



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 478 OF 2018

PETER KIHARA.....APPLICANT

-VERSUS-

CONSOLIDATED BANK OF KENYA LTD.....1ST RESPONDENT

PURPLE ROYAL AUCTIONEERS.....2ND RESPONDENT

RULING

1. Before me for determination are two (2) applications. The first is a Notice of Motion dated 13th September, 2018 filed by the appellant/applicant, and supported by the grounds set out on the face thereof and the affidavit sworn by the applicant. The orders sought therein are for a stay of execution pending appeal and leave to appeal out of time against the ruling delivered by Honourable P.N. Gesora (Chief Magistrate) on 17th May, 2018 in CMCC NO. 7416 OF 2018.

2. The applicant essentially deponed that he is dissatisfied with the aforesaid ruling and is desirous of appealing against the same but since the statutory timelines for lodging an appeal have since lapsed, leave of this court is necessary. The deponent further explained that the delay was occasioned by the time taken to obtain copies of the ruling and proceedings from the subordinate court; that the application has been brought without undue delay and that he stands to suffer irreparable damage unless the orders sought are granted.

3. In opposition to the abovementioned Motion, a replying affidavit was sworn by *Jeremiah Simba* on behalf of the 1st respondent to the effect that the applicant had executed various letters of offer and had taken out a loan facility from the 1st respondent. That shortly thereafter, the applicant neglected and/or failed to repay the loan amount and has continued to be in default.

4. The said deponent also asserted that not only has the application been filed with inordinate delay, but that the applicant has failed to annex a draft memorandum of appeal to demonstrate that his is an arguable appeal. *Jeremiah Simba* added that the applicant has neither demonstrated substantial loss nor offered any form of security.

5. This brings me to the second (2nd) application dated 5th December, 2018 and amended on 19th December, 2018 similarly filed by the appellant/applicant and seeking to reinstate the application of 13th September, 2018. In his affidavit in support thereof, *Duncan Okatch* averred inter alia that when his client's application dated 13th September, 2018 came up for hearing on 6th November, 2018, he had instructed an advocate to hold his brief and at the time the matter was called out, such advocate had stepped out briefly and was therefore not present in court. Consequently, the application of 13th September, 2018 was dismissed for want of prosecution.

6. Both applications were canvassed by way of written submissions. The applicant in his submissions reiterated the averments made in his respective applications save to add that the mistakes of an advocate should not be visited upon the client.

7. As concerns the prayer for a stay of execution, it was the applicant's submission that the essence of the same is to preserve the subject matter and if not granted, the appeal will be rendered nugatory.

8. On its part, the 1st respondent in essence contended that the applicant had failed to attend court on two (2) separate occasions when his application dated 13th September, 2018 had come up in court for hearing. For the aforesaid reasons, the 1st respondent urges this court to dismiss the Motion dated 5th December, 2018.

9. I have duly considered the facts as presented in the respective applications and affidavits in support thereof; the reply by the 1st respondent and the rival submissions together with the relevant authorities cited. It is noteworthy that the 2nd respondent has not put in any documents in this respect.

10. Before I proceed any further, I cannot overlook an issue that it would appear was not addressed by the parties; that is, the proper court to entertain either of the applications. It is my observation that the subject matter in issue relates to a commercial transaction involving the parties herein. It would therefore have been appropriate for the applications to be filed before the Commercial Division of the High Court as opposed to Civil Division. Nonetheless, since the parties have already argued the merits of the said applications before me, it would only be prudent and expeditious for the same to be determined by me.

11. That said, I will first deal with the application dated 5th December, 2018 and amended on 19th December, 2018. In so doing, I deem it necessary to clarify that contrary to the averments made by the applicant, the application of 13th September, 2018 was dismissed for non-attendance and not want of prosecution. In the circumstances, the authorities referenced in that regard have no relevance whatsoever herein.

12. Needless to say, the applicant's counsel gave the explanation that the advocate holding his brief was not in court when the matter was called out. The courts have on various occasions acknowledged that blunders tend to be made by advocates every so often and that this should not be the sole basis on which a party should be made to suffer, as was rightly held in **Phillip Chemwolo & Another v Augustine Kubede [1982-88] KLR 103** in that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit”

13. On the same note, while I took into account the 1st respondent's indication that it had filed a response to the relevant application, no copy has been availed to me. Be that as it may, I am satisfied by the applicant's explanation and will exercise my discretion in ensuring the interest of justice is achieved. In the premises, I will allow the reinstatement of the application dated 13th September, 2018 but will grant costs to the respondents.

