REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 1 OF 2015

HONOURABLE ATTORNEY GENERAL ………… APPLICANT

VERSUS

PETER OMBUNA MAKORI ……………………….RESPONDENT

RULING

By a Notice of Motion Dated 5th January 2015 and filed in court on the same day, the applicant Attorney General seeks from this court orders:-

1. That the court do grant the applicant extension of time to file and serve Memorandum and Record of Appeal against the whole judgment of the Senior Principal Honourable M.C Chepseba at Milimani dated 18th June 2014 vide Milimani CM CC 12784 of 2006.
2. That there be a temporary stay of execution of the judgment of the said court and consequential decree pending hearing and determination of this application interpartes.
3. That there be temporary stay of execution of judgment of the said court and consequential decree pending hearing and determination of the appeal against the said judgment and decree.

The application is predicated on the grounds that the applicant is apprehensive that the said judgment was underserved and hence the need for the appeal; the judgment was delivered on 18th June 2014 wherein the respondent was awarded kshs 3,500,000; that the Senior Deputy Solicitor General has advised that an appeal be filed after being briefed on 24th September 2014 by which time the time for filing of appeal had lapsed hence the application for extension of time; that the intended appeal is meritorious and raised serious issues of law which require adjudication and determination by this court; that the applicant stands to suffer substantial and irreparable loss if the orders sought are not granted and that it is in the interest of justice that this application be allowed.

The application is further supported by the affidavit of Martin Muriuki Munene State Counsel whose depositions reiterate what is contained in the application and grounds in support thereof. He annexes copy of plaint, proceedings and judgment, memo by the Senior Deputy Solicitor General directing that an appeal be lodged against the decree an a draft Memorandum of Appeal. Mr Munene further deposes that the delay in filing this application is not inordinate but excusable.

The respondent Peter Ombura Makori opposed the application and filed replying affidavit sworn on 30th April 2015 reiterating his averments in the plaint in the court below that on two occasions he was arrested by police officers and eventually charged with a criminal offence of robbery with violence against Father John Hannon, the then Parish Priest of Matasia Catholic Church who died in the course

of the said robbery. He was tried in criminal case NO. 704/2005 and was acquitted under Section 210 of the Criminal Procedure Code on 22nd March 2006.

That he filed this suit and after the initial hearing he was awarded kshs 3,000,000 but the applicant successfully applied to set it aside and the case heard **denovo** and concluded on 18th June 2014 wherein he was awarded kshs 3,500,000 but that there has been no appeal and there is no explanation for the delay of 171 days when this application was filed.

The respondent contends that he has satisfied all the conditions for recovery of the decretal sum including filing for Mandamus orders, and obtaining and serving certificate of order against the Government but the applicant has refused to pay the decretal sum. Further, that conditions for stay of execution pending appeal have not been fulfilled hence the application herein should be dismissed with costs.

Both parties agreed to dispose of the application by way of written submissions.

In their written submissions dated 19th May 2015 and filed in court on 20th May 2015, the applicant submitted that the grant of leave to file an appeal out of time is a matter of judicial discretion, which principle was espoused in the case of **Machira & Company Advocates V Mwangi & Another (2002) 2 KLR** and expounded in **Kenya Shell Ltd Vs Kobil Petroleum Ltd (2006) 2 EA 132; Leo Sila Mutiso V Rose Hellen Wangari Mwangi Nairobi CA 255/1995** cited **Ndichu Nduati V Jephita Murigu & Another (2012) e KLR .**

The applicant submitted that there was no inordinate delay in bringing this application and that after judgment was delivered on 18th June 2014, the counsel in conduct of the matter briefed the SDSG on 24th September 2014 who advised that an appeal be filed and by that time the period for filing an appeal had lapsed and the deponent counsel was allocated the file on 13th October 2014 to file an appeal out of time which application was filed on 5th January 2015 hence the delay was not inordinate. They relied on the decision in **Josephine Njoki Mwangi v HFC (K) Ltd (2014) e KLR** where the Court of Appeal granted leave to file Notice of Appeal out of time after lapse of 5 months.

On whether the applicant has offered reasonable justification for the delay in preferring this application it is submitted that the present counsel was only allocated the file on 13th October 2014.

