REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 248 OF 2019

1. CHRISTOPHER NDOLO MBUTA)

2. SAMUEL ESTOK EMBA)

3. ANNAH KAMENE MBUTA)

4. RODAH MUNYIVA ESTOCK).....APPLICANTS

VERSUS

1. JACKSON MUTUA KAVILA)

2. ANNAH MBITHE MUTUA)

3. ATTORNEY GENERAL).....RESPONDENTS

RULING

1. The Applicants vide their application dated 2/04/2019 expressed to be brought under Section 79 G of the Civil Procedure Act, Order 9 Rules 9, 10 and 11, Order 42 Rule 6 and Order 51 of the Civil Procedure Rules 2010 seek the following reliefs:-

(i) Spent

(ii) That the firm of Kittony Maina Karanja Advocates be granted leave to come on record for the 1st, 2nd, 3rd and 4th Applicants after judgement.

(iii) That the time required to put in a Memorandum of appeal in ***Machakos CMCC No. 488 of 1999*** *is enlarged.*

(iv) That the court do issue stay of execution of the judgement of Hon C. K. Kisiangani (Resident Magistrate) in ***Machakos CMCC No.488 of 1999*** *pending the hearing and determination of the Appeal.*

(v) That the costs of the application be in the cause.

2. The application is supported by grounds on the face thereof and the affidavit of Christopher Ndolo Mbuta the first Applicant herein sworn on even date. The Applicants gravamen is that they are dissatisfied by the judgement of the trial court and that they were unable to lodge Memorandum of Appeal within time as they had problems with their Advocates forcing them to take up another counsel hence the delay. It was further their case that one of the Respondents had filed an Application for review of the trial court's judgement and ruling thereof took time to be delivered and hence the delay. It was the Applicants case that they are apprehensive that the Respondents may settle the decretal sum before the appeal is heard and hence the need for an order of stay of execution. Finally they seek that their present Advocates be granted leave to come on record on their behalf.

3. The Application was strenuously opposed by the 1st Respondent who filed a replying affidavit sworn on 14/05/2019 in which he raised several grounds of objections *inter alia*: that the Applicants have not properly explained why they did not lodge appeal within the prescribed period; that the prayers sought should not be granted as the application is frivolous and an abuse of the court process. Finally, it was the 1st Respondents case that his wife who is sued as the second Respondent died way back on 2/09/2012 yet judgement was entered against her despite the suit having abated on grounds of her said death.

4. Parties agreed to canvass the application by way of written submissions. However, it is only the Applicant who filed submissions. It was submitted for the Applicants that the Applicants' present advocate has been duly permitted to come on record after judgement as there is a

duly signed consent in terms of the conditions required by order 9 Rule 9 of the Civil Procedure Rules. On the period of delay, it was submitted that the Applicants' previous Advocates was to blame and now that they have instructed a new counsel they should be allowed to file their appeal. On the arguability of the appeal, it was submitted that the draft Memorandum of Appeal clearly shows that the appeal has high chances of success and is arguable. On whether the Respondents would be prejudiced, it was submitted that the Respondents have not paid the decretal sums to the Applicants. Finally on the issue of stay of execution, it was submitted that an order of stay is merited in order not to render the intended appeal nugatory. The Applicants are worried that the Respondents might settle the decretal sums before the appeal is heard.

5. I have considered the Applicants' applications and the submissions tendered. The issue for determination herein is whether the court may grant the reliefs sought. The Applicant has made three main requests namely: that the firm of Kittony Maina Karanja Advocates be allowed to come on record for the Applicants, that the Applicants be allowed to lodge a Memorandum of Appeal out of time and lastly that an order of stay of execution of the decree in **Machakos CMCC No. 488 of 1999** be granted pending the hearing and determination of the intended appeal.

6. As regards the first request, it is noted that the applicants had been represented by O.N. Makau & Co. Advocates in the lower court all through until judgement was entered in favour of the Applicants. As the issues in controversy were decided with finality vide the judgement, it was imperative for a new counsel coming on board to comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. The Applicants have indicted that they fell out with their former advocates from whom they withdrew their instructions and appointed the present Advocates. The above rule provides that where there is a change of Advocates or when a party decides to act in person having previously engaged an advocate, after judgement has been passed such change or intention to act in person shall not be effected without an order of the court either upon an application with notice to all the parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate or a party intending to act in person as the case may be. There is a consent filed in court between the firm of O.N. Makau & Associates (outgoing Advocates) and Kittony Maina Karanja & Co. advocates (incoming Advocates) which was filed on the 19/06/2019. That being the position, I find the present Advocates for the Applicant have fully complied with the dictates of Order 9 Rule 9 of the Civil Procedure Rules. The objection by the Respondents lacks merit since the Applicants have a right to change Advocates and appoint new ones if they deem it fit. In any event I do not see any prejudice suffered by the Respondents as a result of change of advocates by the Applicants as that is an in house matter in the Applicants corner within the playing field of the dispute. Consequently, I grant prayer 2 of the application.

