



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. APPLICATION NO. 55 OF 2018

STEPHEN KURIA.....APPLICANT

V E R S U S

NANCY WAKABARE.....RESPONDENT

RULING

1. The applicant Stephen Kuria filed a Notice of Motion under Section 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act seeking the following orders:-

(i) This Application be certified urgent, service thereof be dispensed with and it be heard ex-parte at the first instance.

(ii) Leave be granted to the Applicant herein to lodge an Appeal against the entire Judgment and decree in Kerugoya CMCC NO. 208 of 2016.

2. The application is supported by the Affidavit of Rina Walemba and is based on the following grounds:-

(i) THAT Judgment in Kerugoya CMCC No. 208 of 2016 was entered against the Applicant on 23rd March 2018.

(ii) THAT the Applicant, aggrieved by the decision of the Trial Court, wishes to challenge the entire Judgment therein as the learned Magistrate erred in fact and in law in determining the issues of liability and quantum which subsequently condemned the applicant to pay damages therein.

(iii) THAT the applicant has an arguable appeal which has a high chances of success.

(iv) THAT the delay by to lodge the intended Appeal is excusable as it is neither inordinate nor deliberate.

(v) THAT the Applicant risks suffering substantial loss if such leave and stay of execution are not granted as prayed.

(vi) THAT the Applicant is able, ready and willing to deposit such security as the Court orders for the due performance of such decree or order as may ultimately be binding on it.

(vii) THAT unless such stay is granted, the intended Appeal, should it succeed, will be rendered nugatory.

(viii) THAT it is in the interest of justice that the Application be allowed.

3. The respondent opposed the application and filed a Replying Affidavit sworn on 8/10/18. She deposes that the application is an abuse of court process as the annexure relied on PW1 shows that Rina Walemba instructed Jean to note that the stay would lapse on 22/4/15 and is instructed to obtain stay of execution and file a holding appeal as they try to negotiate. That the applicant has not annexed any letter requesting for pleadings and judgment to demonstrate that they are keen on perusing the appeal. That the respondent is bent on delaying the matter and denying the respondent the fruits of Judgment. The respondent further depones that the applicant will not suffer substantial loss as he is a large scale farmer dealing in horticulture and cereals and if the decretal sum is paid and appeal succeeds he has the means to refund the same.

4. The respondent further depones that the delay has not been explained.

5. The parties agreed to proceed by way of written submissions. The respondent filed submissions. The applicant did not file any submissions. I have considered the application. The issues which arise are as follows:-

1. 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.

Section 95 of the Civil Procedure Act 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”.

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

Judgment was delivered on 23/03/2018 and the appellant filed the application on 17/09/2018. The delay was for about 6 months but they claim that they issued instructions to their advocates on record to file an appeal but the same was never received by them since they were sent to the wrong address, under the wrong reference and subject.

6. However, the respondent stated that the second page of annexure **“RW 1”** the correct file number was quoted. In addition, there is no letter requesting for copies of typed proceedings and judgment to demonstrate that the appellant was keen on pursuing the appeal. That her advocate sent to the appellant’s advocate a letter received in their offices on 28/06/2018 advising them to settle the amount but they took no action.

b) Chances of the appeal succeeding

The case involves a road accident claim and they wish to challenge the judgment on liability and quantum which amount was excessive and connoted erroneous estimate of damages suffered.

7. The reasons for the delay is not convincing since the email quoted the correct case number as the subject matter therefore it was easy for their advocates to follow up on the same. In addition having informed their advocates that the stay lapses on 22/04/2018 they never followed up on the matter to confirm whether stay was granted. The only follow up done was on 27/08/2018 which was 4 months after the stay lapsed. They therefore do not deserve the court’s discretion. They have failed to prove that they had a good and sufficient cause for not filing the appeal in time.

2. Stay of execution

Order 42, rule 6 Civil Procedure Rules deals with stay of execution it 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.

8. The applicant needs to satisfy the court on the following conditions before they can be granted the stay orders:

a) Substantial loss may result to the applicant unless the order is made,

b) The application has been made without unreasonable delay, and

c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

a) Substantial loss occurring

The onus of proving that substantial loss would occur unless stay is ordered rests upon and must be discharged accordingly by the applicant. It is not enough to merely state that loss will be suffered, the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given.

In the case of Charles Wahome Gethi v Angela Wairimu Gethi [2008] Eklr

The Court of Appeal held the following view on the issue of substantial loss;

The applicant does not claim that the respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the appeal is determined..... In the circumstances of this case, the applicant would suffer substantial loss rendering the appeal, if successful nugatory only if the suit land is disposed off before the appeal is determined. The applicant does not claim that the suit land would be disposed off. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.

In the case of James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR

The Court held the following view on the issue of substantial loss;

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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

9. In the present application, the appellant has only indicated that he risks suffering substantial loss, but has not demonstrated how he is likely to suffer such loss. The respondent has deponed that he is not a person of straw and he would be able to refund the decretal sum. The applicant has failed to prove that he will suffer substantial loss.

a. Requisite security

The appellant has indicated that he is ready and willing to deposit such security as the court orders.

b. Was there undue delay?

Judgment was delivered on 23/03/2018 and the appellant filed the application on 17/09/2018, the delay was for about 6 months. He claims that he instructed his advocates but quoted the wrong case number.

10. However as seen above, he quoted the correct case number in the subject matter and he never followed up on whether stay was granted until 4 months had lapsed.

11. The applicant has not proved that he has applied for proceedings and judgment. The application is not made in good faith and is an abuse of court process which is meant to buy time. The annexure PW1 shows that the applicant filed a holding appeal as they try to negotiate out of court. The applicant was aware as far back as 22/4/18 that the stay was to lapse on 22/4/18. An order for leave to extend time and stay of execution is a matter of exercise of courts discretion. A party must show that he has a bona fide reason and good and sufficient reason for failing to file appeal in time. The applicant has failed to give plausible reason for not filing appeal in time. The appeal intended to be filed is not intended to be prosecuted but to be used to delay execution and force negotiations. Applicant has not given a good reason for not filing appeal out of time. There is no good reason to warrant this court to exercise discretion in favour of the applicant. Good and sufficient cause has not been shown.

12. In Conclusion:-

The upshot is that the application is without merits. I dismiss it with costs to the respondent.

Dated at Kerugoya this 8th Day of February 2019.

L. W. GITARI

JUDGE