On whether the applicant has an arguable and meritorious appeal, it was submitted that the draft Memorandum of Appeal annexed shows that there was no proof on a balance probabilities the respondent's claim for malicious prosecution as no evidence of malice was adduced against the appellant. They relied on **Kagane V The Attorney General (1969) EA 643** where Rudd J laid down principles that a plaintiff must prove in malicious prosecution proceedings. Further, the applicant submitted that the award of kshs 3,500,000 as general damages was erroneous as the amount was excessively high and made without any basis and exaggerated. In addition, that there was evidence of probable and reasonable cause for arresting and charging the respondent with the offence of Robbery with Violence leading to the death of Father John F. Hannon.

The applicant further submitted that in any case, an arguable appeal need not be one with overwhelming probability of success for the application herein to be allowed. Finally the applicant submitted that the respondent shall suffer no prejudice if the application is allowed since the applicant has a right of appeal which he wishes to exercise after being dissatisfied with the judgment of the lower court.

The applicant urged the court to exercise its discretion judiciously in favour of the applicant to avoid an injustice and for the ends of justice to prevent the abuse of the process of the court with costs to the applicant.

The respondent's counsel filed his written submissions dated 5th June 2015 on the same day seriously

opposing the application as presented and urging this court to dismiss the twin application with costs. The respondent reiterated what was deposed in his replying affidavit and gave a meticulous history of the case in the court below from the time the cause of action arose until the this application was lodged on 5th January 2015.

In the respondent's view, the application was brought after an inordinate and inexcusable delay from 18th June 2014 to 5th January 2015, which delay has not been explained. He relied on the decision of **Mongira & Another vs Makori & Another Kisumu CA 20/2004.**

In his view, the unexplained delay of 171 days is inexcusable. Further, that the intended appeal is not meritorious as the applicant did not call any evidence to prove the guilt of the respondent in the criminal case and neither did they controvert the evidence adduced by the respondent in the subordinate court. It was submitted that the respondent will be prejudiced by the delayed justice whereas the applicant being the Government of Kenya will not and had not shown any prejudice that will be occasioned to it if the application is denied, as the decree is a monetary one. It was further submitted that as no security had been offered by the applicant in an application for stay of execution pending appeal, to stay execution will be depriving the successful respondent fruits of his lawful judgment. He prayed that the application be dismissed with costs.

I have carefully considered the application by the Attorney General, the grounds thereof, supporting affidavit and annextures as well as the written submissions by both parties and the decisions relied on.

In my view, the issue for determination are:

1. Whether the application is entitled to orders extending time within which an appeal should have been filed.
2. Whether he applicant has satisfied this court on the conditions for stay of execution of decree pending appeal
3. What orders should this court make
4. Who should bear the costs of the application

On the first issue of leave to appeal, the applicable law for application for leave to appeal out of time is Section 79 G of the Civil Procedure Act which enact:

> " ***Every appeal from a subordinate court to the High court shall be filed within a period of thirty days from the date of 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".***

The provision thereto provides that:

> ***"An appeal may be admitted out of time if the applicant satisfies the court that he had good and sufficient cause for not filing the appeal in time".***

The above provisions have found espousement in the Supreme Court decision in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others Sc Appl. No. 16/2014** which sets out 7 principles that a court should consider in exercising discretion to extend time namely:

a. Extension of time is not a right of a party, it is an equitable remedy that is only available to a deserving party at the discretion of the court;
b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
c. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to base basis;
d. Whether there is a reasonable reason for the delay. The delay should be explained to the

satisfaction of the court;

e. Whether there will be any prejudice suffered by the respondents if the extension is granted.
f. Whether the application has been brought without undue delay; and
g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

The applicant has submitted that the application was brought without undue delay and that delay was occasioned by the briefing of the SDSG on 24th September 2014 of the outcome of the case in the court below and that it was not until 13th October 2014 that the present counsel handling the matter was allocated the file and he therefore timeously filed the application on 5th January 2015 to extend time for filing as appeal since by that time, the stipulated 30 days of appeal from 18th June 2014 had elapsed. It was also submitted that the respondent will not suffer any prejudice if the orders sought are granted as the applicant will be exercising its right of appeal under the law. Further, that the appeal as intended is arguable and meritorious since the respondent failed to prove his case against the applicant in the court below on a balance of probabilities that his prosecution for the robbery incident was malicious and that the award of kshs 3,500,000 as general damages for malicious prosecution lacked any foundation and was manifestly exaggerated.

