



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC CIVIL APPLN NO. 48 OF 2019

MERU FARMERS SACCO LTD 1ST APPLICANT

ALICE KIENDE.....2ND APPLICANT

HELLEN NYOROKA.....3RD APPLICANT

ZAKARY MPUTHIA.....4TH APPLICANT

KITHINJI FRANCIS.....5TH APPLICANT

VERSUS

FRANCIS MUTEMBEI MBURUGU.....RESPONDENT

RULING

1. This is a ruling on a Motion on Notice dated 27/5/19 brought pursuant to **sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules**. In the Motion, the applicants seek for a stay of execution pending the hearing and determination of the intended appeal and for extension of time to file an appeal.

2. The grounds upon which the application is grounded upon are in the body of the Motion and the supporting affidavit of Daniel Gitonga Kiambati, the Human Resource Manager of the 1st applicant, sworn on 14/5/19. It is contended that the delay in filing the appeal was as a result of the judgment being delivered without notice while the delay in filing this application was as a result of the length of time taken to furnish the applicants with copies of the judgment. That the judgment delivered on 22/8/18 is partial and no prejudice will be occasioned to the respondent if the application is allowed.

3. This was opposed by the respondent through his replying affidavit sworn on 5/7/19. He deponed that a decree has not been obtained thus there is no urgency in the matter as the respondent cannot proceed with execution; that the applicants cannot seek a stay of the part judgment which was delivered on 22/8/18 pending appeal when no such appeal has been lodged and that there had been inordinate delay in bringing the application.

4. The parties filed their respective submissions. The applicants submitted that a stay pending appeal does not depend on whether the appeal is from a final judgment or a partial judgment as provided for under Section 65 (1) (b) of the Civil Procedure Act, CAP 21.

5. The respondent submitted that there is no memorandum of appeal to establish whether the appeal is arguable making their prayer premature. Besides, no decree has been drawn or annexed to the application. The trial court in Meru Chief Magistrates Civil Case No. 276 of 2012 has not finalized the matter as it has only made an award for general damages while the special damages is yet to be determined. That the trial court be allowed to deliver its full judgment and if the applicants are dissatisfied with the same they can appeal.

6. The two issues for determination are: **whether to issue stay of execution** and **whether to grant extension of time to file an appeal**.

7. On an application for stay of execution pending appeal, the guiding principles are laid down under **Order 42 Rule 6 of the Civil Procedure Rules**. The applicants seek to stay the execution of the partial judgment and possible decree in **Meru CMCC No. 276 of 2012** pending the intended appeal. From the record, there is no evidence of this fact as no partial judgment and or decree has been annexed to the application. Further, for an applicant to be entitled to a stay, he has to provide evidence that he/she will suffer substantial loss. In this case, the applicants have failed to provide evidence of this fact.

8. In addition, an application for stay ought to be filed without unreasonable delay. The judgment is said to have been delivered on 22/8/18 but the present application was filed on 27/5/19. That was a delay of approximately 9 months. Definitely, that was inordinate.

9. On the second issue, the applicants have sought the extension of time within to file their appeal. **Section 79G of the Civil Procedure Act** provides: -

“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.”

10. The grant of leave to file an appeal out of time is in the discretion of the court. That discretion has to be exercised judiciously and not capriciously. In terms of the proviso to **section 79G**, the applicant has to satisfy the Court that there was good and sufficient cause for not having filed the appeal within time. In this regard, it is expected that notwithstanding the delay in the filing of the appeal, an applicant must provide the basis for the exercise of the discretion. Put in another way, the delay must be explained.

11. In the case of **Samken Limited & Another v. Mercedes Sanchez Rau Tussel CA No. Nai 21 of 1999 (UR)**, the Court of Appeal held:-

“We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said, the discretion can only be exercised upon reason, not sympathy. On this aspect of the matter, the applicants placed before the learned single Judge no material upon which he could exercise his discretion.”

The foregoing are the principles applicable in an application such as the one at hand.

12. According to the applicants, the delay in filing the appeal was due to two reasons; namely, that judgment was delivered without notice on 22/8/18 in the absence of the all the parties and that there was delay in being supplied with certified copies of the judgment.

13. It is not in dispute that the trial court erred in delivering the judgment without notice to the parties. However, it is clear that the applicants first became aware of the delivery of judgment on 24/10/18 when their advocate was notified of the same by the respondent’s advocates. The applicants took no steps for 23 days until 16/11/18 when they applied for certified copies of the judgment.

14. Between 16/11/18 and 5/3/19 when the judgment was certified the applicants did absolutely nothing. The applicants finally received the certified copy of the judgment on 11/4/19. After that, they took another whooping 45 days to lodge the present application on 27/5/19.

15. Firstly, all the applicants needed was to know the contents of the judgment not to have a certified copy thereof to be able to decide whether or not to appeal against the decision. Secondly, the time between their knowledge of the judgment and when they applied for a certified copy thereof is not explained. Thirdly, there is no explanation why it took 4 months (between 16/11/18 and 5/3/19) to obtain just a certified copy of the judgment, which was in any event not required to make the present application. Fourthly, the delay between 5/3/19 and 12/4/19 was not explained. The applicants took over a month to collect the copy of the judgment, which in any event they never exhibited in the application before Court.

16. Finally, even after receiving alleged the certified copy of the judgment, the applicants took another 45 days to lodge the application. To this Court’s mind, the delay in the various stages pointed out above was not sufficiently explained. The delay being inordinate and not sufficiently explained, there is no basis upon which this Court can exercise its discretion.

17. In the premises, I find the application to be without merit and dismiss the same in its entirety with costs to the respondent.

DATED and DELIVERED at Meru this 17th day of October, 2019.

A. MABEYA

JUDGE