



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL MISC APPL. NO. 260 OF 2018

RONALD GAITA MAATHAI.....APPLICANT

VERSUS

WILLIAM MWORIA MUGAMBI.....RESPONDENT

RULING

1. The Application dated 23rd March, 2018 seeks orders that this honourable court do grant the Applicant herein leave to file his appeal out of time against the whole judgment/decreed in Milimani CMCC No.7541 of 2013, delivered on the 22nd day of December, 2017.
2. Secondly, that there be stay of execution of the judgment entered against the Applicant on the 22nd day of December, 2017, in Milimani CMCC No. 7541 of 2013, pending the hearing and determination of this appeal.
3. According to the affidavit in support, the delay in filing the appeal is due to an inadvertent mistake by the advocate due to one of the office associates handling the file having left their firm. It is further stated that there has been delay in being supplied with copies of the judgment and decree. It is argued that the intended appeal has high chances of success and will be rendered nugatory if the application is not allowed. That if the decretal sum is paid, it will be out of the Applicant's reach.
4. The application is opposed as per the grounds of opposition and replying affidavit filed. The Respondent supported the judgment of the lower court and stated that the application at hand has been made belatedly, has no merits and is meant to delay the enjoyment of the fruits of the judgment.
5. The application was argued by way of written submissions. I have considered the said submissions.
6. 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 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 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.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

7. The court therefore has the discretion to extend time within which to file an Appeal. As stated by the Court of Appeal in the case of **Aviation Cargo Limited v St. Mark Freight Services Limited [2014] eKLR**:

“...whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.”

8. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“No order for stay of execution shall be made under sub-rule (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.”

9. The judgment of lower court was delivered on 22nd December, 2017. The application at hand was filed on 26th April, 2018. This is a delay of about three months. The same has been explained.

10. The Applicant has expressed apprehension that if the decretal sum is paid it will be out of his reach. On the other hand the Respondent has not said anything to allay these fears.

11. To balance the competing interests of the parties herein, I allow the application on condition that the decretal sum is deposited in a joint interest earning bank account of the counsels for the parties or in court within 30 days from the date hereof. The intended appeal to be filed within 14 days from today. Costs to the Respondent.

Dated, signed and delivered at Nairobi this 10th day of April, 2019

B THURANIRA JADEN

JUDGE