7. As regards the request for lodging appeal out of time, the Applicants have averred that they had instructed their former advocates to lodge appeal once the judgement was delivered. The Applicants further averred that their said advocates informed them that they did not file the appeal as instructed as one of the Respondents had filed an application seeking review of the judgement and they had to wait for the ruling which led to delay in filing the memorandum of appeal. The judgement by the lower court was delivered on the 25/07/2018 and hence the appeal ought to have been lodged by close of business on the 25/08/2018. However, this was not done. The draft memorandum of appeal is dated 29/04/2019 and it is clear that the attempt to lodge appeal is being made about nine (9) months after the delivery of the judgement by the trial court. Issues regarding the filing of appeals and the requisite periods are found in Section 79G of the Civil Procedure Act which provides as follows:-

> "***Every appeal from a Subordinate Court to the High Court shall be filed within a period of thirty (30) days from the date of the decree or order appealed against, excluding from such period any time which the court may certify as having been requisite for the preparation and delivery to the appellant of a 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".***

The above position demands that an applicant who is late in lodging his or her appeal on time must provide sufficient reasons to the court. In the case of **Mwangi –v- Kenya Airways Ltd [2013] eKLR** the court outlined the factors to be considered in exercising its discretion whether to extends time to file and appeal out of time which include inter alia:-

> ***(a) The period of delay***
>
> ***(b) The reason for the delay***
>
> ***(c) The arguability of the appeal***
>
> ***(d) The degree of prejudice to be suffered by the Respondent if the extension is granted.***

It is noted that the application has been brought about nine (9) months after the delivery of the judgement by the trial court. Indeed this period is quite a long time to suggest that the intended appellant was rather nonchalant about the need to file the appeal. I would have found the period to be inordinate but for the explanation offered by the Applicants. They have explained that as soon as the judgement was delivered they made their intentions known to their former Advocates to lodge an appeal against the judgement. They waited for a response and later learnt that their advocate had delayed as he waited for a ruling on an application for review of the judgement. This seems to have been the cause of bad blood between the Applicants and their erstwhile advocate as it led to withdrawal of instructions and appointment of the present Advocates. Clearly the delay had been under the mistaken belief that their Advocate would file the appeal as instructed. I find it would be unjust and unfair to punish the Applicants for the mistakes of their advocate. I am satisfied by the reasons advanced by the Applicants regarding the reasons for the delay. I will accept them and grant them a time-line within which to lodge the appeal. The Respondents concerns would be catered for by way of costs and hence I find that they will not be unduly prejudiced. On the issue of the arguability of the appeal, the Applicants seek to challenge the award of damages by the trial court since according to them the same are inordinately low. The Applicants have relied on some authorities where they hope to convince this court that the trial court had awarded damages which were so inordinately low as to represent an erroneous estimate warranting this court to interfere with the same. Indeed the appeal is yet to be heard and thus at this stage I am unable to tell the merits or otherwise of the intended appeal save to add that there is an arguable appeal. Hence I find the application is not an abuse of the court process.

8. As regards the request for an order of stay of execution, the Applicants maintain that they were awarded less sums by the trial court and that they now want an order of stay so as to stop the respondents from settling the decretal sums before the appeal is determined. According to the Applicants, the appeal will be rendered nugatory if stay is not granted. Stay of execution of decree pending appeal is governed by Order 42 Rule 6(2) of the Civil procedure Rules which provides three conditions to be met namely:-

(a) That substantial loss may result to the Applicants unless the order of stay is made.

(b) That the application has been made without unreasonable delay.

(c) That the Applicant is ready and willing to furnish security for the due performance of such decree or order as may ultimately be binding on him.

The issue of whether the Application has been made without unreasonable delay has already been discussed above and found in favour of the Applicants who have furnished sufficient cause for the delay. On the issue of security, I note that the Applicants are silent about it. Their main concern is only about the order of stay of execution pending appeal. One of the key factors for consideration herein is whether the Applicants will suffer substantial loss if the order of stay is not granted. The Applicants have merely claimed that their appeal will be rendered nugatory if the Respondent settles the decretal sums before the appeal is canvassed. I am not persuaded that the Applicants will suffer substantial loss. Indeed the Applicants were the successful parties in the judgment and therefore there is no prejudice suffered even if the decretal sums are paid before the determination of the appeal since they can receive the sums even on a without prejudice basis as they await for more money in the event the appeal succeeds. I do not see any reasons whatsoever why the Applicants would decline to take what the trial court had ordered as they still have the right to pursue their appeal and hope to get more in terms of the award of damages as now anticipated in the intended appeal. Hence the Applicants claim that they stand to suffer substantial loss if stay is not granted is not convincing. Many Kenyans at the moment are going through hard economic times and if given the circumstances of the Applicants would not mind taking what is already on the table as they organize to question whether what had been offered was adequate as compensation. I am therefore not persuaded by the Applicants' assertion that the appeal will be rendered nugatory if the order of stay is not granted. Even if the Respondents settle the decretal sums, they would still be bound to participate in the appeal proceedings and in the evet the appeal succeeds the extra damages that will have been awarded would still be paid by the Respondents to the Applicants. There is therefore absolutely no loss suffered by the Applicants if the order of stay is declined. I find the Applicants have failed to show that substantial loss would be suffered and hence prayer 4 of the application is found to lack merit.

9. In view of the aforegoing observations, the Applicants application dated 29/04/2019 succeeds in terms of prayer (2) and (3) while prayer No.4 is rejected. To this end therefore the following orders are issued:-

(a) The firm of Kittony Maina Karanja Advocates be and are hereby granted leave to come on record for the 1st, 2nd, 3rd and 4th Applicants after judgement.

(b)The Applicants are granted leave to file and serve their Memorandum of Appeal within fourteen (14) days from the date hereof.

(c) The costs of the application are awarded to the Respondents.

Orders accordingly.

Dated and delivered in open court at Machakos this 19th day of November, 2019.

D.K. Kemei

Judge