



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. 38 6 OF 2018**

**ANTHONY GITONGA T/A GOOD**

**SHEPHERD SCHOOL YATTA.....APPLICANT**

**VERSUS**

**FRANCIS MUVEA.....RESPONDENT**

**RULING**

1. What remains for determination in this application is the prayer for an order for extension of time within which to file an appeal. The application is brought under Order 22 Rule 22. Order 50 Rule 6 of the Civil Procedure Rules and Section 3A and 63(e) of the Civil Procedure Act. It is supported by the affidavit of **Anthony Gitonga Kamundi**.

2. The background to the application, as gleaned from the pleadings and the annexures thereto, relates to a civil suit number 48 of 2015 in Kithimani. There is a warrant of attachment of movable property in execution given on 29<sup>th</sup> October, 2018, a warrant of sale of property given on an even date as well as a proclamation dated 13<sup>th</sup> November, 2018.

3. The grounds were stated briefly in the Notice of Motion and laid out in detail in the affidavit in support of the application where the applicant averred that the trial court delivered judgement on 15<sup>th</sup> March, 2018 in the absence of the parties and he was served with a draft decree on 17<sup>th</sup> April, 2018. He averred that at the time the decree was served, the time allowed for filing an appeal had lapsed hence he sought the grant of the prayers sought and attached a copy of the proclamation and the warrants of attachment.

4. In opposition to the application, Francis Muvea vide affidavit deponed on 27<sup>th</sup> March, 2019 averred that the instant application is defective. He averred that it is well over a year that the decision of the lower court was issued and further that on 18.7.2018 the lower court gave him 45 days to file the instant application which was not done hence the applicant is not deserving of the instant order. He averred that if the application is allowed he will be occasioned injustice because he shall be denied the right to enjoy the fruits of his judgement.

5. The court directed that the matter be canvassed vide written submissions. However the applicant's submissions are not on record. Vide submissions filed on 19<sup>th</sup> June, 2019, learned counsel for the respondent framed six issues for determination; is the applicant guilty of laches and/or indolence; does the present application merit the orders for leave to appeal out of time; does the present application merit the condition for grant of the orders sought; does the appellant have an arguable appeal; has the applicant demonstrated how they stand to suffer irreparable damage and which party should bear the costs of the present application. On the first issue, counsel submitted that the instant application has been brought one year after the judgement was delivered and that in the lower court the applicant was directed to file the application within 45 days and he failed to do so hence this being a court of equity, the applicant will enjoy equity if he acts equitably. Reliance was placed on the case of **Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited (2014) eKLR** in submitting that the applicant was guilty of laches. On the issue of stay pending appeal, counsel submitted that the operative law is Order 42 Rule 6 of the Civil Procedure Rules and the applicant has not met the conditions for grant of the said order. It was further submitted that the court cannot extend time in a vacuum and it has not been guided on the reason for delay in filing an appeal and therefore urged the court to dismiss the application with costs as lacking in merit.

6. This court has the discretion, for sufficient cause, to extend time under Section 79G of the Civil Procedure Act. Sufficient cause should relate to the inability to do a particular act.

Section 79G provides as follows:-

**“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.”**

7. The issues for determination in this application are firstly whether the applicant has established sufficient reasons for the court to extend the time in which to lodge the appeal; secondly whether the applicant is guilty of dilatory conduct and finally whether any injustice will be caused if the application is not granted.

8. The above principles were earlier considered by Duffus P in the case of **Mugo & Others v Wanjiru & Another [1970] EA 481** at p.484 where he stated thus;

*"Each application must be decided in the particular circumstances of each case but as a general rule the applicant must satisfactorily explain the reason for the delay and should also satisfy the court as to whether or not there will be a denial of justice by the refusal or granting of the application."*

9. The Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR**, listed the factors which aid our courts in exercising the discretion whether to extend time to file an appeal out of time, they include the following:

**a. The period of delay;**

**b. The reason for the delay;**

**c. The arguability of the appeal;**

**d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;**

**e. The importance of compliance with time limits to the particular litigation or issue; and**

**f. The effect if any on the administration of justice or public interest if any is involved.**

10. I will bear the above principles in mind as I proceed to determine this application. It is therefore not in dispute that there is a warrant of attachment as well as proclamation. A careful perusal of the contents of the affidavit in support, in my view, does not inform the court the nature of the judgement that the applicant wants leave to appeal from and specifically the specific reasons that form the basis of the appeal have not been brought to the knowledge of the court. To my mind, the applicant was narrating a dissatisfaction with the warrant and proclamation that were issued. I must observe that an affidavit filed in support of a motion like in this case contains evidence which the applicant seeks to rely on to support his/her case. Documents attached thereto are part of that evidence and therefore it will not be incorrect to hold that there is no evidence of an arguable appeal.

