



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**ELC MISC. APPLICATION NO. 5 OF 2019**

**JOHN N.M. NYAGA.....APPLICANT**

**VERSUS**

**PETER NJIRU NJAGI.....1<sup>ST</sup> RESPONDENT**

**ELIUD WAWERU JUSTUS KAUGI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a notice of motion dated 2<sup>nd</sup> April 2019 brought under the provisions of **Order 42 Rule 6 of the Civil Procedure Rules, 2010** (hereafter *the Rules*), **Sections 1A, 1B, 3A, 63(e), 79(g) of the Civil Procedure Act (Cap. 21) and all other enabling provisions of the law** the Applicant sought the following orders:

- a) *That this application be certified as urgent and heard ex-parte in the first instance.*
- b) *That this honourable court be pleased to grant the applicant leave to appeal out of time against the judgement of Hon. M.N. Gicheru Chief Magistrate delivered on 1<sup>st</sup> February 2019 in Civil Suit No. 24 of 2013.*
- c) *That pending the hearing and determination of this application inter-partes, there be a stay of execution of the judgement delivered by the honourable court at Embu Civil Suit No. 24 of 2013 on 1<sup>st</sup> February 2019 and all consequential orders.*
- d) *That this honourable court be pleased to stay execution of the judgement delivered by the honourable court at Embu in Embu Civil Suit No. 24 of 2013 on 1<sup>st</sup> February 2019 and all consequential orders.*
- e) *That costs be in the cause.*

2. The said application was based upon the grounds set out on the face of the motion and supported by the affidavit sworn by the Applicant on 2<sup>nd</sup> April 2019. It was contended that even though the Appellant intended to appeal against the judgement and decree of the Chief Magistrate dated 1<sup>st</sup> February 2019, he was taken ill before giving full instructions to his advocate to lodge the appeal. It was further contended that unless a stay was granted, the intended appeal might be rendered nugatory.

3. The Respondents filed grounds of opposition dated 7<sup>th</sup> May 2019 in response to the said application. It was contended that there was no reasonable explanation for the delay in filing the application; that the Applicant had not offered any security; and that the intended appeal had no chances of success.

4. When the said application was listed for hearing on 20<sup>th</sup> May 2019, it was directed, with the concurrence of the parties, that the same be canvassed through written submissions. The Applicant was given 30 days to file his submissions whereas the Respondents were given a similar period to file theirs upon the lapse of the period granted to the Applicant. The record indicates that the Applicant filed his submissions on 12<sup>th</sup> June 2019. There was no indication of the Respondents having filed any submissions by the time of preparation of the ruling.

5. The court has considered the Applicant's twin prayers for leave to file an appeal out of time and for stay of execution pending appeal. The court has considered the supporting affidavit, the grounds of opposition as well as the submissions on record.

6. The factors to be considered in granting or refusing an application for extension of time to appeal out of time were summarized in the case

of *Mwangi Vs Kenya Airways Ltd [2003] KLR 486* as follows;

**“Over the years, the court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance in *Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1997 unreported)*, the court expressed itself thus;**

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also settled that in general the matters which this court takes into account in deciding whether to grant an extension are; first, the length of the delay. Secondly, the reason for the delay; third (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.”**

7. The court has considered the length of the delay and the explanation for such delay. The Applicant’s allegation that he was taken ill immediately after delivery of judgement by the Chief Magistrate was not controverted by any contrary evidence. The court is of the view that the explanation is not unreasonable. The court is further of the opinion that the delay of about 2 months in filing the instant application would not constitute undue or unreasonable delay.

8. The court has perused the draft memorandum of appeal annexed to the application. The court is of the opinion that the proposed grounds of appeal are not merely fanciful or frivolous. Those grounds may well be arguable before this court. The court is thus of the opinion that the Applicant has made out a case for an extension of time to file his appeal out of time.

9. The 2<sup>nd</sup> aspect for consideration is whether the Applicant has made out a case for stay of execution pending appeal. The court has perused the plaint which was before the Chief Magistrate’s court as well as the judgement of the court thereon. It is evident that the Hon. Chief Magistrate simply dismissed the Applicant’s suit against the Respondents. The court did not issue any positive order capable of execution. The court is thus of the opinion that a dismissal order is incapable of being stayed.

10. In the case of *Western College of Arts & Applied Sciences Vs Oranga & Others [1976-80] KLR 78* the Court of Appeal held, *inter alia*, that;

**“But what is there to be executed under the judgement the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs.**

**In *Wilson Vs Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgement for this court, in an application of a stay. It is so ordered.”**

11. That holding has been followed in various other cases such as *Kilindini Warehouses (K) Ltd & Another Vs Omar Saleh Said & Another [2014] eKLR*. The said case of *Western College of Arts and Applied Sciences* was also cited with approval in *Nairobi Civil Application No. Nai 219 of 2007 Sonalux Limited & Another Vs Barclays Bank of Kenya Ltd & 2 Others*.

12. The upshot of the foregoing is that the court finds merit only in the prayer for extension of time to file an appeal out of time. The court is of the opinion that the prayer for stay of execution does not lie. Consequently, the court makes the following orders;

a) Leave be and is hereby granted to the Applicant to file an appeal out of time against the judgement and decree of the Hon. M.N. Gicheru (CM) dated 1<sup>st</sup> February 2013 in *Embu CMCC No. 24 of 2013*.

b) The Applicant shall file and serve the Memorandum of Appeal within 21 days from the date hereof in default of which the leave shall lapse automatically.

c) Costs of the application shall be costs in the appeal.

13. It is so decided.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 17<sup>TH</sup> DAY of OCTOBER, 2019.**

In the presence of Mr. Nzioki holding brief for Ms. Muthoni for the Applicant and in the absence of the Respondents.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**17.10.19**