



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC CIVIL APPLICATION NO 575 OF 2016

NJORE JAMES WAMATU.....APPLICANT

VERSUS

LIBAN RARE BAKAYE.....RESPONDENT

RULING

The application before the court for determination is brought by way of notice of motion dated 7th November 2016 under section 79(G), 3A of the civil procedure Act, Order 22 Rule 22, Order 42 rule 6, order 51 (1) of the civil procedure rules and seeks leave to lodge appeal out of time and stay of execution of the decree pending hearing of the intended appeal.

The applicant's case as can be discerned from the dipositions in the affidavit sworn in support of the application and the oral submissions filed on his behalf, is that the delay in lodging the appeal was purely inadvertent as they were given instructions to appeal after the period within which to Appeal had lapsed. The learned counsel further submitted that the appeal has a high chance of success as shown in the draft memorandum of appeal attached to the supporting affidavit.

Counsel for the respondent opposed the application vide the grounds of opposition dated 1st December, 2016 on the grounds that the delay of 102 days had not been explained; That the application is vague as it did disclose material facts to the court to enable the court exercise its discretion in his favor as required by **Section 79(G)** of the **Civil Procedure Act**. She further argued that the applicants' prayer for stay of execution pending appeal is premature as he has not lodged any appeal nor is any pending.

The court has read and carefully considered the application and submissions made herein. The issues for determination are whether;

- 1) Stay of execution of the decree emanating from the judgment delivered on 22/08/2016 should be granted.
- 2) Whether the applicant should be granted leave to file Appeal out of time.
- 3) Who should bear the costs of the application.

As to whether stay of execution of the decree should be granted, the substantive law governing the relief of stay of execution pending appeal is provided for under **Order 42 Rule 6** of the Civil Procedure Rules. The court should be guided by the three prerequisites provided under **Order 42 Rule 6** of the Civil Procedure Rules, that:

a) The application is brought without undue delay;

b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and

c) 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.

On the first condition on whether the application was filed without undue delay, it is noted that judgment by the trial court was delivered on the 22/8/2016 and the application was filed 105 days from the day the judgment was read. The time frame is long and though the applicant has tendered an explanation, the same is not satisfactory. A period of almost four months is to say the least, unreasonable.

Regarding the second condition on substantial loss likely to be suffered by the Appellant if stay of execution is not granted the applicant in this case merely stated that if there is no stay of execution, the respondent might execute at any time. He further contended that the appeal will be rendered nugatory if the orders for stay of execution are not granted. In **James Wangalwa & Another v. Agnes Naliaka Cheseto [2012] eKLR** it was held:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein V. Chesoni ...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

It follows therefore that the allegation that execution is likely to commence in the event the orders sought are not granted is not satisfactory as an indication of substantial loss. That ground therefore fails.

As to whether leave should be granted to file appeal out of time, the court is guided by the guidelines set out in **David Kuria Maina Kamau T/a Mukinduri General Agencies Vs Shem Onyango (2009) eKLR** and in **Thuita Mwangi V Kenya Airways Ltd, (2003) eKLR** . In the latter case the court opined thus:

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of the delay; secondly, the reason for the delay; and thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

The length of the delay in this application is 105 days. This is a long time. However, the applicant avers that failure to file the appeal on time was due to miscommunication from the applicants’ insurers. The applicant further argues that their intended appeal has high chances of success.

I have considered the circumstances of this case. Though there was inordinate delay in bringing the application, the respondents have not demonstrated what prejudice, if any, they would suffer if leave to file Appeal out of time is allowed. I am, therefore, inclined to exercise the discretion vested in this court in favour of the applicants as no prejudice will be occasioned on the respondent if the appeal is filed out of time.

With regard to the prayer for stay of execution, the applicant has failed to prove substantial loss if any, that he will suffer if a stay of execution is not granted.

Before I conclude, counsel for the Respondent raised the issue of jurisdiction to entertain an application for stay, my take on this, is that, the two prayers can be combined in one Application. i.e a prayer seeking stay of execution pending hearing of an intended Appeal and that of leave to file an Appeal out of time. This court therefore, has jurisdiction to entertain the application for stay of execution.

In the end, the following orders are made;

(a) The Applicant is granted leave to file Appeal out of time. The same to be filed within 14th days from today.

(b) Prayer C of the Application is disallowed.

(c) Costs of the application shall abide the outcome of the Appeal.

Dated, signed and delivered at Nairobi this 14th day of July, 2017.

.....

L. NJUGUNA

JUDGE

In the presence of

.....**For the Applicant**

.....**For the Respondent**