



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**MISCELLANEOUS CIVIL APPLICATION NO 257 OF 2019**

**FAMILY BANK LIMITED.....APPLICANT**

**VERSUS**

**KUKOPESHA LIMITED.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant's Notice of Motion application dated and filed on 15<sup>th</sup> March 2019 was brought pursuant to the provisions of Order 42 Rule 6, Order 50 Rule 6, Order 50 Rule 1 of the Civil Procedure Rules 2010, Sections 27 and 28 of the Limitations of Actions Act Cap 22 of the Laws of Kenya, Sections 1A,1B, 3A and 79G of the Civil Procedure Act Cap 21 of the Laws of Kenya, Rule 3(1) and (2) of the High Court (Practice and Procedure) Rules of the Judicature Act and all other enabling provisions of the law. Prayer Nos (1) and (3) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. THAT this Honourable court be pleased to extend time within which the applicants ought to have filed their Appeal against the Judgment of Honourable M W Murage in Nairobi Civil Suit No 199 of 2016.**

**3. Spent.**

**4. THAT this Honourable court be pleased to grant leave to the Applicants to file appeal against the judgment of M.W. Murage in Nairobi Civil Suit No 199 of 2016.**

**5. THAT costs of the Application be in the cause.**

2. Its Written Submissions and List and Bundle of Authorities were dated and filed on 2<sup>nd</sup> May 2019 while those of the Respondent were dated 23<sup>rd</sup> May 2019 and filed on 24<sup>th</sup> May 2019.

3. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE APPLICANT'S CASE**

4. The present application was supported by the Affidavit that was sworn by Maureen Mwende Cosmas on 13<sup>th</sup> March 2019.

5. The Applicant's case was that it had an arguable appeal with high probability of success and that if the same was not allowed, then it would suffer substantial loss.

6. It pointed out that it did not lodge the Appeal within the stipulated time due to a delay in obtaining the certified copy of the Judgment and hence the delay was not attributable to it.

7. It averred that it was ready and willing to deposit the decretal sum into court as security to enable its Appeal be heard and determined.

8. It therefore urged this court to allow its application as prayed.

### **THE RESPONDENT'S CASE**

9. In response to the said application, the Respondent's Director, Najmudeen Dhanji Jiwa swore a Replying Affidavit on 9<sup>th</sup> April 2019. The same was filed on even date.

10. The Respondent contended that the court should not aid an indolent party and that not obtaining the certified copy was not sufficient cause of the delay on the part of the Applicant for not having an appeal within the stipulated period.

11. It was categorical that the present application was to unjustly hinder it from recovering the decretal sum.

12. It urged this court to dismiss the said application with costs but added that if the court was inclined to allowing the same, then the decretal sum should be deposited in a joint interest earning account.

### **LEGAL ANALYSIS**

13. This court carefully perused the prayers in the Applicant's application and its Written Submissions and noted that there were no arguments advanced regarding the granting of an order for stay of execution pending appeal. In its application, it only had a prayer seeking an order for stay of execution pending **the hearing and determination of the application herein** (emphasis court). In its Written Submissions, it did not advance arguments why it should be granted an order for stay of execution pending appeal. It only made a sweeping statement in the conclusion of its Written Submissions that it should be granted an order for stay of execution.

14. In the only remaining Prayers Nos (2) & (4) of the said application, which appeared to this court to have been one and the same thing, the Applicant was seeking leave of the court to file an appeal out of time. This could have explained why the Respondent's Written Submissions were limited to the issue of extension of time of filing an appeal out of time and did not make reference to the prayer for stay of execution pending appeal.

15. Despite the Applicant having indicated that it was ready and willing to deposit the decretal sum into court and the Respondent had averred that if the court was inclined to allow the application it should order that the Applicant deposits the monies in a joint interest earning account in the names of their advocates, this court was not persuaded that it should grant an order for stay of execution pending appeal because no such order had been sought by the Applicant. The court is a neutral arbiter and must never descend into the arena of the disputes between parties before it to prosecute the case on behalf of one party who it discerned to have had a shortcoming in its case.

16. In this case, unless the parties recorded a consent, it would be practically impossible for this court to grant an order that had not been sought by the Applicant in its application. Indeed, courts should only seek what has been prayed for by parties.

