



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. APPLICATION NO. 68 OF 2018

GACHAU PATRICK.....APPLICANT

VERSUS

LUCY WANGARI MAINA (Suing in her capacity

as the administrator of the Estate of the late

ELIJAH NGUGI MAINA (deceased).....RESPONDENT

RULING

1. This is an application by way of Notice of Motion filed on 26th March, 2018 brought under Section 3A, 79G and 95 of the Civil Procedure Act (Cap 21), Order 22 rule 22, Order 42 Rule 4, 6 and 7, Order 50 rule 6 and Order 51 Rule 1 and 3 of the Civil Procedure Rules. The main prayers are for leave to file an appeal out of time and a stay of execution of the lower court judgment pending the hearing and determination of the appeal.
2. The application is based on among other grounds that the time within which to appeal against the judgment delivered by the trial court on 23rd January, 2018 has since lapsed and that the 30 day stay of execution granted has also lapsed. The application is supported by the affidavit of **Pauline Waruhiu** described as the Claims Manager at **Direct line Assurance Company Limited**. She deponed that the judgment in the trial court was delivered and 30 days stay of execution was sought and granted. Further that the Applicant received a copy of the said judgment from their advocates one month and a half after its delivery, where upon they filed their application. She states that unless the Applicants are granted leave to file their appeal out of time, they stand to suffer irreparable loss and unless stay is granted the Plaintiff will proceed to execute rendering their application and appeal nugatory.
3. **Dominic Njuguna Mbigi** the Respondent's advocate herein filed his Replying affidavit on 24th May, 2018. He deponed that the Respondent was awarded Kshs. 1,700,205.00 in the lower court; that the court allowed 30 days stay of execution and upon the lapse of the said days, he filed a declaratory suit. He deponed that the Applicant has been aware of the judgment and is bent on delaying the suit, and in any event, has not given sufficient reasons for their failure or neglect to act in time. Lastly, he asserted that this application has been overtaken by events as the Respondent has already filed his declaratory suit.
4. The application was canvassed by way of written submissions. Counsel for the Applicant submitted that this court has inherent power to make such orders as may be necessary for the ends of justice as provided for in **section 3A of the Civil Procedure Act**. Further that Section 95 of the Civil Procedure Act lays down the substantive law that grants the court powers to enlarge time. Counsel submitted that the intended appeal herein is arguable.
5. Reliance was placed on the case of **Bake N Bite (Nrb) Limited v Daniel Mutisya Mwalonzi (2015) eKLR** where it was held that an applicant seeking orders of stay pending appeal from the subordinate court to the High Court, is not required to prove that they have an arguable appeal. Rather that as stated in the case of **Kenya Revenue Authority vs. Sidney Keitany Changole & 3 others (2015) eKLR** such applicant need only establish one arguable point and not necessarily one that will succeed.
6. Counsel submitted that the delay in filing the appeal has been sufficiently explained. The case of **Telposta Pension Scheme vs. Onesmus Muiruri Muthee Misc. Application No. 332 of 2015** was cited. In regard to stay of execution, counsel submitted that the Respondent's means are unknown and that it is highly unlikely that the Respondent will be capable of refunding the decretal amount if the appeal succeeds. The Applicant relied on the case of **Edward Kamau & Another vs. Hannah Mukui Gichuki & Another (2015) eKLR** where it was held that in the absence of an affidavit of means, it may be construed that the Respondent is not possessed of sufficient means.
7. In conclusion, counsel submitted that there was no unreasonable delay in bringing the application to court and that the Applicant is ready and willing to furnish security. Counsel urged court to grant leave to file the appeal out of time and an order to stay execution pending appeal.

8. Counsel for the Respondent in his submissions relied on the case of *County Executive of Kisumu v County Government of Kisumu & 8 others (2017) eKLR* where it was held that the period of delay has to be explained satisfactorily. The case of *Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015) eKLR* was relied upon in outlining the principles that guide a court in considering an application for leave to file appeal out of time. It was submitted that the Applicant needs to place sufficient material before court as stated in the case of *M/S Portreitz Maternity vs. James Karanga Kabia, Civil Appeal No. 63 of 1997*, where it was held that there must be just cause for depriving the plaintiff from enjoying the fruits of the judgment delivered in his favour.

