



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISC. APPLICATION NO. 3 OF 2019**

**AUGUSTINE MUHORO MWANIKI .....APPELLANT**

**V E R S U S**

**THOMAS MWANIKI GITARI .....1<sup>ST</sup> RESPONDENT**

**MUTHONI GACUBE.....2<sup>ND</sup> RESPONDENT**

**NYOKABI MUHORO .....3<sup>RD</sup> RESPONDENT**

**GICHOHI KIORIA.....4<sup>TH</sup> RESPONDENT**

**GACHIE MUHORO .....5<sup>TH</sup> RESPONDENT**

**MWAURA THUKU..... 6<sup>TH</sup> RESPONDENT**

**MAINA GICHUKU ..... 7<sup>TH</sup> RESPONDENT**

**MWANGI GAKURU ..... 8<sup>TH</sup> RESPONDENT**

**MUGO WACAHI .....9<sup>TH</sup> RESPONDENT**

**ALICE PAUL .....10<sup>TH</sup> RESPONDENT**

**RULING**

1. The 3<sup>rd</sup> party has filed an application dated 21/01/2019 seeking for stay of execution of the judgment in **Kerugoya CMCC No. 27 of 2004** pending hearing and determination of the intended appeal. He also sought for leave to file appeal against the judgment delivered on 06/11/2018 out of time.

2. The application is based on the following grounds:-

**a) *THAT* the court delivered its Judgment on 6<sup>th</sup> November 2018 and Judgment was entered in favour of the respondents against the 3<sup>rd</sup> Party/Applicant.**

**b) *THAT* the Applicant was acting in person and he was never served with a Judgment notice.**

**c) *THAT* the 3<sup>rd</sup> Party/Applicant came to learn that the Judgment had already been delivered after 2 months, on 7<sup>th</sup> January 2019.**

**d) *THAT* the 3<sup>rd</sup> party/Applicant was dissatisfied with the said Judgment delivered by S.M.S Soita and intends to appeal against the whole Judgment in its entirety.**

**e) *THAT* the applicant is apprehensive that if execution proceeds, he will suffer irreparable loss and damages and the intended appeal will be rendered nugatory.**

**f) THAT the applicant is ready and willing to provide such security as the court will order.**

**g) THAT it is in the interests of justice that this application is allowed.**

3. The parties proceeded by way of oral submissions. The applicant reiterated the grounds in support of the application.

4. For the respondent, it was submitted that the application is defective and is an abuse of court process. That the application is brought under **Order 43 Civil Procedure Rules**. That **Order 42** deals with appeals against orders and Judgment. That applicant ought to have filed an application for leave to appeal out of time in the Court of first instance as well as the application for stay of execution. That the applicant did not apply for the orders in the lower court and they were denied. He prays that application be dismissed.

5. The applicant submits that the fact, that wrong provisions were quoted is a technicality and the court should consider the substance of the application.

## **6. Issues arising:-**

### **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.*

7. The issue was addressed in **Paul Musili Wambua v Attorney General & 2 others [2015] eKLR** where 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.”*

8. These are the conditions the court will consider in dealing with the issue. These are:-

#### **a) Length of delay and reasons thereof**

Judgment was delivered on 06/11/2018 and the 3<sup>rd</sup> party filed the application on 21/01/2019. The delay was for about 1½ months. He claims that he was acting in person and was never served with a judgment notice. He only came to know that judgment had been delivered after 2 months on 07/01/2019.

Though the respondent submits that the plaintiff is the father of the applicant and was therefore aware of the judgment, this fact is not sufficient to demonstrate that the applicant was aware of the Judgment.

#### **b) Chances of the appeal succeeding**

We have no copy of the judgment since the 3<sup>rd</sup> party has applied for it vide letter dated 09/01/2019. Perusing through the memorandum of appeal it seems that the case involved **Rice Holding No. 11** in Mwea Tebere and alleged loan advanced.

9. The reason for the delay is that he was representing himself and he was never informed of the judgment notice.

10. The delay of 1 ½ months is not in-ordinate. The applicant has stated he came to know of the Judgment on 7/1/2019. This has not been disputed.

11. On the issue of appeal succeeding, upon perusal of the memorandum of appeal substantive grounds have been raised. The applicant ought to be given a chance to ventilate the appeal. The court has unfettered discretion to extend time for filing an appeal where the applicant has given the reason for the delay, has shown that the appeal has chances of success and the respondent is not likely to suffer any prejudice. My view is that the applicant has met conditions upon which this court should exercise its discretion in his favour

### **2. Stay of execution**

**Order 42, rule 6** 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.

12. 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**

13. The onus of proving that substantial loss would occur unless stay is issued 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.

14. In **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 of before the appeal is determined. The applicant does not claim that the suit land would be disposed of. 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.**

15. In **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.”***

16. In the present application, the 3<sup>rd</sup> party has indicated that the respondent may start execution any time and he may suffer irreparable loss and damage as the respondent will not be able to reimburse if the appeal is successful. This was not disputed. Where an applicant states that the respondent will not be able to refund, the burden shifts on the respondent to prove that he is not a man of straw. If he fails to prove the conclusion is that the applicant has proved he will suffer substantial loss.

b) **Requisite security**

17. The appellant has indicated that he is willing to provide such security as the court will order. This is sufficient as it is the court orders the security to be provided.

c) **Was there undue delay?**

18. As seen above, the delay was for about 1 ½ months reason being that he was not notified of the judgment. The delay was not inordinate. The application was filed without undue delay.

19. The issue raised by the respondent that the application was brought under the wrong provisions of the law are technicalities.
20. The application is stated to be brought under **Section 1A & 1B of the Civil Procedure Act** which deals with the overriding objectives of the Act which is to facilitate the just expeditious, proportionate and affordable resolution of disputes governed by the Act.
21. **Article 159(2)(d) of the Constitution** mandates the court to do justice without giving undue regard to procedural technicalities **Order 42 rule 6 of the Civil Procedure Rules** does not prohibit a party from filing the application for stay and extension of time directly to the High Court.
22. **Order 42 rule 6(3)** gives court power to give an order of stay without a formal application. A party can file an application before the court of first instance or before the appellate court.
23. The respondents have not shown that they are likely to suffer any prejudice. The applicant has come to court without ordinate delay. I should exercise discretion and allow the application.
24. I order as follows:-
1. Leave is granted to file appeal out of time.
  - 2) *The appeal be filed within 30 days from today's date.*
  - 3) *The applicant to provide security by depositing Kshs 20,000/- in court within 14 days.*
  - 4) *Costs shall be in the cause.*

Dated at Kerugoya this 7<sup>th</sup> day of March 2019.

L. W. GITARI

JUDGE