17. Turning to the issue of extension of time to file an appeal, the court noted that the Applicant's submissions that leave ought to be granted was premised on the ground that it had an arguable appeal. In this regard, it relied on the case of **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR** where it was held that an appeal was arguable if a single triable ground of appeal was raised.

18. It submitted that in the Kenyan judicial system, all who seek justice must be given an opportunity to present their cases because justice was not only about winning but it was also a matter of losing fairly.

19. It further relied on the case of **Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another [2018] eKLR** where Ngugi J allowed an applicant to file an appeal out of time for the reason that such an order would not have adverse effects on the Respondent if it was granted.

20. It was its argument that the Respondent would still have a valid decree pending the hearing and determination of the Appeal herein and hence, would suffer no prejudice.

21. On its part, the Respondent relied on the case of **Aviation Cargo Ltd vs St Mark Freight Services Ltd [2014] eKLR** where it was held that granting leave to a party to file an appeal out of time was discretionary. It was its submission that this court should not exercise its discretion in favour of the Applicant because the reason it had advanced for not having filed an appeal out of time, was not sufficient.

22. It further placed reliance on the cases of **Music Copyright Society of Kenya & 2 Others vs Richard Cheruiyot Tanui & 2 Others [2017] eKLR** in which Meoli J made reference to the case of **Mwangi vs Kenya Airways Ltd [2003] KLR 486** where the Court of Appeal held that in deciding whether or not to grant leave to an applicant to file an appeal out of time, it must consider the length of the delay, the reason for the delay, possible chances of the applicant succeeding an appeal and the degree of prejudice the Respondent would suffer.

23. It also referred this court to the case of **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission [2015] eKLR** where it was held that extension of time was not a right; it was an equitable remedy that was only available to a deserving party. The Respondent termed the Applicant herein an undeserving party.

24. This court wholly concurred with the views of the Respondent that the reason advanced by the Applicant for not having filed an appeal out of time was not a plausible reason. Unless the Applicant was not present in court, it was not necessary to obtain the certified copy of the

Judgment. It could have perused the court file if it did not have a copy of the Judgment and determined if it wished to appeal or not.

25. In addition, the Applicant could also have filed a holding Memorandum of Appeal. Indeed, Order 42 Rule 3 of the Civil Procedure Rules provides as follows:-

**(1) The appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13.**

**(2) After the time limited by subrule (1) the court may, on application, permit the appellant to amend his memorandum of appeal.**

26. By not filing a Memorandum of Appeal because it did not have a certified copy of the judgment, the Applicant was therefore not vigilant and was by all means, indolent. Having said so, this court noted that the Applicant filed its present application on 15<sup>th</sup> March 2019 while the decision it wished to appeal against was delivered on 29<sup>th</sup> January 2019.

27. It is important to point out that there must not only be a delay, it must be inordinate and have the potential to and/or prejudice the opposing party. There was a delay of one and half (1 ½) months.

28. In this case while there was a delay in the opinion of this court, the same was not inordinately long. This court did not also see the prejudice the Respondent would suffer if the Applicant was afforded an opportunity to exercise its constitutional right to have its dispute determined by a competent tribunal as stipulated in Article 50(1) of the Constitution of Kenya, 2010.

29. The said Article 50(1) of the Constitution of Kenya provides that

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

30. No person should be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

31. Accordingly, having considered the parties affidavit evidence, their respective Written Submissions and the case law they each relied upon, this court came to the firm conclusion that there would be more injustice in the Applicant being denied an opportunity to ventilate its case on merit.

## **DISPOSITION**

32. For the foregoing reasons, the upshot of this court’s Ruling was that the Applicant’s Notice of Motion application dated and filed on 15<sup>th</sup> March 2019 was partly merited and is hereby granted in the following terms:-

**1. THAT the Applicant be and is hereby granted leave to file an appeal out of time against the judgment of Hon M.W. Murage in Nairobi Milimani Civil Suit No 199 of 2016.**

**2. The Appellant is hereby directed to file and serve its Record of Appeal within sixty (60) days from today i.e by 30<sup>th</sup> January 2020.**

**3. The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the placing of the typed certified proceedings and lower court file to enable the Appellant comply with Paragraph 32 (2) hereinabove.**

**4. Costs of the application herein shall be in the cause.**

**5. Either party is at liberty to apply.**

33. It is so ordered.

**DATED and DELIVERED at NAIROBI this 12th day of November 2019**

**J. KAMAU**

**JUDGE**