The respondent on the other hand vigorously resisted the application arguing that it lacked merit, the intended appeal has no merit, and that the application was belatedly filed as an afterthought and that no reasonable explanation has been offered for the inordinate delay.

It is trite law that an application for extension of time seeks for an equitable remedy. It is not a right in itself. The applicant indeed had a right of appeal guaranteed by Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya, following the judgment of the lower court delivered on 18th June 2014. He did not exercise that right and after nearly seven months, he sought leave of court to extend the period within which he can exercise that right of appeal.

Being an equitable remedy, the order extending time can only be granted to a deserving party at the discretion of the court, which discretion, nonetheless, as correctly submitted by the applicant must be exercised judiciously and not capriciously.

The record annexed to the applicant's supporting affidavit shows that the primary suit was instituted in 2006 and heard on 16th October 2012 and judgment delivered on 7th February 2013 exparte, which judgment was successfully set aside by consent of both parties on 20th December 2013 and a denovo interpartes hearing ordered and commenced on 28th January 2014. The respondent/plaintiff testified and closed hid case. The applicant herein closed his case without calling any witness and only filed written submissions. Judgment was delivered on 18th June 2014 in the presence of counsel for the respondent and absence of the applicant's representative. Decree and certificate of costs were drawn on 4th July 2014. Annexture MMM3 dated 24th September 2014 is a memo to Senior Deputy Solicitor General (SDSG) by G.N. Kamau litigation counsel briefing her boss of the outcome of the case which was determined on 18th June 2014 and advising a settlement. From 24th September 2014 when the brief was given by the litigation counsel to her boss, the file was only acted upon on 1st October 2014 to the effect that ***" settlement not recommended for now. Quantum is excessive if an appeal should be considered by*** CLC" followed by a consensus by SDSG on 3rd October 2014 thus:

> "***file be allocated to counsel to file an appeal as the case was distinguishable from Odhiambo's case. There is no torture in this case."***

Mr Munene counsel for the applicant deposes that he was allocated the file on 13th October 2014 and that he timeously filed the application herein on 5th January 2015.

What this court has been taken through by the applicant is the movement record of the file at the Office of the Honourable Attorney General and not reasons for delay for filing the appeal and the

application herein in time and after nearly 7 months. No single explanation has been offered why from 18th June 2014 it took three months to 24th September 2014 for the SDSG to be briefed on the outcome of the case yet the briefing memo clearly states in part:

"The Attorney General filed a Memorandum of Appearance together with a defence on 22nd March 2007 (folios 4 & 5a). The case proceeded for hearing on various dates and was fully defended by state counsel. Both parties closed their cases and written submissions were filed by both parties. Judgment was delivered on 18th June 2014, whereby the plaintiff was awarded kshs 3.5 million. As of 30th September 2014, the outstanding decretal amount is kshs 3, 605, 0000………'

The said memo does not provide any explanation to the SDSG for the delay in filing an appeal in time. It is clear that instructions to appeal were given on 3rd October 2014 but those instructions were being given by a superior officer to an officer below her and not by a client to his advocate. The correspondence shows that Office of the Attorney General was all along aware of the proceedings, participated in the case and knew the outcome but nothing is mentioned between the date of judgment and date when the memo was written to the SDSG. Even after receiving instructions to "appeal" on 13th October 2014, it took the same office up to 5th January 2015 to file an application for leave to file an appeal out of time. This delay is not explained at all.

The court therefore does not hesitate to find that there was outright complacence, intentional and contumelious delay on the part of the applicant in seeking the discretionary orders of this court extending time for filing an appeal out of time. I say contumelious and intentional because there has been no attempt to explain or lay a reasonable basis for the delay to the satisfaction of the court.

By the time the application herein was filed, the respondent had spend all his time and energy going through the motions of satisfying the legal requirements for seeking settlement of decree against the Government, including obtaining a decree, certificate of order against the Government and certified copies of proceedings and judgment which were all served on the Honourable Attorney General on 1st September 2014. The procedure for executing decree against the Government is never a simple procedure. It is therefore expected that the Office of the Attorney General would have given an explanation to be considered by this court as to why it took them all that time to file an appeal in time. It has not been stated that the delay or failure thereof was inadvertent.

