



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISC. CIVIL APPLICATION NO. 13 OF 2019**

FRANCIS NZIVO MUNGUTI.....1<sup>ST</sup> APPLICANT

SOUTH SIOUX FARM.....2<sup>ND</sup> APPLICANT

**-VERSUS-**

LINDA MUTIEMBU SIMIYU and

JANET NDUTA SIMIYU (suing as Administratrix of the

Estate of FRANK MWASI MWABAGA).....RESPONDENTS

**RULING**

[1] The Notice of Motion dated **14 January 2019**, was filed herein by the Applicants, **Francis Nzivo Munguti** and **South Sioux Farm**, pursuant to **Article 50(1) and 159(1)(d)** of the **Constitution of Kenya 2010**, **Sections 1A, 1B, 3A, 63(e)**, and **79G** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; **Order 42 Rules 6, 7**; **Order 50 Rule 5**, and **Order 51 Rule 1** of the **Civil Procedure Act, 2010**, and all enabling provisions of the law, for orders that:

[a] Spent

[b] Spent

[c] The Applicants be allowed to file an appeal out of time from the Judgment of **Hon. N. Wairimu**, Principal Magistrate, delivered on **25 September 2018** in **Eldoret CMCC No. 579 of 2007**;

[d] There be stay of execution and/or further execution of the Decree herein pending the hearing and final determination of the intended appeal;

[e] The Memorandum of Appeal annexed hereto be deemed properly filed and served upon payment of the requisite court fees.

[f] The costs hereof be costs in the appeal.

[2] In support of the application it was averred on the face thereof and in the Supporting Affidavit sworn by **Winnie Paul** on **14 January 2019** that Judgment was delivered on **25 September 2018** in favour of the Respondents in **Eldoret CMCC No. 579 of 2007: Linda Mutiembu Simiyu & Janet Nduta Simiyu (Suing as Administratrix of the Estate of the late Frank Mwasi Mwabaga, Deceased vs. Francis Nzivo Munguti & Another)**. That thereupon, the firm of **M/s Nyairo and Company Advocates** immediately wrote to their instructing clients **M/s Kenindia Insurance Company Limited** who are the insurers of the Applicants and whose head offices are located in Nairobi, seeking instructions on whether or not to appeal.

[3] It was further averred that the instructions to lodge an appeal reached **M/s Nyairo and Company Advocates** on **3 January 2019** after the period within which to appeal had expired, hence this application. It was further the contention of the Applicants that the delay in lodging an appeal was as a result of innocent oversight; and that the application has therefore been brought in good faith. The Applicants further posited that no prejudice will be suffered by either party should the orders sought herein issue. They relied on **APA Insurance Limited vs. Michael Kinyanjui Muturi [2016] eKLR**; **Boniface Obala vs. J N O (suing through Father and Next Friend P N O [2017] eKLR** and **Esther Wanjiru vs. Jackline Arege [2014] eKLR**. The application was urged on their behalf by **Ms. Odwa, Advocate**.

[4] The Respondents opposed the application and a Replying Affidavit to that effect was filed herein on **5 February 2019**, sworn by the 1<sup>st</sup> Respondent, **Linda Mutiembu**, on **4 February 2019**. According to them, the application has no merit as the intended appeal is an afterthought and the delay in filing it inexcusable. It was further submitted that the instant application offends the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** for the reason that the Applicants have not demonstrated what substantial loss they risk suffering; and that no deposit has been offered as security. Thus, the Respondents posited that they stand to suffer immense prejudice if the prayer for stay of execution is granted, considering that the lower court case was filed in **2007**. Their Counsel, **Ms. Cherono**, accordingly urged for the dismissal of the application with costs.

[5] The court record shows that temporary orders of stay were granted *ex parte* on **15 January 2019** pending the hearing and determination of the application *inter partes*. Thus, the issue presenting itself for determination herein is whether a good case has been made for enlargement of time to file appeal and for stay pending the hearing and determination of the intended appeal. Thus, having given due consideration to the application, the affidavits filed herein together with their annexures as well as the oral submissions made by the parties on **16 January 2019**, I take the following view of the matter:

**On Enlargement of Time to File an Appeal:**

[6] **Section 79G** of the **Civil Procedure Act** is explicit. It provides as follows:

**"Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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 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."**

[7] In the light of the aforesaid provision, **Order 50 Rule 6** of the **Civil Procedure Rules, 2010** stipulates that:

**"Where a limited time has been fixed for the doing of any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed..."**

[8] Clearly therefore, the Court does have the discretion to enlarge time where necessary; the only consideration being whether sufficient cause has been shown for the exercise of the discretion under the aforementioned provisions. And, it is now settled that some of the guiding principles are:

[a] That there be a good and reasonable explanation for the delay;

[b] That the application be brought without undue delay;

[c] That no prejudice will be suffered by Respondent.

