



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLN. NO. 243 OF 2019

MAXIMA INK ENTERPRISES LIMITED.....1ST APPLICANT

DENNIS KAGIRI KARARI.....2ND APPLICANT

VERSUS

BMX INVESTMENT LIMITED.....1ST RESPONDENT

MUZAMIL ABDULLAHI BAKIR.....2ND RESPONDENT

BARCLAYS BANK OF KENYA.....3RD RESPONDENT

EQUITY BANK OF KENYA LIMITED.....4TH RESPONDENT

VIVO ENERGY KENYA LIMITED.....5TH RESPONDENT

DIAMOND TRUST BANK.....6TH RESPONDENT

RULING

1. By a Notice of Motion dated 12th March 2019, the two applicants sought enlargement of time within which to file an appeal against the lower court's ruling delivered on 12th February 2019 in CMCC No. 4522 of 2018. Secondly, the applicants applied for stay of proceedings in the aforesaid suit pending the hearing of their intended appeal.

2. The application is premised on the grounds stated on its face and the depositions made in the supporting and supplementary affidavits sworn by the 2nd applicant, *Dennis Kagiri Karari* on 12th March 2019 and 19th May 2019 respectively.

3. Briefly, the applicants contend that they are aggrieved by the ruling of the trial court which allowed the 1st and 2nd respondents' application which sought entry of summary judgment in their favour against the applicants and intends to challenge the trial court's decision on appeal but the time allowed for them to file their intended appeal has lapsed; that failure to file the intended appeal within time was not deliberate but was caused by circumstances beyond their control as they had given their previous advocates on record instructions to file the appeal on time but the advocates failed to execute their instructions as expected; that the delay in filing the intended appeal is not inordinate and no prejudice will be occasioned to the respondents if the application was allowed; that the advocates currently on record have already applied for certified copies of the lower court's proceedings and will be ready to file a record of appeal within the shortest time possible if their application was allowed.

4. The application is opposed through grounds of opposition dated 24th April 2019. In my view, the points raised in opposition to the motion other than grounds 1, 2 and 3 are misplaced as they apparently challenge the application on grounds that the applicants have not satisfied the pre-conditions for grant of stay of execution stipulated under *Order 42 Rule 6* of the *Civil Procedure Rules* yet the applicants have not applied for stay of execution pending appeal. Prayer 2 of the motion only seeks stay of proceedings in the suit filed in the lower court pending determination of the intended appeal which is different from a prayer for stay of execution.

5. On the prayer for enlargement of time to file the applicant's intended appeal, the 1st and 2nd respondents (hereinafter the respondents), claim that there has been inordinate delay in lodging the appeal and that if the application was allowed, they will suffer prejudice since execution is already underway.

6. The application was canvassed before me on 27th November 2019 by way of oral submissions. In their submissions, learned counsel on record for the parties besides reiterating the positions taken by their respective clients with regard to the prayers sought in the motion went

further to make arguments which apparently delved into the merits of the intended appeal which this court cannot deal with in the context of the instant application.

7. *Mr. Omboko*, learned counsel for the applicants implored the court to note that the application was filed only two days after time for filing the intended appeal expired and the only reason the appeal was not filed on time is because the previous advocates on record had ceased acting and he had not been instructed to take over the matter; that upon being instructed by the applicants and after perusing the lower court's proceedings, he decided to prefer an appeal against the trial court's ruling and immediately filed the instant application. In support of his submissions, he relied on the authorities of *APA Insurance Ltd V Michael Kinyanjui Motors, [2016] eKLR* and *Imperial Bank Ltd (In Receivership) & Another V Alnashir Popat & 18 Others, [2018] eKLR*.

