



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS CIVIL APPLICATION 163 OF 2019

WILLY TOO..... APPLICANT

VERSUS

GEOFFREY KARANJA KAMAU..... RESPONDENT

RULING

1. The applicant filed this application vide a notice of motion dated 12th September, 2019 seeking for orders:-

i. THAT the Honourable court be pleased to enlarge time within which the applicants may lodge their intended appeal against the judgment delivered on 6th August, 2019 in Eldoret Cmcc no. 778 of 2017, Geoffrey Karanja Kamau vs. Willy Too.

ii. THAT the Honourable court be pleased to order a stay of execution of the judgment issued in Eldoret Cmcc no. 778 of 2017, Geoffrey Karanja Kamau vs. Willy Too pending the hearing and determination of this application.

iii. THAT the orders sought under prayer 3 above be confirmed upon hearing of the application till the hearing of the intended appeal.

2. The application is based on the grounds that the applicant is aggrieved by the judgment of the subordinate court issued on 6th August 2019 and there is a likely to be a miscarriage of justice unless this application is heard and appropriate orders issued.

3. The delay in lodging the intended appeal within the statutory period was occasioned by the fact that the said judgment was delivered in the absence of the applicant's advocates.

4. That the applicant's representative was informed by the court clerk that the judgment was not ready and was to be delivered on notice.

5. The intended appeal is highly meritorious and stands good chances of success as demonstrated by the attached draft Memorandum of Appeal.

6. That the applicants are ready and willing to abide by such terms as this Honourable court may impose on them pending the hearing of the intended appeal.

7. In response to the application, the respondent filed grounds of opposition dated 19th September, 2019 that the applicant is guilty of laches as the application has been filed after a long and inordinate delay.

8. That the application has been prompted by the lapse of stay of execution in the subordinate court therefore no useful purpose will be gained in allowing the application.

9. The affidavits in support of the application are incompetent and contains false hoods, no affidavit has been filed to support the allegations of delay and that the affidavits in support of the allegations have been sworn by third parties to the parent suit.

10. The applicant submitted that *Section 79G* of the *Civil Procedure Act* provides for the time for filing appeals from subordinate courts while *Section 95* of the *Civil Procedure Act* and *Order 5* provides for the enlargement of time.

11. The court is vested with wide powers to enlarge the time within which the applicant may lodge their intended Appeal. The judgment of the subordinate court was delivered on 6th August, 2019 and that on 10th September, 2019, the appellant received a letter from the Respondents advocates notifying them of the judgment. The instant application was lodged 8 days after the expiry of the statutory period within which to lodge the intended appeal.

12. The delay in lodging the appeal was occasioned by inadvertent mistake as they were not aware that judgment had been delivered on 6th August, 2019.

13. From the grounds of appeal, it is clear that the applicants have plausible and conceivable persuasive grounds of both facts and law to overturn the original judgment of the subordinate court.

14. As regards to substantial loss, if stay of execution is not granted the respondent may commence the process of attachment of the applicant's moveable assets in realization of the terms of the judgment issued in the subordinate court.

15. In the circumstances, the applicant will suffer substantial loss as his property will be attached in realization of the judgment rendering the appeal if successful nugatory.

16. The applicant is willing to abide by such terms as this honourable court may impose on him which shows good faith to cushion the respondent in the event that the applicant's appeal is not successful.

17. The application was filed on 13th September, 2019 while the judgment was delivered on 6th August, 2019 which delay amounts to 28 days and owing to the reasons explained, the delay was not inordinate on the part of the applicant.

18. The respondent on their part submitted that the subordinate court delivered judgment on 6th August, 2019 and on 7th August, 2019 as per MON1, the applicants advocates were duly notified of the judgment. It is not true that the letter of 7th August could have been received on 10th September, 2019 as alleged.

19. The delay in lodging appeal within time is therefore deliberate and inexcusable and the same should be visited upon the applicant who ignored lodging the appeal on time.

20. The affidavit in support of the application is sworn by counsel of the applicant and insurers to the applicant. No affidavit has been sworn by the applicant to lay basis to the allegations contained in the two affidavits and or support the same.

21. The deponents of the affidavits are third parties to the proceedings and who cannot ably defend the allegations of delay in lodging the appeal within time.

22. The application is brought in bad faith having been prompted by the lapse of stay of execution in the subordinate court judgment and the applicant is guilty of laches. There is no good sufficient cause shown as to why the applicants did not lodge the appeal within time.

23. ISSUES FOR DETERMINATION

a) Whether the Applicant has met the pre-requisites of Order 42 Rules 6.

b) Whether the time within which to file the appeal can be enlarged.

24. The conditions to be met before stay is granted are provided by Rule 6(2) as follows:

“No order for stay of execution shall be made under subrule (1) unless–

(a) 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

(b) 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.”

25. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellants had an undoubted right of appeal.

5. The court in exercising its powers can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

26. In the present application, the appellants have unequivocally stated that they are ready and willing to offer security on whatever terms as may be imposed by the court in order to protect the interests of the parties, the application was filed without undue delay and that the appeal has high chances of success.

27. The judgment subject of this suit was delivered on 6th August, 2019 and the present application was filed on 13th September, 2019. The applicant has explained that the letter informing them of the judgment was received on 10/9/2019.

28. On the issue of merit of application to extend time, it was held in **NICHOLAS KIPTOO ARAP KORIR SALAT VS. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS [2014] Eklr** that:-

“..... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for 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 derive the following as the underlying principles that a court should consider in exercising such discretion: -Extension of time is not a right of a party. It is 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.”

29. Section 79G of the Civil Procedure Act, provides that:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having requisite for the preparation and delivery to the appellant of a copy of the 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”

30. The Applicant has satisfactorily explained the circumstances leading to the delay in filing the appeal. The application has merit; it is allowed. The applicant will deposit 400,000/- in both advocates joint interest earning account within 40 days and the time to lodge the appeal is extended by 14 days from the date hereof, 17th December, 2019.

Stay of execution is granted pending hearing and determination of the appeal if the aforementioned conditions and timelines are met.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 17th day of December, 2019.

In the absence of;

Mr. Ngaiwa for the Applicant

And presence of Mrs. Cheptoo holding brief for Mr. Winamo for the Respondent

Ms Abigael - Court assistant