



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 141 OF 2018**

**JOHN KAHIKO.....1<sup>ST</sup> DEFENDANT/1<sup>ST</sup> RESPONDENT**

**GEOFREY NJIRU.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**JACOB KARIUKI MURAGU.....3<sup>RD</sup> DEFENDANT/2<sup>ND</sup> RESPONDENT**

**VERSUS**

**VIRGINIA WANJIKU KIBORO**

**(Suing in her capacity as the administrator of the Estate of the late**

**HUMPHREY MBUGUA GICHEHA (deceased)...PLAINTIFF/3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before me is an application by way of Notice of Motion filed on 11<sup>th</sup> July, 2018 and brought under Sections 3A, 79G and 95 of the Civil Procedure Act and Order 42 Rules 4, 6 and 7, Order 50 rule 6 and Order 51 rules 1 and 3 of the Civil Procedure Rules, seeking that the court be pleased to grant the Applicant leave to file an appeal out of time and stay of execution of the Judgment of the lower court, pending the hearing and determination of the intended appeal.
2. The application is based on among other grounds that the Applicant is dissatisfied with the court's judgment delivered on 30/6/17 and subsequent apportionment of liability as contained in the ruling delivered on 23<sup>rd</sup> February, 2018. The application is supported by the affidavit of **Mutua Emmanuel Bara** the 2<sup>nd</sup> Defendant's/Applicant's Advocate. He deposed that in the judgment delivered on 16<sup>th</sup> June, 2017 (sic) the lower court omitted to apportion liability. That the Applicant paid half of the decretal amount in the belief that the lower court had apportioned liability at 50:50 between the Applicant and other defendants in the lower court. That at the same time, the said defendants being dissatisfied with the judgment on liability, sought clarification on apportionment of liability in the said judgment.
3. Counsel contended that the Applicant received notice of the ruling under protest. That in the said ruling the 2<sup>nd</sup> Defendant/Applicant was declared 100% liable, leading to the Plaintiff/Respondent's demand for the balance of Ksh. 965,772/= . That thereafter, the Applicant instructed his advocate to appeal the finding on liability and quantum. Counsel contends that the time within which to appeal has since lapsed and unless stay of execution is granted, the intended appeal will be rendered nugatory. The Applicant further contended that the intended appeal has high chances of success; that this application has been brought without undue delay and that if leave is not granted, the Applicant will suffer irreparable loss and damage.
4. **John Kahiko** and **Jacob Kariuki Muragu** the Applicant's co-defendants in the lower court filed their grounds of opposition to the application. Contending that the delay of one year in filing the application since the delivery of judgment is inordinate and inexcusable. It was said that the Applicant has not demonstrated his efforts in obtaining a copy of the Ruling on time.
5. Subsequently, the said Defendants' Advocate filed a replying affidavit on their behalf. He deposed that judgment was delivered on 16.6.2017 (the correct date is 30/6/17) and the Applicant herein was evidently not dissatisfied with the said judgment as he did not file an appeal at the time. That thereafter, the parties sought clarification on liability and a ruling was delivered to that effect. It was deposed that the Applicant has been indolent.
6. The application was canvassed by way of oral arguments. Counsel for the Applicant submitted that at the time liability was found against the Applicant at 100% on 23/2/2018, time to appeal against the judgment had lapsed thus the application for leave to appeal out of time. Reliance was placed on the case of **Mwangi Vs. Kenya Airways Ltd, [2003] KLR**. Counsel contended that the Applicant is willing to comply with any conditions the court might impose and is also ready to pay the remaining decretal amount should the judgment be upheld on appeal.

7. Counsel for the Applicant's co-defendants in the lower court submitted that the Applicant has not stated when he became aware of the ruling on liability and/or explained the delay in filing his instant application. It was said that the delay is inordinate as the application was filed one year after delivery of judgment. Counsel further contended that the Applicant had offered to settle the remaining decretal amount, thus the instant application is an afterthought.

8. Mr. Nyachoti, counsel for the Plaintiffs, adopted the submissions of the above Defendant/Respondents. He submitted that there was no mistake in the judgment of the lower court and the Applicant was employing delaying tactics. It was submitted that the Applicant has not approached the court with clean hands as he had initially promised to pay the balance but instead filed the instant application. The 3<sup>rd</sup> Plaintiff/Respondent was said to be a widow who would suffer prejudice if the application is granted.

8. 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 23<sup>rd</sup> January, 2018.

9. 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.”***

10. The successful applicant must demonstrate “good and sufficient cause for not filing the appeal in time.” In **Thuita Mwangi v Kenya Airways [2003] eKLR**, 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.”***

11. 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.

12. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] eKLR** 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] eKLR**.

13. The delay in this case, in making the present application was about one year since the lapsing of the 30 day period allowed for filing an appeal after judgment, and five months since the lower court ruling clarifying the apportionment of liability. The reason for the delay is in part explained by the fact that the parties had subsequent to the judgment approached the court for clarification on the apportionment of liability. The ruling was delivered on 23/2/18, by which date the Applicant had paid half the decretal sum.

14. The explanation for the further delay of five months though not substantiated is that the Applicant's advocates were unable to immediately trace the lower court file or ruling in order to file the present application. In my considered view, the delay is not inordinate and is mitigated by the apparent readiness by the Applicant to pay what he believed to be his share of the decretal sum. The draft memorandum of appeal raises arguable points of appeal on the face of it, although this is not a mandatory requirement as the Court of Appeal observed in

**Thuita Mwangi's case.**

15. And while I agree that the Applicant appears to have deliberately misled the Plaintiff's advocate as to his willingness, subsequent to the February 23<sup>rd</sup> Ruling, to settle the balance of the decretal sum, I do not accept that the present application should be rejected for having been brought as an afterthought. Any prejudice occasioned to the Respondents can be compensated through costs and interest. Besides, the Applicant has already been paid half of the decretal sum.

16. 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**. I therefore grant leave to the Applicant to file an appeal within 14 days of today's date.

17. 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) of the Civil Procedure Rules. 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.

18. 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.”**

19. 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.

20. 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**).

21. 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/Plaintiff.

**DELIVERED AND SIGNED AT KIAMBU THIS 2<sup>ND</sup> DAY OF APRIL 2019**

.....

**C. MEOLI**

**JUDGE**

**In The Presence of:-**

Mr. Olaka holding brief for Mr. Nyachoti for Plaintiff/Respondent

Applicant – Absent

Court Clerk - Kevin