14. Having settled my mind on the above, I now turn to the application dated 13th September, 2018 and will first address the prayer on leave to appeal out of time. In that respect, reference is made to **Section 79G of the Civil Procedure Act** which provides as follows:

“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.”

15. The above provision elaborates that a court can only grant a party leave to file an appeal out of time where sufficient cause is shown. Given that the impugned ruling was delivered on 17th May, 2018, it is obvious that the time-period for lodging an appeal has lapsed. The question therefore remains whether or not the applicant has given sufficient reason for not appealing in good time.

16. In contemplation thereof, I draw guidance from **Apa Insurance Limited v Michael Kinyanjui Muturi [2016] eKLR** with reference to the Court of Appeal case of **Thuita Mwangi v Kenya Airways Limited [2010] eKLR** which illustrate the conditions to be met in an application for leave to appeal out of time as follows: ***the length of delay; the reason for the delay; whether the appeal is arguable; and the degree of prejudice that will befall the respondent if the application is granted.***

17. It is also worth mentioning that the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** discusses similar conditions though the said case is most relevant in appeals to the Court of Appeal.

18. As concerns the first element on the length and explanation for the delay, it is clear that the application has been brought close to four (4) months following the delivery of the impugned ruling. It is without a doubt that there has been a delay here, though I do not find the same to be inordinate. As to the reason thereof, the applicant argued that time was taken in obtaining the copies of the ruling and proceedings. I have perused the record and found nothing to indicate the date on which a request was made for the same and at what point they were finally made available. Nevertheless, I am aware that delays often arise when it comes to obtaining copies of rulings/judgments and proceedings, hence the applicant's submission seems not to be far-fetched.

19. This leads me to the element on prejudice that will be visited upon the respondents and more particularly, the 1st respondent. As I may recall, the 1st respondent submitted that following the dismissal of the application of 13th September, 2018, it proceeded to file a bill of costs though a copy thereof has not been made available to this court. What also comes out clearly is that the 1st respondent is keen on realizing its security. It is therefore apparent that the 1st respondent undeniably stands to be prejudiced if a stay of execution is granted and the matter proceeds to appeal.

20. Suffice it to say, the applicant, being aggrieved by the subordinate court's ruling, should not be hindered from exercising his right to appeal unless absolutely necessary. In this sense, while I am alive to the prejudice that the 1st respondent will suffer, I cannot turn a blind eye to the prejudice that the applicant will be made to face should he be denied leave to appeal out of time. It is necessary for me to balance the rights of the parties in ensuring that access to justice is not overlooked in the process. I find it reasonable for the applicant to be given the opportunity of challenging the subordinate court's decision on appeal.

21. Having determined the above, I shall now address the second limb of the Motion which concerns the granting of a stay of execution as well captured under **Order 42, Rule 6 (2)** of the Civil Procedure Rules.

22. I believe the first condition on whether or not the application has been brought without unreasonable delay has been analyzed in detail and there is little need for me to belabor my arguments above.

23. The second conditions touches on substantial loss, which I might add, forms the crux of an application for a stay of execution. The applicant argued that if granted, a stay will have the impact of preserving the subject matter of the appeal. Put another way, the applicant seems apprehensive that unless a stay is granted, the respondents will proceed with execution.

24. My deliberation on the above is taken from the analysis made in *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR* that:

“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.”

25. It therefore follows that it is not enough for the applicant to contend that the respondents will proceed with the statutory power of sale. If anything, the applicant has neither denied the existence of a loan nor alluded to the fact that the subject property was not charged to the 1st respondent. In my humble view, execution is a lawful process in every sense of the word and should not be impeded save for where substantial loss has been established, which is not the case here. I therefore have no basis on which to conclude that substantial loss will result.

26. The third and final condition on the provision of security was not addressed by the applicant.

27. Consequently, this court makes the following orders:

a) Prayer c) of the Amended Notice of Motion dated 19th December, 2018 is allowed with no orders as to costs.

b) Prayers 3) of the Notice of Motion dated 13th September, 2018 is allowed. Costs shall abide the outcome of the appeal.

c) The applicant to file the intended appeal at the Commercial and Admiralty Division of the High Court within 30 days from today, failing which the order for leave to appeal out of time shall lapse.

Dated, signed and delivered at NAIROBI this 1st day of April, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st Respondent

..... for the 2nd Respondent