

***“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*”**

2. 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.”

5. These are conditions upon which the applicant must satisfy in order to be granted the orders of stay of execution. He relies on **Order 42 rule -2-** which is quoted above.

6. He further relies on **Order 22 rule 22(1) Civil Procedure Rules** which provides:-

7. He further relies on the case of He further relies on the case of **Tabro Transporters Ltd –v- Absalom Dora Lumbas (2012) eKLR** where Justice Gikonyo enumerated the conditions under which the court may order Stay of Execution. It is submitted that the respondent's means are unknown and it is highly unlikely that the respondent will be capable of refunding the decretal sum of the appeal succeeds since the respondent has not disclosed nor furnished the court with documentary evidence to prove his financial standing. The applicant relies in **Edward Kamau & Another (2015) eKLR and National Industrial Credit Bank Ltd –v- Aquinas Francis Wasike Court of Appeal Application No. 238/2005** where the court stated that where an applicant alleges the respondent is unable to pay back if appeal succeeds, the burden shifts to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.

8. On the issue of leave to appeal out of time the applicant submits that **Section 3A Civil Procedure Act** gives court inherent and immense and considerable power to make such orders as may be necessary for the ends of justice. He urges the court to exercise its wide powers and admit the appeal herein for hearing and proceed to admit it and hear it on merits. He submits that the duty of the court is to do justice. He relies on **Wachira Karani –v- Bildad Wachira (2016) eKLR and Patel –v- E. A Cargo Handling Services Ltd (1974) E.A 75** where it was held that the main concern of the court is to do justice to the parties and will not impose conditions on itself to fetter the wide discretion given to it by the rules. The applicant relies on **Section 95 of the Civil Procedure Act** which provides:-

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

9. It submitted that the applicant has arguable appeal which raises serious points of law and facts which that warrant this court's intervention on Appeal. He relies on **Bake N. Bite (Nairobi) Ltd –v- Daniel Mutisya Mwalonzi (2015) eKLR** where the court of Appeal held that the applicant is not required to prove that they have an arguable appeal but need only establish an arguable point. He further relies on the proviso to **Section 79G of the Civil Procedure Act** which gives court discretion to admit the appeal out of time where the applicant has satisfied the court that he has sufficient reason for not filing appeal in time. This he submits is also provided under **Order 50 rule 6 Civil Procedure Rules**. He relies on **Ester Wamaitha Njihia & 2 Others –v- Safaricom Limited (2014) eKLR** where it was held that the court exercises discretion to avoid injustice and hardship resulting from accident, in advertence or excusable mistake or errors but not to aid a party who had sought deliberately to delay the cause of Justice. He prays that the application be allowed as he has demonstrated a good and sufficient cause to exercise its discretion to grant leave to applicants to appeal out of time.

9. For the respondent it is submitted that the applicant has approached court through the wrong procedure. The supporting affidavit is defective and the applicant has failed to meet the threshold for the grant of the orders sought. It is submitted that the proviso to Section 79G Civil Procedure Act does not contemplate the procedure adopted. That the applicant must first file the appeal first and then move the court to admit it out of time. He relies on **Gerald M'limbine –v- Joseph Kangangi (2008) eKLR**, **Judge Emukule and Asma Ali Mohamed –v- Fatima Mwinji Juma (2014) eKLR**.

10. On the affidavit it is submitted that the deponent Pauline Wambui is not a party in the proceedings and there is no averment that the applicant has authorized the deponent to swear the affidavit. Reliance was had on **Akamba Public Road Services –v- Abdikadir Adan Galgalo (2016) eKLR and Chania Shuttle Bus –v- Rebecca Mbogho (suung as legal Representative of the Estate of Joseph Mwanyika Mbogho (deceased) (2016) eKLR**.

11. It is further submitted that the affidavit contains averments that are not matters of personal knowledge and sources are not disclosed.

