



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 294 OF 2018**

**CHRISTA MUTIO MUTISYA.....APPLICANT**

**VERSUS**

**EQUITY BANK LIMITED.....RESPONDENT**

**RULING**

1. By the Notice of Motion dated 7/11/2018, the Applicant seeks in the main an order that time be extended for her to file an appeal and that pending the hearing and determination of the intended appeal the applicant be granted stay of execution of the orders by the trial court contained in the ruling dated 2/9/2018.
2. The reasons advanced in the face of the Application and on the Affidavit in support are that; by the said ruling the Applicants application for an injunction to stop sale pursuant to chargee's power of sale was dismissed with costs but the applicant was not made aware of the same till the 27/10/2018 when she received a letter from the respondents advocate to the effect that the suit property had been sold. Upon receiving the information, the Applicant felt aggrieved with the decision, dropped the previous counsel and appointed the current one who then filed the application on the 8/11/2018.
3. On the duty to explain the failure to take steps in time the applicant asserted that the time to lodge the appeal having lapsed on 2/10/2018, due to lack of information, she moved expeditiously within some ten days of being informed hence there is no inordinate delay and that the delay was occasioned by mistake of counsel which should not be visited upon her. It was then asserted additionally that she stands to suffer irreparably in that her property being her home and home to her family was threatened with wrongful and illegal transfer in favour of a third party and will thus render the appeal nugatory.
4. In opposing the application, the Respondent filed a notice of preliminary objection, grounds of opposition and a replying affidavit sworn by one JAMES CHEGE MBUTHIA. The preliminary objection contends that this courts lacks jurisdiction to entertain the matter owing to the provisions of Section 34 Civil Procedure Act. On the other hand the grounds of opposition fault the application for being an abuse of the court process owing to inordinate and inexcusable delay and for being anchored on advocate client relationship. It was then contended that the matter had been overtaken by event in that the charge had already foreclosed on the property by sale hence stay cannot be granted for failure to disclose material facts and merely designed to seek courts intervention in re-writing the contract between the parties. It was equally contended and asserted that having failed to pay the debt the applicant approached the court with unclean hands thus unworthy of equitable remedies as she seeks to frustrate the respondent from recovering its due funds.
5. These facts were reiterated in the Replying Affidavit with a stress of failure to make candid and honest disclosure including the fact of non-disclosure of the sale and thus foreclosure and that to grant the orders sought would be to put the court into disrepute by aiding the applicant who has defaulted in her obligations under a contract with the Respondent. For good measure a statement of accounts was exhibited as "Annexure S" showing sums outstanding as at November 2018.
6. After the matter had been adjourned severally to enable the parties try an out of court settlement, the negotiations failed, and the parties then filed written submissions in urging the application.
7. The submission by the Applicant are dated 29/01/2019 and filed in court on 31/01/2019 while those by the Respondent are dated 04/03/2019 and filed in court the same day. In their submission, the Applicant has essentially made a case for extension of time while citing to court the decisions in *Richard Muthusi vs Patrick Gatimu Ngumo [2019] eKLR* and *Jenipher Njuguna vs Robert Gichuni [2017] eKLR* on when account would extend time to file an appeal out of time. From those submissions nothing of substance has been said about the prayer for stay pending appeal because even the issue for determination is only isolated as one concerning extension of time.
8. For the respondent extensive and elaborate submissions were filed covering issues ranging from the competence of the Memorandum of Appeal exhibited; whether stay can be issued against a negative order and when to grant extension of time to file an appeal out of time. In

the submissions reference has been made to the provisions of Order 42 Rule 1 & 6(2) Section 79 G of the Act as well as the decision in ***Thuita Mwangi vs Kenya Airways Ltd*** on the proposition of law that extension of time is essentially a discretionary matter and the applicable principles. Critical to court from those submissions is the position taken that the application for extension should not be allowed because in the Application the applicant shifts blame upon the former advocate and that the applicant had the duty to ascertain the status of her case from the court records. It was also contended that the applicant had failed to satisfy any of the pre-requisites of grant of extension of time to file an appeal. On stay pending appeal, submission were made to the effect that the order appeal against was a negative order and thus not meriting being stayed and the decision in ***Keinwal Singh Dhinan vs Keshavji Jirraj Shall CACA No. 320 of 2006*** cited for such submissions.

