



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. CIVIL APPLN. NO. 36 OF 2015

FREDRICK IGNAZA.....APPLICANT

-VERSUS-

AGASETA KANGER ZARIA.....RESPONDENT

RULING

INTRODUCTION:

1. The Applicant herein, **FREDRICK IGNAZA** moved this Court by way of the Notice of Motion dated 29/05/2015 for a total of 8 orders the main ones being orders for stay the execution of the decree in ***Hamisi RMCC No. 53 of 2013*** (hereinafter referred to as '***the suit***') as well as for leave to appeal out of time.
2. The application was opposed and eventually heard by way of written submissions thereby resulting into this ruling.
3. This Court has intently looked into the parties' positions alongside the various of authorities referred into and would wish to deal with the twin issues of leave to appeal and stay of execution as follows:-

On the leave to appeal out of time:

4. It is the Applicant's case that it participated in the suit as a Defendant upto the delivery of the judgment on 04/12/14 where on the Applicant's request the Court granted a 30-days' stay of execution of the decree for the Applicant herein to consider the said decision. That stay of execution order lapsed on 03/01/2015.
5. The Applicant further avers that he requested for certified copies of the proceedings and the judgment and upon consultation with his insurers, the Advocates filed a formal application for leave to appeal out of time as well for a further stay of execution. That application was filed in the suit sometimes in February 2015 and which application was dismissed by a ruling delivered on 28/04/2015.
6. The Applicant then moved to this Court and filed the current application under consideration. That was on 29/05/2015 about one month after the dismissal on the application by the lower Court.
7. It is the Applicant's position that the delay to lodge the appeal timeously was occasioned by the absence of the proceedings and the judgment which the Advocates needed to liaise with the instructing insurers. It is further contended that the subordinate Court took 2 months to deliver its ruling on the application hence adding onto the delay. The Applicant therefore argues that since the delay is on the part of the Court, the same is clearly explainable and indeed excusable and hence prays that leave to lodge the appeal out of time be granted.

8. The Respondent herein who was the Plaintiff in the suit strenuously opposed this limb of the application. She contended that the delay remains inordinate, unexplained and inexcusable given that the Applicant did not require certified copies of the proceedings to update his client. She cited the lack of any letter requesting for the proceedings and that no deposit-payment was ever made to Court. She sees the application as an afterthought and further raises the issue of the application being *res judicata* since a similar application was dismissed by the lower Court.

9. From various judicial pronouncements on the aspect of leave to appeal out of time, some of which have been referred to herein by the parties, it is clear that the principles for consideration in granting such leave or otherwise are now well settled. The Court of Appeal in considering an application for extension of time to file and serve a Record of Appeal under the Court of Appeal Rules (which principles equally apply in the current instance) in **GACHERO & ANO -VS- POINEER HOLDINGS (A) LTD & ANO.(2008) KLR 315** had the following to say: -

“The powers of the Court (of Appeal) in an application for extension of time (under the Court of Appeal Rules, Rule 4) were discretionary and unfettered. However in executing its discretion, this Court would consider the length of the delay, the explanation or reason given for it (and) whether the intended appeal was arguable.....”

The above was restated in the decision of M.S.A Makhandia, J (as he then was) in **Benjamin G. Ndegwa vs C.N. Murungaru (2009) eKLR.**

10. Other factors for such consideration were stated by the Court of Appeal in **Civil Application No. Nai. 41 of 2014 Samiyan Kaur Devinder Singh vs Speedway Investment Ltd & CFC Stanbic Bank Limited (UR 31/2014)** to include: -

- (a) The effect of the delay in public administration of justice;***
- (b) The importance of compliance with time-lines in litigation;***
- (c) The resources of the parties;***
- (d) Whether the matter raises issued of public importance;***
- (e) If the Applicant has been diligent.***

The net effect of all the above considerations is to foster a quicker and equitable disposal of disputes between parties, a calling which all persons and this Court is constitutionally-bound to uphold.