Article 159(2) (b) of the Constitution abhors delayed justice , for delayed justice is denied justice for the respondent who had by 5th January 2015 expected to receive payment for his lawfully obtained judgment.

Albeit it was submitted that the intended appeal is arguable, it is not for this court at this stage to delve into the merits of the intended appeal, which proposition is nonetheless not one of the principles set out by the Supreme Court in the **Nicholas Kiptoo Arap Korir Salat case (supra).** Even then the applicant had an opportunity to file an appeal within 30 days statutory period or to timeously file this application providing cogent reasons for the delay, to warrant exercise of this court's discretion. They did not. In addition, section 79G of the Civil PROCEDURE Act contemplates two scenarios- one is where time for filing an appeal has expired, an appeal could nonetheless be filed out of time and then leave is sought to extend the period thereof. The second scenario is where time for filing an appeal has lapsed; the applicant can file an application for leave to file an appeal out of time. The applicant herein opted for the second scenario. He came to court seeking for this court's discretion but gave no plausible reasons for the delay. The applicant maintains that the application was made without any delay which is not the case.

To grant the prayers sought will be exercising the discretion of this court lavishly at the expense of the respondent's legitimate expectation that after 7 months of waiting for payment, the decree would be settled

Having squandered that opportunity to appeal and having delayed to bring this application, the applicant cannot be heard to demand for the right that now crystallized into a discretionary remedy. I reiterate that

nothing like an inadvertent mistake was advanced for the delay. It has also not been demonstrated that the case herein is of a public interest nature to warrant consideration for extending time.

Consequently, I find that this application for leave to file an appeal out of time is not merited and I decline to grant it.

On the second issue of whether stay of execution should be granted pending appeal, the answer partly lies in the determination on issue No. 1 above. The applicable law is Order 42 rule 6 (2) of the Civil Procedure Rules.

The purpose of stay of execution of decree pending appeal is to preserve the subject matter of the suit, to maintain the status quo, so that should the appeal be successful, it should not be rendered nugatory.

In this case, the applicant has failed to satisfy this court that they deserve leave extending time for filing the appeal. They did not file an application for stay, without undue delay. They did not demonstrate that they stand to suffer substantial loss if the stay sought is declined and the appeal succeeds, then it shall be rendered nugatory. The applicants' submissions concentrated on the merits of the appeal. That is a consideration that the Court of Appeal and not this court take into account in determining whether or not to grant the orders of stay sought pending appeal.

On the issue of security for the due performance of decree, none was offered. Nonetheless, the applicant being the Government of Kenya principal legal advisor and representative, this court believes that that security of kshs3.5 million is guaranteed and therefore that factor cannot influence this court in granting or refusing to grant stay.

Having found that the applicant's application for leave is unmeritorious and dismissed it, there is no appeal or intended appeal which would be rendered nugatory should stay be declined and execution of decree be allowed to proceed. Further, no prejudice is shown to be suffered should the application be declined. On the other hand, I find that the respondent who has waited for justice since 2006 will be prejudiced by a further delay. The applicant did have a second opportunity to defend the suit after formal proof hearing. They cannot have it all the time. Justice is for both parties to a dispute and in this case, in my view, delay would defeat justice for the respondent.

Having found that the applicant has not demonstrated that they deserve leave to file an appeal out of time, and that the application for stay is not deserved in the circumstances of this case, I would therefore not belabor determining the merits of the intended appeal which the applicant has focused on all through.

Accordingly, I decline to grant the prayer for stay of execution of decree pending appeal or intended appeal and dismiss it.

In the end, I dismiss the applicant's entire application dated 5th January 2015 with costs to the respondent.

Dated, signed and delivered at Nairobi in open court this 14th day of October 2015.

R.E. ABURILI

JUDGE

14/10/2015

Coram R.E. Aburili J

C.A. Adline

Mr Onyango holding brief for Nyachoki for respondent

Mr Munene for the applicant.

Court -Ruling read and delivered in open court as scheduled. Ruling to be typed.

R.E. ABURILI

JUDGE

14/10/2015