12. It is further submitted that the applicant has failed to meet the threshold for grant of stay. It is submitted that the applicant has to satisfy the court that the application has been made without unreasonable delay, that substantial loss may result and that the applicant has furnished security. It is submitted that the applicant has not satisfied this criteria. He relies on **Joseph Ngigi Ibare –V- Myovi James & Another (2016) eKLR** where the Court stated that even a delay of two days must be satisfactorily explained.

13. The respondent submits that the applicant has not established that substantial loss may result to the applicant unless the order is made. He relies on **Kenya Shell Ltd –v- Kariga Court of Appeal (1982-881) IKAR 1018** where it was held that substantial loss is the cornerstone of granting a stay. That the applicant has not alluded to substantial loss in his affidavit and has not shown that he is likely to suffer substantial loss.

14. Lastly it is submitted that the applicant has not furnished security and has not offered to comply with conditions that the court may set. He prays that the application be dismissed.

I have considered the application.

Issues arising:-

1. Stay of execution

15. The applicant has sought for stay of execution pending hearing of the application which was granted on 18/07/2017. They did not seek stay of execution pending hearing and determination of the intended appeal.

16. *A party is bound by his own pleadings therefore once the application herein was heard there was no further order of stay to be granted by the court. It was futile to argue an application which is not pleaded. The supporting affidavit does seem to support an application for stay of execution pending the hearing and determination of the intended appeal. There is no allegation that they are likely to suffer substantial loss and they have not offered security. There is no basis for this court to order stay of execution.*

2. Filing an appeal out of time

Section 79G of the Civil Procedure Act deals with the time for filing appeals from subordinate courts and states:

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.

In **Paul Musili Wambua v Attorney General & 2 others [2015] eKLR**

The Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated the following;

....it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered 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, the degree of prejudice to the respondent if the application is granted.

a) Length of delay and reasons thereof

17. Judgment was delivered on 23/03/2017 and thereafter the applicant's advocates sent their clerk to obtain copy of the judgment which took a long time to obtain. Being aggrieved with part of the judgment, the advocates sent an opinion regarding possible appeal to their client and by the time the instructions to appeal were received, the time limit within which to appeal had already lapsed.

18. The delay in filing the application was for about three months which cannot be said to be inordinate. However, as per the copy of the judgment annexed to the respondent's affidavit, the signed judgment was available on the same day of the judgment. In addition, the respondents duly informed the applicants of the judgment having been delivered on the following day therefore the reasons for the delay is not persuasive. The judgment was available on the day it was delivered. A delay of three months was inordinate and the applicant has not satisfied the court that he had a good and sufficient cause for not filing the appeal in time.

b) Chances of the appeal succeeding

19. The case was road traffic accident and they were in agreement with part of the judgment except Kshs.100,000/= awarded for diminished earnings since the same was never proved. That they have already paid the decretal sum of Kshs.587, 182/= which is undisputed plus costs.

20. Upon perusing a copy of the judgment, PW 1 stated that the respondent had comminuted fracture of right femur and assessed degree of permanent incapacity of 40%. That she had metal implants which would never be removed. DW I confirmed the fracture with metal implant in situ but could not assess degree of incapacity since it was too early. The trial court stated that the respondent was using crutches 11 months after the accident and agreed with PW 1. The appellant has not shown that he has an arguable appeal.

21. In the circumstances, the applicant has not proved his claim and does not deserve to be granted extension of time to appeal.

22. For these reasons and having considered the submissions, I find that the application lacks merits. The applicant has not met the threshold for the grant of leave to appeal out of time. The applicant has satisfied substantial part of the judgment. In the words of the Court of Appeal, substantial loss is the corner stone for the grant of stay. This applicant has not pleaded that she is likely to suffer substantial loss. The prayers are not deserved. I find that the application lacks merits. I dismiss it with costs.

Dated at Kerugoya this 15th day of February 2019.

L. W. GITARI

JUDGE