



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**MISC. CIVIL APPLICATION NO. 289 OF 2017**

**GEOFFREY NG'ANG'A GITAU.....1<sup>ST</sup> APPLICANT**

**BUXTON FARMERS CO. LTD.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**WILFRED MUIGAI MUTURI.....1<sup>ST</sup> RESPONDENT**

**ARTHER NJENGA MTURI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant seeks orders for enlargement of time to file Memorandum of Appeal out of time as well as a stay of execution of the judgment rendered between the parties in the lower Court. The intended appeal is from a judgment delivered in Limuru SPMCC No. 138 of 2011 on 16/11/2017. The Application is supported by a Supporting Affidavit by Geoffrey Ng'ang'a Gitau.

2. The Application is opposed. In opposition, the Respondents filed a lengthy Replying Affidavit. Much of it is dedicated to demonstrating the correctness of the Learned Magistrate's decision. Needless to say, that is not the core issue at this point in the litigation.

3. The brief facts are as follows. The Respondents sued the Appellants in the lower Court. The Defendants filed a Statement of Defence. In response, the Respondents filed an application seeking to have the Statement of Defence struck out for not disclosing any trial issues. The Appellants were represented by counsel in the Lower Court. The Counsel failed to respond to the Application to strike out the Defence. Consequently, on 16/11/2017, the Learned Trial Magistrate treated the Application as unopposed and struck out the Defence and entered judgment.

4. The Appellants are aggrieved and believe that the sins of their advocate should not be visited on them and that the Learned Trial Magistrate should have given them an opportunity to be heard. However, they were late in filing the appeal – in part, they say, due to the wrong advice they go from the same lawyer.

5. Hence, the Appellants brought the current Application – filed by the 1st Appellant in person. He also filed a further affidavit in which he has explained the delay in filing the appeal – including the frustrations he went through as a lay person to get proceedings at the Limuru Law Courts.

6. By the time the Application was scheduled for hearing, the 1st Appellant had hired a lawyer, Ms. Masakhwe who argued the application orally on his behalf. The Respondents also argued in person.

7. The two issues for determination is whether the Applicant is entitled to an extension of time and an

order for stay of execution.

8. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

*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 been 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.*

9. Our case law has now provided guidelines on what will be considered “good cause” for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

10. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in ***Mwangi v Kenya Airways Ltd [2003] KLR***. They include the following:

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the appeal;
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved.

11. I will now consider the Applicants’ application for extension of time against these factors.

12. Looking at these factors, I have easily concluded that leave should be granted to appeal out of time. There was no inordinate delay here and the Appellant has demonstrated that he exercised due diligence to try to perfect the appeal despite frustration or insufficient legal guidance from his former lawyer. There is no way one can say with authenticity that this appeal is an afterthought or that it is brought in bad faith.

13. I am also unable to say that the intended appeal is in-arguable. Of course, all the Applicants have to show at this stage is arguability – not high probability of success. Additionally, I am unable to see any substantial adverse effects granting this order will have on the Respondent other than permitting the Applicants to exercise a precious right of appeal. Lastly, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in the same sense, for example, that the Constitution and the Elections Act place on the timelines for filing Elections Petitions.

14. Consequently, I will grant the prayer seeking extension of time to file an appeal out of time.

15. I will now turn to the Applicants’ prayer for a stay of execution.

16. The Application for stay of judgment is primarily governed by the terms of Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an Applicant in order to be entitled to an order for stay are encapsulated in that Rule in the following terms:

*6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(2) No order for stay of execution shall be made under sub-rule (1) unless—*

*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*

*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.*

17. The law regarding the grant of stay of execution is well established in Kenya. Among the legion of authoritative cases establishing it, the judges of the Court of Appeal were both concise and emphatic in ***Rhoda Mukuma v John Abuoga***:

*It was laid down in ***M M Butt v The Rent Restriction Tribunal, Civil Application No Nai 6 of 1979***, (following ***Wilson v Church (No 2) (1879) 12 Ch 454 at p 488***) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.*

*Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being*

*– (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security.*

18. Hence, under our established jurisprudence, to be successful in an application for stay, Applicants have to satisfy a four-part test. They must demonstrate that:

a. The appeal they have filed is arguable;

b. They are likely to suffer substantial loss unless the order is made. Differently put, they must demonstrate that the appeal will be rendered nugatory if the stay is not granted;

c. The application was made without unreasonable delay; and

d. They have given or are willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on them.

19. As I alluded above, I have perused the Draft Memorandum of Appeal filed in this case. I am unable to say that the grounds of appeal enumerated are in-arguable. As I stated above to earn a stay of execution, one is **not** required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard.

20. But what is the substantial loss that the Applicants are likely to suffer if the order is not granted? All Ms. Masakwe said in oral argument is that it will be an injury to pay the monies to the Respondents. There was no allegation at all in the affidavit or even from the bar that the Respondents are or will be unable to refund the decretal amounts if it is paid. The Applicants did not as much as bother to express any apprehension at all that they will not be able to recover any decretal sums paid to the Respondents. There seems to be an assumption – impermissible in our law - that a right of appeal means an automatic stay is, instead, argued. The Applicants did not as much as claim that the Respondents are men of straw in their Supporting Affidavit. They merely asserted that the appeal will be rendered nugatory. It is true that the legal position in Kenya is that once an Applicant for stay credibly raises the issue of lack of means by a Respondent (judgment-creditor) to refund decretal amounts, the evidential burden is shifted to the Respondent to demonstrate that she has the resources to repay any amounts paid to her.

21. Here, however, the Applicants did *not* as much as make the claim in their filed papers. It is not automatic that the Court will assume that a Judgment-Creditor is impecunious once an applicant for stay in a money decree says that his appeal will be rendered nugatory. Indeed, the opposite is the case as demonstrated in *Kenya Hotel Properties Ltd v Willsden Properties Ltd Civil Application number NAI 322 of 2006* (UR).

22. It follows that the Applicants have not even attempted to show what substantial loss they would suffer if stay of execution is not granted. They have, therefore, failed to satisfy this mandatory requirement for the grant of stay. Similarly, while the Application was brought without inordinate delay, the Applicants have not as much as offered to demonstrate that they are willing to furnish security for the due performance of any decree which might ultimately be binding on them.

23. It is, therefore, my conclusion that the Applicants have *not* demonstrated that there will be substantial loss unless stay is granted. They have also not demonstrated that they are willing to furnish security for the due performance of any decree which might ultimately be binding on them. Consequently, the Applicants have *not* met the conditions placed by Order 42 Rule 6.

24. The upshot is that the Application dated 17/05/2017 succeeds in part. In accordance with this ruling, it shall be disposed as follows:

- a. **The Applicants shall file and serve a Memorandum of Appeal within seven days of the date hereof.**
- b. **The Applicants shall pay the full decretal sum due within thirty days of this ruling failure to which execution shall ensue.**
- c. **The Applicants shall file the Record of Appeal within sixty days from the date hereof.**
- d. **The Applicants shall write to the Deputy Registrar requesting him to place the Appeal before the Judge for directions within fourteen days of the filing of the Record of Appeal.**

25. The costs of this Application will abide by the outcome of the Appeal.

26. Orders accordingly.

**Dated and delivered at Kiambu this 8<sup>th</sup> day of February, 2018.**

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**JOEL NGUGI**

**JUDGE**