



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL APPLICATION NO. E013 OF 2021

ELIJAH KIRUGI KAIRANYA.....APPLICANT

VERSUS

BERNARD NTONGAI M'ABURUKI.....1ST RESPONDENT

FRANCIS MUGIRA MUNGAMA.....2ND RESPONDENT

RULING

The Application

1. Before the Court is an application dated 1st March 2021 seeking stay of execution of the Judgment delivered on 15th December 2020 in Tigania CMCC No. 46 of 2016 and leave to appeal out of time against the said Judgment.

Applicant's Case

2. The application is supported by the affidavit of Kelvin Ngure, the Legal Counsel at Directline Assurance Co. Limited, the insurers of the Applicant's motor vehicle. He urges that the Advocates who has handling the matter at the time of delivery of judgment left their Advocates' Law Firm without proper hand over, leading to the delay as the Judgment in the matter was discovered after stay had lapsed. That being aggrieved by the Judgment, they have instructed the firm of Kimondo & Gachoka to lodge an appeal. That time to lodge an appeal expired on 8th February 2021, 30 days after judgment by the trial Court was delivered. That the intended appeal raises pertinent points of law and has overwhelming chances of success.

3. He further urges that the Judgment/Decree is of a substantial sum of money and if the Respondents are paid and the appeal is successful, they might not recover the same. That he is ready, able and willing to furnish such reasonable security as the Court may deem fit. That he is ready to deposit the whole decretal amount in Court or to furnish a bank guarantee. That the Respondent does not stand to suffer any prejudice.

1st Respondent's Case

4. The 1st Respondent opposed the application by his replying affidavit sworn on 10th March 2021. He urges that it is 3 months since the Judgment was delivered and no attempt was ever made to apply for the proceedings and Judgment. That the reason for delay advanced by the Applicants, that the Advocate who has handling the matter left without handing over is not a matter of concern for him and neither should it be of concern for the Court. That once Judgment was delivered, he forwarded a letter to the Applicant notifying him of the Judgment and this happened way back on 13th January 2021. That he also forwarded a certificate of costs by

another letter dated 25th January 2021. That he has previously visited the Applicant's Advocates' offices and they have always promised to settle the decretal sum. That the decretal amount to be paid by the Applicant is a mere Ksh 209,244/=. The 1st Respondent also filed submissions dated 10th November 2021.

Determination

Leave to Appeal out of time

5. Appeals from a subordinate Court to the High Court ought to be filed within thirty (30) days of the decision sought to be challenged. Extension of time is a matter of discretion and the law gives this Court jurisdiction to extend time upon application. The law allows for such applications to be made even when the time for doing the act in question has already lapsed. Section 79 G of the Civil Procedure Act provides as follows: -

79G. Time for filing appeals from subordinate courts

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.

See also Order 50, Rule 6 of the Civil Procedure Rules, Section 95 of the Civil Procedure Act and Section 59 of the Interpretation and General Provisions Act.

6. The factors to consider when determining an application seeking leave to appeal out of time include the length of delay, the reason for the delay, the chances of the appeal succeeding and the degree of prejudice to be suffered by the Respondent if the application is granted.

7. The Judgment sought to be challenged was delivered on 15th December 2020. The 30 days' window period within which the Applicant was to file a memorandum of appeal lapsed on 15th January 2021, if the time is construed in a strict sense. The instant application was filed on 1st March 2021, about one and a half months later. A one and a half months delay period cannot be said to be inordinate.

8. On the reasons for the delay, the Applicant claims that the Advocate who was handling the matter left the law firm which was acting on his behalf without a proper handover and thus, the matter went unnoticed until the Applicants wrote to them. He urges that the mistakes of an Advocate should not be visited upon him. The Respondent on the other hand claims that that is an internal matter which the Court should not be concerned with. The Court considers that apart from the mere averments, no evidence was adduced to prove that the Applicant's Advocates was faced with the predicament of an Advocate leaving without proper handover. The reasons advanced were thus not satisfactory, in this Court's view.

9. On the chances of the appeal succeeding, the Applicant has annexed a draft Memorandum of Appeal raising 6 grounds of appeal which challenge both liability and quantum. The Court considers that an appeal on quantum and liability is indeed arguable and at this stage, the Court is not required to look into the merits of the case.

10. Although the reasons advanced for the delay were not substantiated, the Court considers that the delay herein was not inordinate and that there appears to be an arguable appeal. The Court further considers that the Respondent has failed to demonstrate any real prejudice to be suffered should leave be granted. The Court finds that the interests of justice call for the grant of leave to appeal out of time.

Stay of Execution

11. The test for applications for stay of execution in the High Court is set out in Order 42 Rule 6 of the Civil Procedure Rules. The conditions that an Applicant has to meet and/or demonstrate for the court to grant a stay of execution are as follows: -

- a. substantial loss will result to applicant if stay is not granted; and
- b. security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and
- c. the application has been brought without unreasonable delay.

Substantial Loss

12. The Applicant has expressed fears of the inability of the Respondent to refund the monies should the appeal be successful. The Respondent, has failed to respond to this allegation and he merely indicated that the Applicant has previously made promises to settle the decretal sum. This Court finds that Respondent failed to discharged the burden to rebut the allegation of inability to pay as was required of her once the Applicant raised his fears. See *Equity Bank Limited v Japhet Kubai Ikiamba & Another Meru HCCA No. E007A of 2020*. See also *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR*. For this reason, this Court finds that the Applicant has proven the likelihood of suffering substantial loss. The Court has however taken note of the amount of funds in question said to be a mere Ksh 209,244/= which this Court does not find to be substantial in any way. The Court considers that it has discretion on the question of stay and taking into account all the circumstances of the case, the Court considers that the risk of suffering substantial loss is significantly reduced by the fact that the sum in question is a paltry Ksh 209,204/=.

Security

13. The Applicant has indicated his willingness to offer security for the due performance of the decree. This Court would have ordered the Applicant to deposit security but taking into account the insubstantial sum in question, the Court does not see any prejudice to be suffered if the same is paid to the Respondents.

Undue Delay

14. The Court has already found above that the delay in the matter was for a period of one and a half months which is not inordinate.

ORDERS

15. Accordingly, for the reasons set out above, this Court makes the following orders: -

i. Leave is hereby granted to the Applicant to file his Appeal out of time on condition that he files a Memorandum of Appeal within 7 days from the date of this order.

ii. The Applicant's prayer for stay of execution of the Judgment delivered on 15th December 2020 in Tigania CMCC No. 46 of 2016 is hereby declined.

iii. The costs of this application shall abide the outcome of the appeal.

Order accordingly

DATED AND DELIVERED ON THIS 9TH DAY OF DECEMBER, 2021

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Kimondo Gachoka & