



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 21 OF 2015

ABDI AHMED ABDI.....APPLICANT

VERSUS

JELLE ABDI AHMED SUING of the Personal representative of the

Estate of ABDIRIZAK JELLE ABDI (deceased)..... RESPONDENT

RULING

The Application

The application before the court for determination is a Notice of Motion dated 19th February 2011 filed by the Applicant under the provisions of sections 3A, 75, 78 and 79G of the Civil Procedure Act and Order 43 Rule 1(3) of the Civil Procedure Rules. The Appellant is seeking the following substantive orders:

- a. That leave be granted to appeal out of time against the judgment made by the Hon. C.K. Kisiangani on the 10th December, 2014 in Machakos CMCC NO. 1576 of 2009.
- b. That the said leave do operate as a stay of all proceedings.

The Appellant's application is premised on the grounds that the said judgment was delivered in the absence of the Advocates for the parties on 10th December, 2014, having waited for the said judgment to be delivered upto 3.00p.m to no avail, and that the same was not communicated. Further, that it is not until 2nd February, 2015 upon perusal of the court file that the Applicant's advocates became aware that the said judgment was delivered on the said date, but in their absence.

The Applicant's advocate stated that being aggrieved by the judgment he thereafter made an application for typed certified copies of the proceedings for purposes of lodging an appeal in the High Court, and that the certified typed proceedings are yet to be supplied. The Applicant states that the time for appeal had in the meanwhile run out, and that the Respondent is likely to execute the decree herein any time.

The Applicant avers that it is in the interest of justice that the he be allowed to appeal the judgment of the Hon. C.K. Kisiangani out of the prescribed time, and that the Respondent will not be prejudiced if the said leave is granted. Lastly, that there has been no inordinate delay in bringing this application.

The Applicant relied on a supporting affidavit sworn by his Advocate, Alphonse Muema Mbindyo on 19th February 2015, wherein an account of the events leading up to and after the delivery of the judgment was given. It was further deponed that upon computation of time, taking into account the provisions of Order 50 Rule 4 of the Civil Procedure Rules and the fact that the Advocate's offices remained closed

over the December holidays upto 12th January, 2015, the time allowed for filing an appeal run out on 2nd February, 2015 thus rendering this application necessary.

The Response

The Respondent opposed the Applicant's application in a replying affidavit he swore on 30th April 2015, wherein he stated that the instant application was filed on 19th February, 2015 but only served upon his advocates on record on 16th April, 2015, soon after his advocates had served the Applicant's advocates with a Party and Party costs. That it is therefore clear that the objective of this application is to evade settlement of the decretal amount payable to him.

Further, that the subject judgment date being the 10th December, 2014 was taken in court by consent of all the parties advocates, and it was made known to parties that the same would be read at 2.30p.m. The Respondent averred that the Applicant's failure to attend court for the judgment was deliberate as the Applicant's representative vacated court just 30 minutes after 2.30p.m without an official communication from the trial court on the position of the judgment. Further, that after missing to attend the judgment the Applicant and or his counsel on record did not bother to follow up on the same from the registry until about three (3) months later.

The Respondent deponed that the Applicant has not demonstrated that the intended appeal has any chances of success and did not call any evidence in the trial court. He further deponed that he is frail and in bad health and any further delay in this matter will be highly prejudicial to him. The Respondent was of the view that should this Court be inclined to exercise its discretion and allow the Applicant's prayers, then the same ought to be on the condition that the Applicant do deposit in court the whole of the decretal amount being Kshs. 415,750/=.

The Issues and Determination

The parties canvassed the Applicant's application by way of written submissions, which they relied on at the hearing of the application on 23rd September 2015. The Applicant's submissions were filed on 9th June 2015 while those of the Respondent were filed on 15th July 2015.

I have read and carefully considered the pleadings and submissions filed. There are two issues to be determined. The first is whether the Court should exercise its discretion in favour of the Applicant and grant leave to appeal out of time. The second is if such leave is granted, whether the leave should operate as a stay of proceedings.

The Applicant in his submissions invoked the discretion of this Court and the provisions of Order 50 Rule 6 of the Civil Procedure Rules, and submitted that there has been no inordinate delay in filing the Notice of Motion dated 19th February, 2015. Further, that the intended appeal by the Applicant has a very high chance of success since the trial magistrate based her findings on submissions made by counsel for the plaintiff which were not supported by evidence.

The Applicant contended that the trial court did not allocate the time for the judgment on 10th December, 2014 as 2.30p.m, and that the allegation that the Applicant's representatives left the court 30 minutes after the time allocated for delivering of the judgment was misleading. Lastly, it was submitted that the Respondent is not a person of means and if the orders sought are not granted, the intended appeal would be rendered nugatory causing the Applicant to suffer loss.

