



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 35 OF 2019

WINNIE WAIRIMU MACHARIA.....PLAINTIFF

VERSUS

ELELION COMPANY LIMITED.....DEFENDANT

Coram: Hon. Justice R. Nyakundi

Mr. Mouko for the appellant

Mr. Gicharu Kimani for the respondent

RULING

The applicant moved this court under certificate of urgency accompanied with a notice of motion for leave to extend time to appeal out of time against the judgement of the Chief Magistrate's Court in **CMCC No. 98 of 2016**.

The motion expressed to be brought under Order 51 Rule 1, Order 42 Rule 6, Section 1A and 1B, and 3A of the Civil Procedure Act seeking the following orders: -

- 1. THAT there be a temporary stay of execution pending the entering of an Appeal upon being supplied with proceedings.***
- 2. THAT upon hearing interparties, the stay be confirmed pending the determination of the appeal.***
- 3. THAT leave be granted to the Applicant to file Appeal out of time.***
- 4. THAT costs be provided for.***

In support of the motion is an affidavit sworn by the applicant Winnie **Wairimu Macharia** dated 20th September, 2019.

The respondent in challenging the application filed grounds of opposition dated 24th September, 2019.

Background

The respondent to this motion had sued the applicant vide a plaint dated 12th April, 2016 and filed in court on 20th April, 2018 seeking for outstanding rental arrears of Kshs.176,000, cost and interest.

The claim arises from the terms of a lease agreement entered into on or about the month of August, 2013 which created landlord – tenant relationship. From the implied terms and the conduct of the parties. The respondent was to rent the premises situated at Melting Port off Lamu Road in Malindi for an agreed monthly rent of Kshs.10,000.

That in performance of the obligation the respondent paid the agreed deposit of Kshs.20,000 and further paid the required monthly rent of Kshs.10,000 and thereafter took vacant possession.

That on or about November, 2013 the applicant borrowed a loan of Kshs.376,000 which amount was meant to build a new unit within the adjoining unit. That the amount was to be deducted from the monthly rent that in the foregoing the applicant breached the terms of the

agreement. This was the gist of the claim before the trial court.

From the record the learned trial magistrate having considered the evidence found the applicant liable and gave judgement in favour of the respondent with cost and interest.

Being aggrieved with the judgment the applicant has now approached this court seeking leave to file an appeal out of time and a further to stay execution in terms of Order 42 Rule 6 of the Civil Procedure Rules.

I have considered the application, affidavits by the applicant and grounds of opposition. I shall start with the prayer for leave to extend time to file an appeal out of time.

The Law

In a case involving a relief to extend time to file an appeal which ought to be decided under the discretionary power of the court is provided for under Section 79G of the Civil Procedure Act. The purpose of the section is to make sure that as far as possible an appeal from the subordinate court to the High Court be brought and filed within 30 days from delivery of judgement.

With this object in mind the same provision under the terms of sufficient and good cause being given by an applicant an appeal may be admitted out of time. The supreme Court in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others [2014] eKLR** has stated on the issue in their judgement as follows: -

“It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for the delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. We denote the following as the underlying principles that a court should consider in exercising such a discretion.

Extension of time is not a right of a party. It’s an equitable remedy that is only available to a deserving party at the discretion of the court.

A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis. Where there is a reasonable cause, for the delay the same should be expressed to the satisfaction of the court; whether there would be any prejudice suffered by the respondent, if extension is granted, whether the application has been brought without undue delay and whether in certain cases like election petitions, public interest should be a consideration for extending time.”

The circumstances and fact of the instant motion are distinguishable with the principles in **Nick Salat** case. The applicant relies on the ground that judgement was delivered in her absence and when she came to have a notice of it she applied for the typed proceedings and judgement. The applicant indeed annexed a letter addressed to the executive officer dated 10th July, 2019.

In his oral submissions before me, the learned counsel for the applicant contended and invited this court to treat the letter as sufficient and good cause for the delay to file an appeal out of time. As is required the applicant has no explained in her affidavit at what time she came to know of the judgement and in computation of time under Section 79G of the Act. The nature of the period left as stipulated in the provisions that an appeal be filed within 30 days. If the applicant at the time she learnt of the judgement and gave notice in writing of her intention to appeal for transmission to the high Court in accordance to Section 79G of the Act she might have been within time. That to me could have a sign of good faith for an applicant of this nature as there is a prescribed limitation period of 30 days within which to file an appeal.

It is my understanding that notwithstanding the delay that might be occasioned in obtaining the certified copy of the record it would be expected that a decree or order being appealed against should have been extracted and annexed to the motion. What this court is being invited to peruse is draft memorandum of an appeal which may or may not be entertained on appeal.

The other consideration for me which cannot be ignored is the fact that an applicant is not precluded from applying for certified copy of the original (normally referred to as handwritten record) with an extract of the decree or order appealed against so as to satisfy the prescribed time in Section 79G of the Act.

Therefore, proof of good and sufficient cause being a condition precedence to the proviso in Section 79G for the court to exercise discretionary power to grant the equitable relief. The onus is on the applicant to discharge that burden under Section 107(1) of the Evidence Act.

It appears from the affidavit of the applicant that undoubtedly after the judgement she entered into negotiations with the respondent. The case for the applicant as submitted therefore for exercise of discretion under Section 79(G 1) of the Act has more to do with her failure to satisfied the judgement and decree than being aggrieved of the decision.

Furthermore, a motion of this nature an applicant must show sufficient reasons why she failed to approach the court within time and also that the intended appeal raises serious issues to be ventilated to meet the ends of justice.

The court in the case of **Mugo and others v Wanjiru and another 1970 E.A. 481 at page 484** addressed this question as follows: -

“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.”

As indicated from the record of the trial court the main contention in this belatedly filed application is to delay the respondent from accessing the fruits of the judgement.

I agree with learned counsel for the respondent that the circumstances under which the prayers in this motion are being sought that the requisite threshold and the great purpose of both Section 1A on overriding objective and Section 79G of the Act. That the failure by the applicant to fully demonstrate existence of good case and sufficient reasons renders this court not to enlarge time for her appeal to be filed out of time.

In my view Section 79G of the Act should be interpreted and construed in a liberal manner that dilutes its letter and spirit to advance substantial justice. This is to lock out vexatious litigants who are desirous of filing an appeal so as to sequence it in the queue before the Court of Appeal as denying a successful litigant access to the fruits of the Judgment.

The courts should be slow to admit a party to file an appeal out of time as a matter of course who has not discharged evidential burden on good and sufficient cause on filing an appeal out of time on a serious issue to be tried on appeal. This application is therefore incompetent and must be dismissed with costs.

The second prayer in the motion concerns stay of execution under Order 42 Rule 6 of the Civil Procedure rules pending the hearing and determination of the intended appeal.

I have read the affidavit of the applicant and the respondent grounds of opposition.

In view of what I said above, the applicant is not entitled the orders of stay of execution where there has been no appeal filed or admitted out of time by this court. The prayer on stay of execution is equally dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF OCTOBER, 2019.

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mouko for the appellant
2. Ms. Mwangi for Gicharu for the Respondent