REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISCELLANEOUS CIVIL CASE NO. 82 OF 2017

JAMES MWAURA GATHII.....APPLICANT

VERSUS

FRANCIS NJUGUNA ITUBIA.....RESPONDENT

R U L I N G

1. By a Notice of Motion dated 23rd May, 2017 expressed to be brought *inter alia* under Section 3A of the Civil Procedure Act, and Order 42 Rules 1 and 2 of the Civil Procedure Rules, the Applicant sought stay of execution and leave to appeal out of time against the ruling delivered Kiambu Civil Case No. 1984 of 1996 by Kituku, PM on the 1st February, 2017.The ruling was in respect of an application principally brought to set aside a consent recorded on 15th June 1999.

2. The Application is premised on among other grounds, that the ruling was delivered without notice to the parties, having initially been adjourned on 8th December,2016. The Applicant claims to have learned of the ruling "long after" the delivery and that there has been no inordinate delay on his part. That, in sum, is the gist of his affidavit in support of the motion.

3. Through his advocate, the Respondent filed a replying affidavit in opposition to the motion. At paragraph 7, the deponent lists several applications, including one in **High Court Miscellaneous Application No. 304 of 2005** dismissed on 24th February, 2016 which she deposes were filed by the Applicant seeking stay of execution among other prayers.

4. The application was canvassed through brief submissions based on filings on record. The court has considered the material canvassed in respect of the instant motion. The application is erroneously expressed to be brought under Section 3A of the Civil Procedure Act. The correct provisions to be invoked in an application this nature ought to be Sections 79 G and 95 of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules. The ruling that it is sought to be appealed from was delivered on 2nd February, 2017.

5. 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:***
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> > ***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."***

6. The successful applicant must demonstrate ***"good and sufficient cause for not filing the appeal in time."*** In **Thuita Mwangi v Kenya Airways [2003] e KLR,** 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."**

7. 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 exercise of the court's discretion in his favor.

8. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** 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 burn 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[e KLR.**

9. The period of delay in bringing the instant application was over 3 months since delivery of the ruling. The Applicant is vague as to the actual date when he learned of the delivery of the ruling in the lower court. It is also evident that the Applicant has filed many previous applications relating to the suit in the lower court. The suit itself was filed in 1984 and judgement on liability recorded by way of a consent order on 15th June 1999. Damages were subsequently assessed at sh. 88,674.50 on 9th November 1999 .

10. It is evident from the ruling of 2nd February, 2017 which the Applicant desires to appeal against, that the Applicant had prior to the application subject of the ruling filed several other applications, including one to the High Court in 2004. Inasmuch as the Applicant presently seeks to appeal against that latest ruling, the history and age of the dispute is relevant in considering whether to exercise discretion in the Applicant's favour.

11. The maxim that justice delayed is justice denied comes to mind. It would be a travesty of justice to allow the applicant to continue extending the life of a 35year old dispute under the guise of an intended appeal, concerning an application, seemingly an afterthought, brought some 33 years since the consent order. Thus, despite the brevity of the period of delay since the ruling of Kituku PM and the filing of the present application, it is my opinion that, the entire context within which it is made militates against the granting of leave in this case.

12. Cases must come to an end and no party ought to enjoy the luxury of using myriad applications to delay the execution of a decree infinitely, to the detriment of the decree holder. The prejudice visited upon the Respondent by this delay is obvious; the Respondent has a decree in his favour that has remained unexecuted for all these years. He must be allowed, without any further delay, to enjoy the fruits of his judgment.

13. No good and sufficient cause as envisaged in Section 79 G of the Civil Procedure Act has been demonstrated in this instance, for the lengthy period of delay in this cause . Besides, great prejudice has thereby been visited upon the Respondent. There can be no justification for extending this state of affairs. In the result, I find no merit in the application filed on 23rd May,2017 and will dismiss it with costs. The court further directs that execution of the decree in the lower court does proceed expeditiously.

DELIVERED AND SIGNED AT KIAMBU THIS 3RD DAY OF OCTOBER 2019

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C. MEOLI

JUDGE

In The Presence of:-