8. In his riposte, *Mr. Kefa*, learned counsel for the respondents opened his submissions by contending that the applicants' prayer for stay of proceedings in the lower court should be dismissed primarily because the applicants have failed to satisfy the requirements of *Order 42 Rule 6 (2) of the Civil Procedure Rules*. Learned counsel was obviously labouring under the mistaken belief that *Order 42 Rule 6* which outlines the parameters for grant of orders of stay of execution pending appeal was applicable to orders for stay of proceedings which is not the case. In applications for stay of proceedings, the court exercises its discretion depending on the facts and circumstances in each case and makes a decision which best suits the ends of justice.

9. Regarding the applicants' prayer for leave to file an appeal out of time, counsel did not offer any submissions but relied on the persuasive authority of *Samuel Mwaura Muthombi V Josephine Wanjiru Ngugi & Another, [2018] eKLR* in which *Hon. Ngugi J* allowed an application for enlargement of time to file an intended appeal guided by the principles laid down by the Court of Appeal in *Mwangi V Kenya Airways Ltd, [2003] eKLR*.

10. I have carefully considered the application, the affidavits sworn in support thereof and the grounds of opposition filed by the respondents. I have also considered the rival submissions made on behalf of the parties and the authorities cited. The reliefs sought by the applicants in this application are not granted as a matter of right. They are dependent on the exercise of the court's discretion upon sufficient cause being shown and where it is established that the opposite party is not likely to suffer prejudice which cannot be compensated by way of costs.

11. In *Imperial Bank Ltd (In Receivership) & Another V Alnashir Popat & 18 Others, [supra]* and in *Charles Karanja Kiiru V Charles Githinji Moigwa, [supra]* which were referenced by the applicants, the Court of Appeal outlined the factors which should guide a court in determining applications such as the one before this court. They include but are not limited to the following:

- i. The period of the delay;
- ii. The reasons for the delay;
- iii. The degree of prejudice to the respondent if the application was granted;
- iv. The conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal;
- v. The need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes;
- vi. Public interest issues implicated in the appeal or intended appeal and whether *prima facie*, the intended appeal has chances of success or is a mere frivolity.

12. Guided by the above factors, I will now proceed to determine the applicant's application. At the outset, I wish to point out that pursuant to *Section 79 G of the Civil Procedure Act*, appeals to the High Court ought to be filed within 30 days of the date of the judgment or order sought to be appealed against but the court upon establishment of sufficient cause showing why the appeal was not filed on time has discretion to extend time for filing of an intended appeal on terms it considers just.

13. In this case, it is not disputed that the current application was filed only two days after the time limited by the law for filing of the intended appeal expired. The applicants have explained that failure to file their intended appeal on time was occasioned by their previous advocate's failure to execute their instructions to file the said appeal on time and when this was discovered, remedial action was taken by engaging the current advocates who immediately filed the current application. It is therefore safe to conclude that the delay was caused by mistakes made by the previous advocates on record which in all fairness cannot be visited on the applicants. In any event, a delay of two days cannot by any standard be said to be inordinate. It is in my view excusable.

14. I have also looked at the draft memorandum of appeal annexed to the supplementary affidavit and I am satisfied that, *prima facie*, the intended appeal is arguable. It cannot be said to be frivolous.

15. In view of the foregoing, I am convinced that prayer 1 of the application is merited and it is hereby allowed. The applicants are granted leave to file and serve their intended appeal within the next 7 days.

16. As for the prayer for stay of proceedings pending the filing of the intended appeal, the applicants have not disclosed which proceedings are pending before the trial court given their averment that they intend to challenge a ruling which entered summary judgment in favour of the respondents. This in effect means that as far as the trial court is concerned, the suit has been determined and what possibly remains is execution of the aforesaid judgment. In the premises, I find no basis upon which I can exercise my discretion in favour of the applicants with regard to the prayer for stay of proceedings. Suffice it to say that since I have given them leave to file their intended appeal, all is not lost

since they can still seek whichever other relief they find appropriate in their intended appeal.

17. The respondents are awarded costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF DECEMBER, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Omboko for the appellant

Mr. Kefa Esilaba for the 1st & 2nd respondents

Mr. Salach: Court Assistant