9. In regard to the Applicant's prayer to file appeal out of time, counsel for the respondent submitted that no documentary evidence has been tendered to prove that the Applicant made deliberate efforts to get a copy of the judgment to be appealed from. The case of *Tipilikwani Mara Camp vs. Benard Omuchanya Alikhaba (2017) eKLR* was cited in support of the submission. Finally, in regard to stay of execution, it was submitted that the Applicant has not shown or demonstrated the substantial loss that may result if stay of execution is not granted.

10. The court has considered the material canvassed in respect of the instant motion. The application is expressed to be brought primarily under Section 79 G and 95 of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules. The judgment that it is sought to be appealed from was delivered on 23rd January, 2018.

11. Section 79G of the Civil Procedure Act provides that:

“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. The successful applicant must demonstrate “good and sufficient cause for not filing the appeal in time.” In *Thuita Mwangi v Kenya Airways [2003]e KLR*, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari material* with Section 79G of the Civil Procedure Act, reiterated its decision in *Mutiso v Mwangi [1997] KLR 630* as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

13. While the discretion of the court is unfettered, an Applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the invocation of the court's discretion in his favor.

14. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR* enunciated the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

- 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;***
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;***
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;***
- 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;***
- 6. Whether the application has been brought without undue delay.***
- 7.”***

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR*.

15. The delay of this case, in making the present application was about one month and 5 days since the lapsing of the 30 day period allowed for filing an appeal. The delay is not inordinate in the circumstances. The reason for the delay, though not substantiated through annexing the advocate's letter forwarding the judgment to the Applicants appears reasonable, and on the face of it the draft memorandum of appeal raises pertinent grounds of appeal. The latter requirement is not mandatory as the Court of Appeal stated in *Thuita Mwangi's case*.

16. The Respondent deposed in the replying affidavit that he will be prejudiced if the instant motion is allowed as he has already incurred costs in filing the declaratory suit in the lower court. Evidently this prejudice can be taken care of by an award of costs. The main interest at this stage is to do justice between the parties, and notwithstanding the delay herein, it is my considered view that justice can still be done

between the parties. See **Ivita v Kyumbu [1984] KLR 441. In Bagajo v Christian Children Fund Inc. [2004] 2 KLR 73** the court (**Ringera J** as he then was) emphasized that in exercising its discretion relating to extension of time, **“the court’s primary concern should be to do justice to the parties.”**

17. In the circumstances, I am inclined to grant the prayer for leave to file appeal out of time. Such appeal is to be filed within 14 days.

18. With regard to prayer 4, the same is predicated on a non-existent appeal. In my view, the filing of an appeal is a condition precedent to the exercise of this court’s appellate jurisdiction under Order 42 Rule 6 (1). Although the provision does not expressly say so, this can be inferred from the rule. Further an analogy can be drawn from Order 42 Rule 6 (4) of the Civil Procedure Rules which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given.

19. Equally Order 42 Rule 6 (6) of the Civil Procedure Rules states:

“Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

20. It would seem that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by the filing of an appeal, or compliance with the procedure for filing appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the Civil Procedure Rules). Until the Memorandum of Appeal is filed, the court may be acting in *vacuo* by granting a stay of execution pending appeal.

21. I am fortified on this position by the pronouncement of the Court of Appeal in the case of **Equity Bank -Vs- Westlink MBO Limited [2013] eKLR**. Commenting on Rule 5 (2) (b) of the Court of Appeal Rules which is substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules and on Order 42 Rule 6 (6) of Civil Procedure Rules, the Court of Appeal left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also **Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR**).

22. I therefore reject prayer 4 of the Notice of Motion as being prematurely brought, and for the avoidance of doubt, that part of the Notice of Motion is deemed as struck out. In the interest of justice however I order that the status quo be maintained during the 14 days allowed for the filing of the appeal. All the costs occasioned by the application are awarded to the Respondent.

DELIVERED AND SIGNED AT KIAMBU THIS 7TH DAY OF MARCH 2019

C. MEOLI

JUDGE

In the Presence of:-

Mr. Ranja holding brief for Mr. Mbigi for Respondent

Applicant – No Appearance

Court Clerk – Kevin/Nancy