The Respondent on the other hand submitted that the application herein has been supported by a sole affidavit sworn by the Applicant's counsel, Mr. Alphonse M. Mbindyo, and that it is not competent for a party's advocate to depose to evidentiary facts in any matter. Therefore, that the said affidavit remains hearsay. The Respondent sought to have the said affidavit struck out and cited the decisions in **Kysia Investment vs. Kenya Finance Corporation Ltd, Civil Suit Number 3604 of 1993**, and **In the matter of the Estate of M'Mbijiwe Muongo, Meru Succession Case No. 8 of 1991** in this respect.

On the merits of the application, the Respondent submitted that orders for stay of execution should only be granted where sufficient cause has been shown as provided under Order 42 rule 6 of the Civil Procedure Rules. The Respondent urged in this regard that the Applicant had relied on the “running of time” under Order 50 of the Civil Procedure Rules in to explain the delay to file an appeal. However, that even after considering the vacation over the said period, the Applicant still had 45 days period when he ought to have acted and for which no satisfactory explanation has been given.

Further, that the Applicant has not demonstrated that he might suffer any loss, and that this legal burden does not shift to the Respondent to prove he is possessed of means to make a refund. The Respondent relied on the decisions in **Kenya Shell Ltd vs Benjamin Karuga Kigibu & Ruth Karuga(1982-1988) 1 KLR, James Wangalwa & Another vs. Agnes Naliaka, Bungoma HCCC. Misc. Application No. 42 of 2011**, and **Machira t/a Machira & Co. Advocates vs East African Standard (No. 2), (2002) KLR 63**.

The Respondent prayed that in the event that the Court decides to exercise its discretion in favour of the Applicant, then furnishing of security should be a condition of granting any of the orders in the application. It was his submission that a successful party in litigation must be allowed to enjoy the fruits of his judgment. Lastly, the Respondent submitted that the Applicant's intended appeal does not raise any triable issues as he did not attend the trial court to controvert the Respondent's evidence.

I have considered the pleadings and arguments by the parties. I will first address the preliminary issue raised as to whether the affidavit sworn by the Appellant's counsel should be struck out. I will be brief in this regard and find that an advocate is not barred from swearing an affidavit in a client's cause, on matters which he as an advocate has personal knowledge of or is able of his own knowledge to prove under Order 19 rule 3 of the Civil Procedure Rules.

The affidavit sought to be struck out deponed to the proceedings that took place at the trial court, and as to the law on the time of filing of an appeal which were facts which are within the advocate's personal knowledge, having represented the Applicant in the trial Court. The affidavit sworn by Alphonse Muema Mbindyo on 19th ebruary 2015 is therefore properly on record.

On the issue of leave to appeal out of time, section 79G of the Civil Procedure Act provides as follows as regards appealing out of time:

"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 Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat – Vs – IEBC & 7 Others, (2014) eKLR** laid down the principles for extension of time for filing an appeal as follows:

- 1) 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;
- 2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- 3) Whether the court should exercise the discretion to extend, is a consideration to be made on a case to case basis;
- 4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

- 5) Whether there will be any prejudice suffered by the respondent if the extension is granted
- 6) Whether the application has been brought without undue delay; and
- 7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

The Applicant has put forward various factors to explain the delay in filing the appeal, principally being that he was not aware that the judgment was delivered on 10th December 2014 and the reason of the intervening vacation period. I note that this application was eventually filed on 19th February 2015, and I do not find the delay unreasonable given the factors the Appellant has stated. I accordingly exercise my discretion in his favour and grant leave to file the appeal out of time.

I would like to comment on the applicability of Order 50 rule 6 of the Civil Procedure Rules relied upon by the Applicant in his application for leave, and note that the said provisions do not apply in the circumstances of this application where the period to appeal is fixed by statute. Order 50 Rule 6 of the Civil Procedure Rules only applies to situations where a limited time has been fixed for doing any act or taking any proceedings under the Rules, by summary notice or by order of the court, and not by statute as in this case.

The last issue is that of execution pending appeal, which is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) 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.”

For a stay of execution to be granted, an applicant must satisfy the conditions stated in rule 6 (2) to the effect that:

- (a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;
- (b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and
- (c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

In the present application, as regards the first condition for stay, this Court has already found that the Applicant's application was brought without unreasonable delay.

On the fulfillment of the second condition, the Applicant urged that the Respondent is not a person of means. The implication is that the Respondent will not be able to refund the decretal sum if an order of stay is not granted. The Applicant however has not offered any security to cushion the Respondent in the event that the intended appeal is not successful. I note in this regard that the Respondent is however open to a stay on condition that security is provided by the Applicant, and it is only fair that his right to be able to enjoy the fruits of his lawfully obtained judgment is also taken into account.

I accordingly allow the Applicant's Notice of Motion dated 19th February 2015 for the foregoing reasons, and only to the extent of the following orders:

1. The Applicant is granted leave to file an appeal out of time within 14 days from the date of this ruling.
2. Stay of execution is granted only on condition that the Applicant deposits the decretal sum of Kshs 415,750/= in a joint interest earning account to be opened and held by both advocates for the parties within 30 days of the date of this ruling.
3. The costs of the Notice of Motion dated 19th February 2015 shall be borne by the Applicant.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 9th day of October, 2015.

P. NYAMWEYA

JUDGE