



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 37 OF 2018

FELIX MOCHIEMO OINDI.....APPELLANT/APPLICANT

VERSUS

GUTONYA NEWTON MBOGO (suing as the legal representative of the

Estate of SHARON GACHERI MBOGO (Dsd).....**RESPONDENT**

RULING

A. Introduction

1. This is a ruling on the applicants' notice of motion dated 9th August 2018 which seeks the following orders;

a) That leave be granted to the appellant/applicant to appeal out of time against the judgement and decree in Embu CMCC No. 175 of 2017, and that the Appellant's Memorandum of Appeal dated the 27th July 2018 and filed on 31st July 2018 be and is hereby deemed as properly filed and served;

b) That there be a stay of execution of the said judgement and decree in Embu CMCC No. 175 of 2017 pending the hearing and determination of the Appeal;

2. The respondent filed a replying affidavit dated 4th September 2018 opposing the application on the grounds that the application was an afterthought as the conduct of the parties pointed towards an amicable settlement of the suit.

3. The parties agreed to file submissions to dispose of the application.

B. Appellant's/Applicant's Submissions

4. On grant of stay of execution, the applicant submitted that he stood to suffer substantial loss if the orders are not granted as the respondent had not availed any evidence that they had the financial ability to reimburse the judgement sum should the appeal succeed.

5. The applicant submitted that there was no unreasonable delay in filing their application and that the respondent would suffer no inconvenience if the orders of stay were granted. It was further submitted they had already deposited the sum of Kshs. 1,000,000/= in court as security. The applicant relied on the cases of Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR and Johnson Mwiruti Mburu v Samuel Macharia Ngure [2004] eKLR.

6. On leave to file the appeal out of time, the applicant submitted that the court's power to grant leave extending time to file an appeal was discretionally and must be exercised judiciously. He relied on the cases of **Edward Njane Ng'ang'a & Another v Damaris Wanjiku Kamau & Another [2016] eKLR** and **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another [2018] eKLR**.

7. He further submitted that their delay in filing the Memorandum of Appeal was only 3 days, a delay which was well explained. It was further submitted that they had an arguable appeal and urged the court to allow their application.

C. Respondent's Submissions

8. The respondent submitted that the applicant had not given a good explanation as to why the appeal was not filed on time and as such his application ought to fail.

D. Analysis & Determination

9. As to whether stay of execution should be granted, I note that such an application seeks to invoke the discretionary powers of the court. Of course discretionary powers must be exercised judiciously. Stay of execution is provided for in Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the **Rule 6(2)** as follows:

"No order for stay of execution shall be made under sub-rule (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."

10. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

"1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellants had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

11. The above cited case captures the applicable principles in deciding whether or not to grant a stay of execution pending appeal. In the Court of Appeal decision in the case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** as followed by the High Court in **Stanley Karanja Wainaina & another v**

Ridon Anyangu Mutubwa [2016] eKLR it was held that:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

12. In the case at hand, the Respondent has not disclosed any source of income that he would use to refund the Applicant the decretal amount should the appeal succeed. The applicant has thus established that it will suffer substantial loss if the intended execution is not stayed. It also follows that if the Respondent executes the judgement and the applicant’s appeal succeeds; then not only will the Applicant suffer substantial loss but the appeal will also be rendered nugatory.

13. The Applicant has indicated that he has deposited in court Kshs. 1,000,000/= which is almost half of the decretal amount of Kshs. 2,442,566.80 for the due performance of the decree. The Respondent asserts that the Applicant should deposit the full decretal amount in court as a prerequisite to granting of the appeal to be filed out of time. It is the Court which determines the security upon ordering stay to ensure the due performance of the obligations by the applicant as to costs and to satisfy the decree in **Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates** Justice Gikonyo the Court stated that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

14. My view is that it is sufficient for the applicant to provide a security of Kshs. 1,000,000/= and has therefore satisfied this ground for stay. The other consideration is whether there was undue delay. The judgment was delivered on 27th June 2018 and this application was filed on 10th August, 2018. This application was filed about 33 days after delivery of the judgment. The delay was explained as a genuine error on part of the advocates. It is trite law that the mistake of the advocate should be revisited on his client. I am convinced that the error was not deliberate and is excusable. There is no doubt that the appeal was filed without undue delay.

15. The applicant has argued that the appeal has reasonable chances of success. All what the applicant needs to show are the three grounds under **Order 42 rule 6 Civil Procedure Rules (supra)**. The law does not require this Court to determine the application based on the merits or otherwise of the appeal.

16. Consequently, I am persuaded that the applicant has met the requirements for grant of stay of execution.

17. As to whether the applicant should be granted leave to file this appeal out of time, the operative part in answering the question whether the prayer to enlarge time is merited is Section 79G of the Civil Procedure Act. The section provides as follows:

“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.”

18. Our case law has now provided guidelines on what will be considered “good cause” for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

19. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the **Court of Appeal in Mwangi v Kenya Airways Ltd [2003] KLR**. They include the following:

- a) *The period of delay;*
- b) *The reason for the delay;*
- c) *The arguability of the appeal;*
- d) *The degree of prejudice which could be suffered by the Respondent if the extension is granted;*
- e) *The importance of compliance with time limits to the particular litigation or issue; and*
- f) *The effect if any on the administration of justice or public interest if any is involved.*

20. The respondent complains that this application is in bad faith because the Applicant had given hope to the respondent that the payments of the decree were in high gear.

21. Looking at all the factors in totality, I am unable to agree with the respondent that the application is an abuse of the Court's process and has been brought as an afterthought.

22. First, I note that the application was brought about 33 days after the time to appeal had run out and that a request for proceedings was made within one month of the judgment. I do not find this delay to be inordinate under the circumstances. The applicant has also explained the reason for the delay to the satisfaction of the court.

23. All considered, I do not see any substantial or adverse effects in granting the orders sought on the respondent. Lastly, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves of substantive value in the interests of justice.

24. The applicant has satisfied the requirements of the law in my considered opinion. I find that the application dated 9th August 2018 has merit.

25. The appeal should be filed within 21 days' failure to which these orders will be automatically vacated.

26. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of : -

Ms. Muriuki for Wanjihia for Appellant/Applicant



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