



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 140 OF 2016

NAZIR JINNAH.....APPLICANT

VERSUS

ASMAHAN PETERSEN.....RESPONDENT

RULING

1. The applicant herein seeks leave to file a memorandum of appeal out of time. He has sought the said order in his notice of motion dated 29th March, 2016 and brought under section 75 and 79G of the Civil Procedure Act and Order 42 rule 1 and Order 43 rule 1 (1) and (5) of the Civil Procedure Rules.

2. The motion is supported by the affidavit of the applicant and the grounds listed on the body of the motion. The applicant's reasons for the delay in filing the memorandum of appeal in time was the pendency of Constitutional Petition No. 241 of 2014 Nazir Jinnah v. Principal Magistrates Commercial Courts and 6 Others in which he sought protection of his fundamental rights to fair hearing, right to administrative action and in which judgment was delivered on 22nd January, 2016 and Criminal Case No. 1489 of 2010 instituted against him by the Director of Public Prosecution and she was acquitted on 8th March, 2016. He stated that the filing of the Constitutional petition was occasioned by the dismissal of his application seeking stay of execution of the trial magistrate's earlier orders. The said orders were to the effect that he was granted leave to appeal on condition that he deposits KShs. 2.5 Million by close of business of the day the said orders were granted. That his said motion was dismissed without according him a hearing. He further stated that a criminal charge was preferred against him for obtaining money by false pretences but he was acquitted. These two cases caused delay in filing the appeal.

3. In response thereto the respondent filed a replying affidavit sworn by Alex Gatundu an advocate in conduct of this matter on his behalf. The respondent contended that the prayer seeking leave to file a memorandum of appeal out of time was not capable of being granted and that granting it would be ineffectual. That the law on contempt of court was clear that all court orders must be obeyed by all concerned persons unless the same are reviewed or set aside. That the applicant having admitted that there is a court order in the related lower court case which granted him leave to appeal, this motion is therefore duplicitous and an abuse of the process of court. That the applicant has not todate made good the court order demanding that he deposits the decretal sum by close of business on 23rd April, 2014 and therefore has no right of audience unless and until he complies with the said order. It was further contended that even without the said court order, it is trite law of execution of decrees under order 22 rule 22 (3) and order 42 rule 6 (2) of the Civil Procedure Rules that execution of a decree can only be stayed upon security being furnished. That the applicant should be enjoined to deposit the decretal sum in court as it would be very oppressive and unfair for the respondent to wait until the proposed appeal against a judgment that was handed in her favour is heard and determined. It was further contended that the applicant has misled the court when he stated that he was unable to file a memorandum of appeal. That

immediately after the entry of the summary judgment, he proceeded to file an application seeking the same orders as the ones he seeks in this application in HC Misc. Application No. 523 of 2012, Nazir Jinnah v. Asmahan Petersen which was dismissed by dint of section 7 (6) explanation 5 of the Civil Procedure Act as the applicant abandoned the motion after being denied stay pending appeal and as a result of that, this motion is res judicata. That the decree in the related lower court case remains unsatisfied and execution had already started. That the same should be finalized given the age of the decree which is four (4) years.

4. In his submissions, learned counsel for the applicant Dr. Khaminwa submitted that the replying affidavit was not sworn by the respondent and urged court to ignore it. He submitted that the intended appeal concerns fair hearing as provided for in article 50 of the constitution and urged this court to exercise its discretion in favour of the applicant. He asked this court take into account that the applicant already has a stay order and the complexity of this matter.

5. Mr. Gatundu learned counsel for the respondent opposed the motion and submitted that the orders herein if granted shall not be in a position to be executed. That the proceedings herein ought to indicate the case number and the name of the officer who gave the judgment. He averred that the order cannot be executed the way it has been couched. That the order of stay pending appeal referred to by the applicant's counsel has not been annexed to the supporting affidavit. That paragraph 2, 4, 5 and 12 of the supporting affidavit ought to be struck out since they refer to documents that are not on the record. That the annexures have not been marked or commissioned by a commissioner of oaths. That the said omission is not a mere technicality under rule 9 of the Oaths and Statutory Declarations Act. The counsel further reiterated the averments in the replying affidavit.

6. In reply, Dr. Khaminwa stated that counsel for the respondent has admitted that the applicant has a stay order. He averred that the objection raised on behalf of the respondent is a technicality and he in this regard cited Article 159 (2)(d).

7. Section 79G of the Civil Procedure Act provides:-

“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 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.”

8. The court has considered the application and the arguments by the respective parties. Section 79 (G) provides that an appeal should be filed within a period of thirty days from the date of the decree or order appealed from. The applicant herein failed to file appeal within the stipulated period. The reason that has been given is that there was a pending petition and a criminal case both of which involves the applicant herein and are related to this matter. The constitutional petition was dismissed on the 22nd January, 2016 while the criminal case was dismissed on the 8th March, 2016. The application herein was filed on 1st April 2016.

9. It has emerged from the evidence on record and from the submissions by the counsel for respondent that the lower court had granted the applicant herein an order staying execution on condition that he deposits the decretal sum in court by close of business on 23rd May, 2014. The applicant did not comply with that order. He also did not file the appeal but he opted to file a constitutional petition which was later dismissed.

10. It also emerged from evidence that on the 18th September, 2012, the applicant filed another application seeking stay of execution pending the hearing and determination of the applicant's intended appeal and the same was dismissed. And by virtue of that fact, counsel for the respondent has submitted that the application herein is res judicata.

I have perused the said miscellaneous application which had sought orders for stay of execution pending the hearing and determination of an intended appeal. Counsel for the respondent has submitted that the said application was dismissed which fact has not been denied by the applicant herein and that being the case, filing of the application herein is an abuse of the court process.

11. On whether the application was filed without undue delay; the reasons advanced by the applicant for the delay in filing the same are that there was a pending petition and a criminal matter both of which involved the applicant herein. Judgment in the constitutional matter was delivered on the 22nd January, 2016 while the criminal case was dismissed on the 8th March, 2016. In my considered view, the petition could have had a bearing with the matter herein but the criminal matter did not in any way prevent the applicant from filing and pursuing the appeal and therefore, the existence of the criminal matter is not a good reason for the delay in filing the application herein. The two jurisdictions are different and the applicant was a liberty to pursue both at the same time so that two run together.

12. Having considered the application, I find that it has no merits and it is hereby dismissed with costs to the respondent.

Dated, Delivered and Signed at Nairobi this 9th day of February, 2017.

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L. NJUGUNA

JUDGE

In the presence of

..... ***for the Applicant.***

..... ***for the Respondent.***