



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MISC. CIVIL APP NO. 61 OF 2017

NAHASHON KINYUA GICHUKU.....PLAINTIFF

V E R S U S

DIONISIA NJURA KINYUA.....DEFENDANTS

RULING

1. The applicant Nahashon Kinyua Gichuku filed an application dated 5/11/2017 seeking orders that there be an interim stay of execution of Judgment which was delivered on 18//8/2017 in **SRMCC Divorce Cause No. 3/2017 Kerugoya** pending the hearing and determination of an application to extend time and grant leave to the applicant to file appeal out of time against the said Judgment.
2. It is based on the grounds that the applicant was desirous of challenging the Judgment on appeal but the proceedings and Judgment of the trial court were not supplied in good time. A certificate of delay was issued after which he filed this application. That the delay was not inordinate and the appeal has high chances of success. That if stay is not ordered the appeal will be rendered nugatory. That he was served with notice to show cause which shows that execution is in progress.
3. The application is also supported by the affidavit of the applicant sworn on 6/12/2017. The respondent opposed the application and filed a Replying Affidavit sworn on 8/2/2018. She deposes that the application is without merits and should be dismissed.
4. The parties filed their respective submissions. I have considered the application. This court granted interim orders of stay of execution on 6/12/2017. The issue for determination is whether the court should grant leave to file grant out of time.

Section 79G of the Civil Procedure Act deals with the time for filing appeals from subordinate courts and states:

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.

The court exercised discretion in determining whether to extend time for filing of an appeal. In the case of **Paul Musili Wambua v Attorney General & 2 others [2015] eKLR**, the Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated the following;

....it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.

a) Length of delay and reasons thereof

Judgment was delivered on 18/08/2017 and the applicant filed the application on 06/12/2017. However, he claims that he was only given copies of the proceedings and judgment on 18/09/2017 and certificate of delay was issued. The delay was for about 3 months which cannot be said to be inordinate. The applicant has shown the reasons for the delay which were not of his own making.

The applicant has shown that he applied for the proceedings and Judgment vide a letter annexed NKG 2. The proceedings were not supplied in time. He could not file the appeal without the Judgment. The decision of **Kyuma –v- Kyema (1988) KLR.184** cited is considered but the applicant was not supplied with the order or the decree. Without the two he could not file a complete appeal. After receiving the proceedings and judgment he filed the appeal without delay. Where an applicant has filed his appeal without inordinate delay and demonstrates to the court a reasonable explanation for the delay, the Court ought to exercise discretion in his favour other than deny him his constitutional right to appeal. I am persuaded by the decision of Justice C. M. Izama in **Tight Security Ltd –vs- Chartis Uganda Insurance Co. Ltd H. C. of Uganda Kampala Misc. Appeal No. 14/2014** where the applicant was seeking enlargement of time to file appeal. It was stated: that

“the issue for consideration is whether there is ‘good cause’ for extension of time to admit the appeal.

My view is that a reasonable explanation for the delay has been given and I should therefore exercise discretion in favour of appellants to extend time for filing the appeal.”

The court has unfettered discretion where a party has given a reasonable explanation for the delay.

5. (b) Chances of Appeal Succeeding

The Judgment of the trial court awarded the respondent maintenance expenses of Kshs 30,000/- per month. One of the grounds is that the Judgment was against the weight of the evidence. The applicant has submitted that the sum of Kshs 30,000/= awarded to the respondent was not pleaded before the trial court. These grounds show that the appeal is arguable. The court could not award that which was not pleaded. The Court of Appeal in the case of **Paul Musili (Supra)** and in the case of **Attorney General –v- Col. (RTD) Richard Ndapi Lenyagu (2017) eKLR** it was stated that among the which the court has to take into account in deciding whether to grant extension of time is the chances of the appeal succeeding. A party must establish the three grounds that is to say, that delay was not inordinate, reasons for delay have been shown and thirdly the chances of appeal succeeding. I am of the view that the applicant has established these grounds and I must exercise discretion in his favour in view of the circumstances of this case.

In conclusion I find that the application has merits. I order that:

- 1) Leave is granted to the applicant to file appeal out of time against the judgment of in SPMC Divorce Cause No. 3/2017.
- 2) The appeal be filed within 30 days from today.
- 3) Costs shall be in the cause.

Dated at Kerugoya this 11th Day of October 2018.

L. W. GITARI

JUDGE