11. I will therefore examine the said principles as hereinbelow: -

(a) The period of the delay:

12. As judgment was delivered on 04/12/2014, the Applicant pursuant to **Section 79G** of the **Civil Procedure Act**, Chapter 21 of the Laws of Kenya, had 30 days, that is upto 03/01/2015, to lodge the appeal. However pursuant to **Order 50 Rule 4** of the **Civil Procedure Rules 2010**, time does not run between the twenty-first day of December in any year and the thirteenth day of January in the year next following both days inclusive. Accordingly therefore the Applicant had upto the **27th January 2015** to lodge the appeal.

13. I have looked at the copy of the Memorandum of Appeal annexed to the application which was filed in the suit. It was signed and dated 23/01/2015. It was however not filed though there was around 4 days to the lapse of the period to lodge the appeal. The Applicant instead filed an application in the suit for leave to appeal out of time sometime in February 2015 which was later on dismissed. It may have been possible that the Applicant’s Counsels did not address their minds to the provisions of **Order 50 Rule 4** of the **Civil Procedure Rules 2010**.

14. Be that as it may, the application under consideration was filed in this Court on 29/05/2015. The period from 27/01/2015 upto the filing of the application translates to around 4 months. For the purposes of the application under consideration, this Court shall go by the period of **4 months** as the period of delay herein.

(b) The reasons for the delay:

15. The main reason put forth by the Applicant herein for the delay is in respect to obtaining certified copies of proceedings and the judgment in the suit coupled with the fact that the Learned Magistrate took around 2 months to render the ruling on the application. But as already indicated, the Applicant had by 23/01/2015 prepared and signed a Memorandum of Appeal in the matter. It is marked as **Exhibit 'SN-1'** in the Affidavit sworn by **Sandra Nyakweba** on 29/05/2015 in support of the application before Court.

16. Under **Order 42 Rule 1 of the Civil Procedure Rules, 2010**, the filing of a Memorandum of Appeal in the High Court signifies the filing of an appeal. All the other issues are then dealt with subsequently and as provided for under the said Rules. The Applicant therefore having prepared the Memorandum of Appeal by 23/01/2015 did not require certified copies of the proceedings or judgment to lodge it in the High Court. The issue of the period taken by the trial Court to deliver the ruling in respect to the application filed in February 2015 does not therefore arise.

17. To buttress the foregone, I have also noted that under prayer 5 of the application dated 29/05/2015, the Applicant prayed that the said Memorandum of Appeal be deemed as duly filed and served. The same being not a draft but a substantive Memorandum of Appeal means that the Applicant had fully made up his mind to lodge the said appeal as presented.

18. I have perused the persuasive authorities of *Gichohi Susana vs. Philip Muchoki and Lucy Wanjiru Ngugi (suing as administrators of the Estate of the Late John Ngugi Mwangi (2015) eKLR* and *Utalii Transport Company Limited and 3 others vs. NIC Bank Limited & Another (2014)eKLR* as tendered by the Applicant and find that the circumstances therein remain different from the ones in the current application in that there was the issue of a judgment delivered in the absence of one party without due notice.

19. This Court has also addressed its mind to **Article 159(2)(b) of the Constitution of Kenya** on the need to dispense justice without delay. Further this Court has had a look at **Sections 1A and 1B of the Civil Procedure Act** on the overriding objective of the Act. Whereas the overriding objective confers a considerable latitude in the interpretation of the law and rules made thereunder, an Applicant remains under a duty to satisfy the Court that it is deserving of the prayers sought. This Court remains alive to the truism that the suit was filed in 2013 and a consent on liability recorded as between the parties. (See: *Aviation Cargo Support Limited v. St. Mark Freight Services Limited (2014)eKLR*).

20. In light of the above considerations, it is my finding that the delay of 4 months, in the circumstances herein, remains inordinate and was not satisfactorily explained.

21. Having found so, I therefore do not need to deal with the aspect of stay of execution pending the determination of an appeal since there is now no appeal in the first instance.

CONCLUSION:

22. The upshot is that the application by way of the Notice of Motion dated 29/05/2015 be and is hereby dismissed with costs. The stay of execution order on record is hereby discharged accordingly.

DATED and SIGNED at MIGORI this 5th day of October, 2015.

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at KAKAMEGA this 8th day of October, 2015.

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JUDGE