REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS APPLICATION NO. 73 OF 2018

JOSEPH KARUTI.....APPLICANT

VERSUS

JULIUS MWITI M'MUNGANIA .....RESPONDENT

RULING

1. Before me is a Motion on Notice dated 16th March 2018 brought under ***Section 79G of the Civil Procedure Act***, ***CAP 21 Laws of Kenya*** *and* ***Order 51 Rule 1 of the Civil Procedure Rules 2010*****.** The Applicant seeks a stay of execution of the judgment and decree in **TIGANIA P.M.C.C NO. 146 OF 2015** pending the filing, hearing and determination of an intended appeal which he seeks to be granted leave to file out of time.

2. The grounds upon which the Motion was grounded were set out in its body and the supporting affidavit of Joseph Karuti sworn on 16th April, 2018. It was contended that the award made by the trial court was inordinately high and excessive in the circumstances; that if stay of execution is not issued, the applicant is likely to suffer irreparable/substantial loss; that the delay in filing the appeal was as a result of negotiations between the parties aimed at reaching a reasonable award but which failed. That if the decree is effected, it will render the substratum of the appeal nugatory and that the applicant is willing and ready to deposit the entire decretal sum in court or in an interest earning account as security.

3. The Motion was opposed vide a replying affidavit sworn on 30th April, 2018 by Carlpeters Mbaabu, advocate on record for the respondent. He denied the allegations that there were any negotiations that took place between him and counsel for the applicant. He deponed that the judgment sought to be appealed against was delivered on 29th November, 2016 when applicant was granted 30 days stay of execution. He further contended that on 14th September, 2017, the cost in the suit were agreed at Kshs.120,360/=. That if the decretal award was in issue, costs would not have been agreed to by consent. That this was evidence that the applicant was dishonest in alleging non-existent negotiations.

4. It was further averred that it was more than 1 ½ years from the date of judgment; that the appeal has no chances of success in view of the serious injuries suffered by the respondent. There was intention to execute in November, 2017 but the Applicant frustrated the process by going underground and concealing his properties. That Respondent has assets worth Kshs. 10,000,000/= and that therefore, he is not impecunious.

5. The application was canvassed by way of written submissions. It was submitted for the applicant that with regard to stay of execution pending appeal, he had satisfied the conditions set out in ***Order 42 Rule 6(2) of the Civil Procedure Rules 2010***. With regards to leave to appeal out of time, it was submitted that the applicant had explained the reason for the delay.

6. On the part of the respondent, it was submitted that in view of the prayer for stay of execution pending appeal, the applicant had not satisfied any of the three conditions set out ***Order 42 Rule 6(2)*****. T**he cases of **Aviation Cargo Support Limited vs. St. Mark Freight Services Limited (2014) eKLR**, **Meru H. C.C A. NO.58 of 2006: Ronald Dewayne Enock vs. Charles Wanjama Wachira**, **Meru H. C. C. A. NO. 46 of 2015: British American Insurance Co (K) Ltd & Another vs. Daniel Gikunda Anampiu** and **Loise Ruguru Kimani vs. Nelson Ndege Gatimu (2004) Eklr** were relied on in support of those submissions. On the leave sought, it was submitted that the delay of one and a half years was inexcusable and had not been explained.

7. ***Order 42 Rule 6(2) of the Civil Procedure Rules*** provides three principles for the grant of a stay of execution. The applicant must show that there will be substantial loss if a stay is not granted; he must offer security for the due performance of the decree that will ultimately be binding upon him and that the application must be made timeously.

8. On substantial loss, the applicant submitted that his appeal has high chances of success and if a stay is not granted, the appeal would be rendered nugatory. Moreover, it was contended that the respondent would not be able to repay amount decreed if the appeal succeeds.

9. This Courts view is that, once an allegation is made on oath by an applicant under ***Order 42 Rule 6*** that a respondent will not be capable of

refunding the money if it is paid over to him, the evidentiary burden of proof shifts to such a respondent to prove the contrary. This is so because no one is in a position to know the financial standing or ability of his adversary other than the person himself. It is for the respondent to show that he is not impecunious and that if the funds are released to him, he will be capable of refunding the same if the appeal is successful.

10. In the present case, the respondent did not swear any affidavit. The affidavit was sworn by his advocate who could not vouch for his own financial ability. The advocate made a sweeping unsubstantiated statement that the respondent is worth over KShs.10,000,000/-. In this regard, the advocate was not competent to swear to such matters that were not in his own knowledge as he could not be cross-examined on them. Accordingly, there being no any evidence from the respondent. I am satisfied that the applicant has shown that if a stay is not granted, he will suffer substantial loss.

11. As regards security, the Applicant has indicated that he is willing to deposit the entire decretal sum in court or in an interest earning account as security. To this Court's mind that is good security as envisaged uinder ***Order 42 Rule 6(2) of the Civil Procedure Rules.***

12. Lastly, on the issue of whether the application was made timeously, applicant averred that there was delay in the filing of the application because of negotiations between the parties. Negotiations between combatants in a litigation is a welcome gesture. Indeed a court of law should always encourage that as it would be in consonant with ***Article 159 of the Constitution.*** It goes to save the scarce judicial time.

13. In this case however, there was no evidence that was produced to prove there being such negotiations. The respondent denied any such negotiations. What was admitted was agreement on the costs of the suit before the trial court. The least the Court expected the applicant to do was to produce the communication between the parties to that effect. To my mind, a delay of 16 months was inordinate and required cogent, consistent and satisfactory. This lacking, I am not satisfied that the application was made timeously.

14. The other order sought was leave to appeal out of time. The judgment the applicant seeks to appeal against was delivered on 29th November, 2016. It was in favour of the respondent to the tune of Kshs.400,000/- as general damages and Kshs.60,139/- special damages. Liability had been agreed at 85:15 in favour of the respondent. The court granted a stay of 30 days. Since, November, 2016, the applicant has not lodged his appeal. Time for lodging the appeal expired on 28th December, 2016. The present application was filed on 18th April, 2018. There was a delay of 1 year 3 months and 20days. That in my respective view is inordinately long.

15. This Court is aware that under ***Section 79G of the Civil Procedure Act***, this Court has a discretion to extend the time for filing of an appeal out of time. However, the section requires that the applicant must satisfy the court that he had *'good reason and sufficient cause'* for failing to lodge the appeal within time. In the present case, it was alleged that the parties were involved in negotiations. As I have already founf out, there was no evidence that was tendered to show the existence of such negotiations. In any event the respondent denied that there were any such negotiations.

16. In the **Aviation Cargo Support Limited v St. Mark Freight Services Limited (2014) eKLR** the Court of Appeal held:-

> ***"The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vissiccitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time."***

17. ***Section 109 of the Evidence Act*** provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. The applicant desires that this court accepts as true the existence of the alleged negotiations. The law placed evidential burden to prove that fact on him. He did not discharge that burden. Accordingly, this Court is not satisfied with the explanation given as to the delay.

18. In this regard, I am satisfied that this application has no merit and it is dismissed with costs to the respondent.

DATED and **DELIVERED** at Meru this 4th day of July, 2018.

A. MABEYA

JUDGE