



## REPUBLIC OF KENYA

### IN THE EMPLOYMENT & LABOUR RELATIONS

#### COURT OF KENYA AT NYERI

CAUSE NO. 5 OF 2018

DANIEL MBAI MUTUA.....CLAIMANT/RESPONDENT

VERSUS

H. YOUNG & COMPANY EAST AFRICA.....RESPONDENT/APPLICANT

#### RULING

1. The application before me for determination is the Respondent's (hereafter Applicant) Notice of Motion application dated 15<sup>th</sup> July 2019. In it, the Applicant seeks the grant of orders as follows:-

- a. Spent
- b. That pending the hearing and determination of this application *inter partes* this Honourable Court be and is hereby pleased to issue an order of stay of execution of the judgment and decree issued on 29<sup>th</sup> May 2019 and/or all consequential orders arising therefrom.
- c. The Honourable Court be pleased and hereby allow the Applicant to file an appeal out of time.
- d. That costs of this application be provided for.

The Application was supported by the affidavit of Veronica Njeri and the ground on the face of the motion. The Applicant asserts that it has an arguable appeal with high probability of success and if the stay sought is not granted the appeal will be rendered nugatory.

2. The Claimant (hereafter Respondent) filed grounds of opposition in which he asserted that the application by the Applicant was an abuse of the court process and had no basis in law. The Respondent asserts the motion is mischievous, misconceived and made in bad faith and ought to be dismissed with costs.

3. Parties conceded to argue and oppose the motion by way of written submissions. The Applicant submitted that the provisions of Order 42 Rule 6(2) are focal in that before the grant of stay a court has to be satisfied that substantial loss may result to the applicant unless the order is made. The Applicant relied on the case of **Kiplagat Kotut v Rose Jebor Kipngok [2015] eKLR** which restated the principles a court has to consider. On the issue of substantial loss, the Applicant submitted that the purpose of an application for stay pending appeal is to prevent the execution against a party in the dispute so that the rights of the appellant are safeguarded and the appeal if successful is not rendered nugatory. The Applicant submitted that the execution if carried out will cause substantial loss as no assurances have been made by the Respondent. The Applicant relied the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** as well as the case of **Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR** for the propositions on substantial loss. On the issue of unreasonable delay, the Applicant submitted that the motion was brought without any delay thus satisfying the second condition. On the matter of security, the Applicant submitted that it was ready and willing to offer such security as the court may deem proper and just in the circumstances. The case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another [2018] eKLR** was cited in aid on the issue of security. The Applicant submitted that it had an arguable appeal and if the orders are not granted it would render the appeal nugatory. The Applicant cited the case of **Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR** as well as **Kenya Wildlife Service v Lake Jipe Safari Lodge Limited [2018] eKLR**. The Applicant submitted that it not only had an arguable appeal in the sense that it raises numerous grounds for consideration but that the same would be rendered nugatory absent the orders sought. The Applicant submitted that the application was for granting.

4. The Respondent submitted that the Applicant had no explanation for the delay in filing the intended appeal. The Respondent asserts that it is well settled that the decision as to whether to extend time for filing an appeal is discretionary as it will depend on the length of the delay, the reason for the delay, the degree of prejudice to the respondent if the application is granted as well as the chances of the appeal

succeeding. The Respondent relied on the case of **Raphael Musila Mutiso & 3 Others v Joseph Ndaba Nthuka & Another Civil Application No. 27 of 2019** (unreported) where the learned Judge of Appeal held that *on the strength of a long line of authorities it is settled that whether or not to extend time for filing a notice of appeal or lodging the appeal itself is discretionary and will depend on the length of the delay; the reason for the delay; the degree of prejudice to the respondents if the application is granted; and (possibly) the chances of the appeal succeeding if the application is granted.* The Respondent submitted that going by the decision, the Applicant was duty bound to give a plausible reason for the delay. The Respondent submitted that on the strength of the decision, in an application for extension the most critical consideration is the explanation for the delay. The Respondent thus urged the dismissal of the motion.

5. It think it bears no repeating that the grounds for the grant of stay by the Superior Court pending an appeal are well settled. The premise is on Order 42 Rule 6(2) of the Civil Procedure Rules 2010 which makes provision as follows:-

*(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.*

The applicant in an application for stay pending appeal is bound to demonstrate there is grounds for the grant of the orders sought as these have the effect of dislodging the judgment and the proverbial fruits of the judgment. The Applicant herein argues that the orders sought will cause it substantial loss. The sum awarded to the Respondent in the suit is somewhere in the region of roughly Kshs. 142,400/-. This may not necessarily qualify as substantial but assuming for the sake of arguments that it is indeed substantial and the Applicant has met this condition, the second limb of conditions to be met is that the application must be made without unreasonable delay. Unreasonable delay is not firm and fixed or well defined. That is to say a delay for 7 days and a delay for a month are in the circumstances of a particular case either inordinate or not. In the decision cited by the Respondent being **Raphael Musila Mutiso & 3 Others v Joseph Ndaba Nthuka & Another** (*supra*), on an application for extension of time to lodge an appeal, the President of the Court of Appeal (Ouko JA) held at page 4 of the Ruling as follows:-

*In an application for extension of time the most critical consideration is the explanation for the delay. A delay of a day will result in the application being dismissed if there is no explanation. There are, on the other hand many decisions where delays of many months and even years have been excused because the applicant in those applications provided plausible explanation see: **Kamau Mugwima v Nganga Njoroge & 3 Other**, Civil Application No. Nairobi 60 of 2996 where the delay was 393 days. In the present case, while the delay before July 2018 has been explained on the failure by the court to notify the parties of the date delivery of judgment, there has been no attempt to explain the delay thereafter.*

*So, although the delay was not inordinate, the reason for the delay has not been furnished. (underline mine)*

6. The Applicant has not explained why no notice of appeal was filed within the 14 days prescribed in law for that purpose. To compound matters, there is no explanation given for the delay. The phrase ‘without unreasonable delay’ should receive a liberal construction in that the court should advance substantial justice but in this case the Applicant is out of time and has no valid excuse for the delay. A court must guard itself against the danger of being merely sympathetic to a party. Where there is no reasonable explanation for the delay, the entreaty to allow the filing of an appeal out of time should be disallowed since it is time-barred, even at the risk of perceived injustice or anticipated hardship to the Applicant. In any application for extension of time, a court is being asked to exercise discretion but there must be some material before the court to enable its discretion to be so exercised. Once there is non-compliance with the rules on filing notices and the like, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in their favour and the rule of thumb as demonstrated in the Court of Appeal decision cited above is that where there is no explanation, there shall be no indulgence. No reason was advanced for the delay whatsoever and the consequence is there is no merit in the leave to appeal out of time or for grant of stay. Applicant’s application is dismissed with costs to the Respondent.

It is so ordered.

**Dated and delivered at Nyeri this 29<sup>th</sup> day of October 2019**

**Nzioki wa Makau**

**JUDGE**