11. In this case, the applicant has averred that judgement was delivered without notice and the only documents referred to in the affidavit in support are; the proclamation and the warrants of attachment. I opine that the same are not relevant for proving the grounds of this application.

12. Be that as it may, it is not in dispute that the impugned judgement was delivered by the trial court as counsel for the respondents also alluded to them in his submissions. I am therefore inclined to consider the same in the interest of justice since counsel for the respondent did not challenge its authenticity.

13. The applicant averred that the delay was occasioned by the fact that judgement was delivered without notice. However, in the affidavit in reply the respondent averred that there was an application in the lower court that the applicant was directed to file the appeal within 45 days and the said applicant failed to heed to the directions of the trial court. There is no evidence in support of the same and therefore the court finds that it has not been shown that there were such directions issued.

14. The judgement intended to be appealed from was delivered on the 15<sup>th</sup> March 2018. Under Section 79G of the Civil Procedure Act, the appeal ought to have been filed by 15<sup>th</sup> April, 2018 which is 30 days from the date of the judgement. The applicant concedes that he did not take those necessary steps. He attributes his failure to do so to the issue of judgement in the absence of the parties. He states that he only became aware of the same when he was served with the draft decree on 17<sup>th</sup> April, 2018 and it would appear to me that he has been in slumber until he was jolted by the proclamations that were issued in October and November 2018. In the premises, I am not convinced with the reason for the delay.

15. From the foregoing analysis of the applicant's grounds of application as relate to his failure to take the necessary steps in instituting the appeal, it is clear that the applicant has failed to demonstrate any sufficient ground that prevented him from acting within time. Ordinarily, this application would be dismissed for that reason.

16. I have carefully considered the arguments of counsel for the respondent and the rival affidavits on these grounds vis-a-vis the background of this application. On the first one, it is indeed true that the subject matter of the dispute between the parties herein is a judgement that was issued by the trial court. The respondent feels that if the application is allowed, he will be denied from enjoying the fruits of his judgment and, moreover the applicant has been guilty of laches. However I note that the applicant has not even availed any draft memorandum of appeal as an indication that he is aggrieved about the impugned judgement. The court is in an awkward position much as it would have liked to give relief to the applicant. The applicant has been aware of the matter when he was served with the draft decree and had he been prudent would have taken the appropriate steps. Sadly he has done nothing.

17. A court of justice cannot turn a blind eye to aggrieved parties with a judgement and send back parties that run to it for redress to go and face it simply because certain requirements of the law or conditions set by court are not strictly met. Article 159 (2) (d) of the Constitution enjoins this court to administer substantive justice without undue regard to technicalities. As noted above the applicant has not availed a draft

of the petition of appeal as a sign of seriousness on his part. It has been held by the Supreme Court of Uganda that the equivalent of this article is not a magic wand in the hands of a defaulting litigant. (**Kasirye, Byaruhanga & Co. Advocates vs. Uganda Development Bank, Supreme Court Civil Appeal No. 2 of 1997.**)

18. Rules of procedure should be applied with due regard to the circumstances of each case. Considering the circumstances of this case as explained above, I would have, in exercise of the inherent power of this court under Section 3A of the Civil Procedure Act, be inclined to grant this application on the ground of cognizance of the right to be heard on appeal. As indicated above, there is no such appeal annexed to the application. In the case of **Legal Brains Trust (LBT) Limited vs Attorney General, Civil Appeal No. 4 of 2012 of the Appellate Division court in the East African Court of Justice**, it was held that a court of law will not adjudicate hypothetical questions. A court will not hear a case in the abstract, or one which is purely academic and speculative in nature, where no underlying facts in contention exist. For this court to indulge in a hypothetical and speculative appeal would amount to an abuse of court process. Further the applicant's right of appeal should be balanced against the right of the respondent to enjoy the fruits of the judgement. The Applicant has not given any justification as to why he should keep the respondent at bay over the fruits of the judgement. However, even though the Applicant has not persuaded me to grant the orders, I am inclined to give the Applicant leave to file and serve his Memorandum of Appeal within 14 days from the date hereof.

19. In the result and save for leave to lodge appeal, I find the application dated 14.11.2018 lacks merit and is dismissed with costs.

It is so ordered.

Dated and delivered at **Machakos** this 22<sup>nd</sup> day of **October, 2019.**

**D. K. Kemei**

**Judge**