



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISCELLANEOUS CIVIL CASE NO. 172 of 2018

MOSES KINUTHIA WANGIGE.....APPLICANT

VERSUS

VITAL CARGO LOGISTICS LIMITED.....RESPONDENT

R U L I N G

1. By a Notice of Motion dated 24th September, 2018 expressed to be brought under Article 159(2) (d) of the Constitution and Sections 1 A, 1B & 3A, *inter alia*, of the Civil Procedure Act, the Applicant herein **Moses Kinuthia Wangige**, sought leave to appeal out of time against the judgment entered against him in **Thika CMCC No. 1095 of 2017** *vide* the ruling delivered by **Kyanya Nyamori, SRM** on the 11th July 2018, and stay of execution pending the intended appeal.
2. The Application is premised on among other grounds that, after the ruling was delivered the Applicant promptly applied for proceedings, but the court file went missing so that proceedings were only supplied on 3rd September 2018.
3. The Applicant swore an affidavit in support of the motion. His depositions repeat the grounds on the face of the motion, and in addition, he asserts that he will suffer great prejudice if execution is not stayed.
4. The Respondent company filed a replying affidavit through its Managing Director, **Andrew Wachira Gitari** in opposition to the motion, primarily pointing to the Applicant's delay in applying for the lower court proceedings. Much of the affidavit is taken up with argumentative material not suited for an affidavit.
5. The application was canvassed by way of written submissions by the respective parties. The Applicant's submissions take cue from his filed material. On its part, the Respondent centered its submissions on the prayer for stay of execution pending appeal and urged the court to reject it.
6. The court has considered the material canvassed in respect of the instant motion. The application is erroneously expressed to be brought under Sections 1A, 1B & 3A of the Civil Procedure Act and invokes article 159 of the Constitution. The appropriate provisions to be invoked in an application this nature ought to be Sections 79 G and 95 of the Civil Procedure Act and Order 46 Rule 6(1) and Order 50 Rule 1 of the Civil Procedure Rules. However, the Applicant has belatedly cited the correct provisions in his submissions.
7. 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:

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.”

8. 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.”

9. While the discretion of the court is unfettered, a successful 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.

10. 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.**

10. The ruling that it is sought to be appealed from culminated in the entry of a summary judgment against the Applicant. The total period of delay in this case was about 2 months since delivery of the said ruling. The delay is not inordinate in the circumstances of the case. The Applicant's twin explanations though not authenticated by way of a letter from the lower court registry, or through medical records as regards the Applicant's alleged illness are not altogether unbelievable. No serious prejudice will be suffered by the Respondent if the Applicant is granted leave to file an appeal, which is an important right. The Respondent can be compensated adequately through costs. Consequently, this court is persuaded to grant leave to the Applicant to appeal out of time. The memorandum of appeal shall be filed within 21 days of today's date.

11. The parties expended much energy in urging the merits or otherwise of the prayer for stay of execution pending appeal. However, the court is of the firm view that the existence of an appeal is a condition precedent to the exercise of its appellate jurisdiction under Order 42 Rule 6(1) of the Civil Procedure Rules, as read with Order 42 Rule 6(4) and 6(6) of the Civil Procedure Rules. Until a memorandum of appeal is filed, this court cannot exercise that jurisdiction. See the decision of the Court of Appeal in **Equity Bank v Westlink MBO Limited (2013) eKLR** – an application to the Court of Appeal for stay of execution under Rule 5(2) b of the Court of Appeal Rules which is in *pari materia* with Order 42 Rule 6(1) Civil Procedure Rules, cannot be entertained before an appeal or notice of intended appeal is filed. The prayer for stay of execution pending appeal in this case is therefore premature and is declined. The costs of this application are awarded to the Respondent in any event.

DELIVERED AND SIGNED AT KIAMBU THIS 17TH DAY OF OCTOBER 2019.

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C. MEOLI

JUDGE

In the presence of:

Applicant – No appearance

Respondent – No appearance

Court Assistant – Kevin/Nancy