



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. 81 OF 2019**

**STANLEY KIOKO NDUKU.....APPLICANT**

**VERSUS**

**MUSYOKA MUIA.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. What remains for determination in this application are two prayers namely an order for extension of time within which to file an appeal and stay of execution until the intended appeal is heard. The application is brought under Order 42 Rule 6(1), (2), Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B, 3A and 95 of the Civil Procedure Act. It is supported by the affidavit of **Stanley Kioko Ndiku**.

2. The background to the application, as gleaned from the pleadings and the annexures thereto, relates to a **Civil Suit 820 of 2014 in Machakos** wherein judgement was delivered on 27.9.2018. There is a discharge summary and treatment notes in respect of the applicant as well as a draft memorandum of appeal which accompanied the application.

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 judgement in the lower court was delivered on 27.9.2018 and that the suit in the lower court was dismissed with costs. Subsequently the applicant fell ill and was admitted to hospital hence was unable to issue instructions to his advocate to institute an appeal within the stipulated time and which time lapsed. The applicant averred that the intended appeal will be rendered nugatory if the orders sought are not granted and if execution proceeds.

4. In opposition to the application, are grounds of opposition filed by P.N. Musila and Co. Advocates dated 28<sup>th</sup> January 2019 under Order 45 rule 1 and Order 51 of the Civil Procedure Rules. The 1<sup>st</sup> respondent finds the application as being brought after undue delay and that the application has not been brought upon discovery of new and important matter or evidence that was not within the knowledge and after the exercise of due diligence. There is no indication of any response from the 2<sup>nd</sup> Respondent.

5. The court directed that the matter be canvassed vide written submissions and it is only the applicant's submissions that are on record. Vide submissions filed on 23<sup>rd</sup> April, 2019, learned counsel for the applicant relied on the evidence presented vide the supporting affidavit and cited Section 79G of the Civil Procedure Act as well as Section 7 of the Appellate jurisdiction Act. In placing reliance on the case of **APA Insurance Limited v Michael Kinyanjui Muturi (2016) eKLR**, learned counsel submitted that the applicant has given good reasons why he should be granted leave. From the lens of counsel, the intended appeal has good chances of success as elicited from the grounds of appeal in the draft memorandum of appeal. On the issue of stay of execution, it is counsel's argument that the same be granted to prevent any adverse process of execution being commenced when the instant application is pending before the court and consequentially render the intended appeal nugatory.

6. 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 court should grant stay of execution; Thirdly whether the applicant is guilty of dilatory conduct and finally whether any injustice will be caused if the application is not granted.

7. 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.”**

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 is 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 the applicant is aggrieved with the decision of the trial court and has a draft memorandum of appeal annexed to the application. A careful perusal of the contents of the grounds of opposition in my view does not inform the court the specific reasons why the 1<sup>st</sup> respondent is opposed to the application. To my mind, the respondent has not challenged the evidence presented in the application for leave and stay of execution, and in the absence of factual evidence to oppose the same, I am inclined to believe what is before the court. 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. Therefore it will not be incorrect to hold that there is no evidence of an arguable appeal and it would be inconceivable not to believe that the applicant was indisposed hence was unable to meet the strict timelines within which to file the appeal.

11. In this case, the application was filed on 16<sup>th</sup> January, 2019 that is about three months or so after the judgement was delivered, I find the delay not to be inordinate and the explanation is satisfactory. I am unable to see the prejudice that the Respondents will suffer if the application is allowed. Hence the applicant has easily met the test for grant of order for extension of time within which to file the appeal and to that end I grant prayer 2 in the notice of motion.

12. The Application for stay of execution of judgment is primarily governed by the terms of Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an Applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

**6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(2) No order for stay of execution shall be made under sub-rule (1) unless—**

**The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

13. The applicant has to satisfy a four-part test as was highlighted in the case of **UAP Provincial Insurance Company Limited v Michael John Becrett, Civil Application Number 204 of 2004**. He must demonstrate that:

*a. The appeal he has filed is arguable;*

*b. He is likely to suffer substantial loss unless the order is made. Differently put, he must demonstrate that the appeal will be rendered nugatory if the stay is not granted;*

*c. The application was made without unreasonable delay; and*

*d. He has given or are willing to give such security as the court may order for the due performance of the decree which may*

*ultimately be binding on them.*

14. I have perused the draft Memorandum of Appeal in this case as annexed to the application. I am unable to say that the grounds of appeal enumerated are in-arguable and hence I find that the applicant has easily met that standard.

15. But what is the substantial loss that the Applicant is likely to suffer if the order is not granted? The affidavit in support is silent on the same save that the right to be heard on appeal ought to be preserved and this court being a court of justice cannot turn a blind eye to a party aggrieved by a judgement.

16. I am not convinced that there may be loss occasioned to the applicant if the orders sought are not granted. The applicant has not indicated the willingness to deposit security. The respondents have equally not done so and in this regard it cannot be found that the applicant has shown this court what substantial loss they would suffer if stay of execution is not granted. None of the parties have managed to satisfy this mandatory requirement for the grant of stay.

17. The Application was brought without inordinate delay and therefore my conclusion is that the Applicant has partially met the conditions imposed by Order 42 Rule 6.

18. However, in the grounds of opposition the respondent alluded to Order 45 of the Civil Procedure Rules and with due respect the said rules are inapplicable to the instant application. There is no evidence to oppose the application or controvert the averments of the applicant. Hence I find that the respondent has failed to demonstrate any sufficient ground that prevents the court from granting prayer 4 in the application.

19. I have carefully considered the grounds of opposition that have been filed and as indicated earlier, Order 45 is inapplicable and therefore the 1<sup>st</sup> ground fails. The second ground finds the application to have been brought with undue delay however in light of my analysis in paragraph 11 above, the ground also fails. Overall the grounds of opposition lack merit and are dismissed.

20. The applicant's application if allowed will of course inconvenience the respondent who should be allowed to enjoy the fruits of the judgement. However I note that the appellant's case was dismissed with costs and hence the respondent's interest at present is about the costs which are yet to be assessed. The respondent's concerns would be best catered for by way ordering the appellant to make a deposit of security for costs.

21. In the result the application dated 16<sup>th</sup> January 2019 is allowed in the following terms :

***a. An order of stay of execution of the judgement in Machakos Cmcc No. 820 of 2014 is granted upon the appellant depositing the sum of Kshs 100,000/ into court as security for costs within 14 days from the date of this ruling failing which the stay shall lapse.***

***b. The costs of the application shall abide in the appeal.***

It is so ordered.

**Dated and delivered at Machakos this 23<sup>rd</sup> day of October, 2019.**

**D. K. Kemei**

**Judge**