[9] There is no controversy that the lower court Judgment was delivered on **25 September 2018**; or that Counsel for the Applicant was at all material times aware of the outcome. It was conceded in Paragraph 3 of the Supporting Affidavit that the letter advising **Kenindia Assurance Company Limited**, as the instructing client in the matter, was promptly sent on **26 September 2018**. A copy thereof was annexed to the Supporting Affidavit and marked **Annexure WP 2**. It was however explained that the response by **Kenindia Assurance Co. Ltd**, a letter dated **17 October 2018**, vide which instructions were given to **M/s Nyairo & Co. Advocates** to not only appeal but to also seek stay of execution pending appeal, though written within time, was inadvertently dispatched to the wrong address; and that this anomaly was not discovered until **3 January 2019** when a status report was given by the said firm of Advocates to **Kenindia Assurance Co. Limited**.

[10] Those assertions were backed by the documents annexed to the Supporting Affidavit and having scrutinized them, I am satisfied that they have the ring of truth to them. **Annexure "WP 3"**, for instance, confirms that the same was indeed addressed to **P.O. Box 1057, Eldoret**, as opposed to **P.O. Box 1051, Eldoret**. I am therefore satisfied that a plausible explanation has been given for the period of inaction for purposes of **Section 79G** of the **Civil Procedure Act**. It is also manifest that the instant application was filed on **14 January 2019**, soon after the anomaly was discovered.

[11] On whether the Respondents will suffer prejudice, whereas it was the averment and submission of the Applicant that no prejudice would be suffered by the Respondent should his application be allowed, the Respondents explained that it took a while for the lower court case to be determined; and that it is only fair that the dependants of the deceased be allowed to enjoy the fruits of their Judgment. In such instances, it is imperative for the Court to weigh the competing interests and rights of the parties; and having done so, I take the view that the party that would suffer the most prejudice would be the Applicant, should he be denied a chance to pursue his appeal. I say so because, the Respondent already has a Decree in his favour; and the delay in its enjoyment will be compensated for by costs as well as interest on the principal sum, should the appeal turn out to be frivolous. I would, in the premises, find instructive the position taken by the court in **Banco Arabe vs. Bank of Uganda [1999] 1 EA 22** that:

**"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuance of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered."**

In the result, I would be inclined to rule in favour of extension of time, which I hereby do.

**On Stay Pending Appeal:**

[12] **Order 42 Rule 6 of the Civil Procedure Rules** pursuant to which the instant application has been brought provides that:

"(1) 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 thereof 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."

[13] Accordingly, in an application of this nature, it is imperative for an applicant to satisfy the Court that:

[a] he stands to suffer substantial loss unless the order is made;

[b] that the application has been made without unreasonable delay, and

[c] that such security as the court orders for the due performance of such decree has been given.

[14] The rationale for the aforesaid conditions has been considered in various cases such as Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63, in which it was held that:

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

[15] I note that, in this matter, leave has been given for the proposed appeal to be filed out of time; and since it is now settled that the mere fact that execution is imminent is no proof of substantial loss, it was imperative for the Applicant to demonstrate that the Respondents are persons of straw and that they are no financial state to refund the decretal sum if paid. In the circumstances, it would only be fair that the Applicants be required to make some payment to the Respondents as a condition for stay. Thus, while I would allow the application on both limbs, I would issue orders as hereunder:

[a] That leave be and is hereby granted to the Applicants to file their intended appeal out of time. The same to be filed within 21 days from the date hereof;

[b] That execution of the Decree issued in Eldoret CMCC No. 579 of 2007: Linda Mutiembu Simiyu & Janet Nduta Simiyu (Suing as Administratrix of the Estate of the late Frank Mwasi Mwabaga, Deceased vs. Francis Nzivo Munguti & Another) arising from the Judgment delivered therein on 25 September 2018 be and is hereby stayed pending the hearing and determination of the Applicants' proposed appeal, on condition that the Applicants pay half of the Decretal Sum to the Respondent within 30 days from the date hereof; and that the balance thereof shall be deposited in an interest earning account in the joint names of the Advocates on record within a period of 30 days from the date of payment as ordered herein above.

[b] That the costs of this application be borne by the Applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12<sup>TH</sup> DAY OF MARCH, 2019

OLGA SEWE

JUDGE