9. The last point submitted upon was the realization by the Respondent that the discretion is wide and unfettered and therefore it was submitted that if the court was to be inclined to grant stay then the respondent should be ordered to deposit the sum outstanding on the debt.

### **Determination**

10. I have carefully perused the papers filed as well as the written submissions as highlighted orally and I have come to the view and opinion that the application seeks that the court determines two issues:-

- i. Whether the applicant deserves time being extended to file an appeal.
- ii. Whether there should be granted to the applicant an order of stay pending an intended appeal.

### **Extension of time**

11. The discretion of the court to extend time is so vested and granted in my view as one of the pillars to support access to justice and the right to be heard on the merits of the dispute. The wide powers, otherwise called unfettered discretion, exists for the purpose that merely because a lapse has occurred, a litigant with a deserving case, need not be shut out. However it being also an established principle of law that justice be done expeditiously without delay the discretion on the court to extend time is also not given for free with no obligation upon the applicant at all. The applicant has the obligation to explain the delay to the satisfaction of the court.

12. In this matter there is unchallenged explanation that having been represented by counsel the fate of the applicant's application before the trial court was never communicated to her. Can that be the only basis to shut the applicant from the seat of justice? I think not. Even before the constitution 2010, with its very robust bill of rights encompassing the right to access justice, the Kenyan courts had taken the proactive approach that legal disputes need to be handled on the merits and the mere fact that a slip or mistake has occurred should not be the only reason to shut a citizen from being heard in his dispute. The very forceful words of madam J, in HIS known flowery and immortalized words keep coming to mind. The judge said in ***Belinda Muran vs Amos Wainaina [1979] eKLR***

**“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress”**

(Emphasis Added)

13. Those words even though delivered as obiter dictum have been a guiding light for the superior courts in this country. Courts now strive to sustain the substratum of disputes rather than routinely and summarily stop them without affording parties access to the courts.

14. For my part in this matter, I am satisfied that the explanation given by the applicant is satisfactory to me. I may only add that the test on satisfaction should never be so stringent as to appear to be a fetter on the courts discretion. The court must be focused on the need to do justice between the parties and every case would have to be determined on its own merits and peculiar facts and circumstances.

15. The next issue is the period of delay, what is not disputed or controverted is the assertion that there was not communication from the advocate until the buyer's Advocates' letter of 25/10/2018 said to have been received on 27/10/2019. The period of delay must thus be the period between the time the information was received and the date an action was taken.

16. I calculate this to be between 27/10/2018 and 8/11/2019 when the information was received and get a period of 10 – 11 days. That is a period I do not consider to constitute an inordinate delay.

17. Consequently, I do find and hold that there has been offered a satisfactory explanation of the delay and the period is not ordinate. Accordingly I do extend time to lodge the appeal by a period of 7 days from the date of this decision.

### **Stay pending intended appeal**

18. Notwithstanding the other provisions cited to ground the application, the prayer for stay sought must be seen to be stay pending appeal.

19. My understanding of the law is that this court or indeed any other court can only grant stay where there is an appeal filed in accordance with the Rules of that court. Here I have just given leave to appeal and the appeal is yet to be filed. To grant stay now would be premature and preemptive unless I was to grant stay on any other basis but not stay pending appeal.

20. For now, I stop at the level of saying that there being no pending appeal, I have no discretion to grant stay in the air. Having said so I opt not to say anything on the alleged sale and the nature of the order sought to be appeal against.

21. On the notice of preliminary objection filed, I note that no submissions were offered in that regard and it may as well be safely inferred that the Respondent did not deem it be serious a point to engage the court upon. It may however be enough to say that Section 34 only mitigate against filing of a fresh suit but clearly does not bar an appeal on an application to file an appeal out of time.

22. In any event the provision is clear that it prohibits litigation of issues in a decree by a separate suit to challenge execution. Here the Respondent take the very strong view that the dismissal order is incapable of execution and it thus difficult to understand how Section 34 has been invited here.

23. All in all, I do grant to the applicant extension of time to file an appeal for a period of 7 days but I decline to grant any order of stay.

24. The Applicant having necessitated the application shall pay the costs of the application to the Respondent even though the success is here.

**Dated and signed at Mombasa this 4<sup>th</sup> day of June 2019.**

**P.J.O. OTIENO**

**JUDGE**

**Dated and delivered at Mombasa this 6<sup>th</sup> day of June 2019.**

**LADY JUSTICE D. CHEPKWONY**

**JUDGE**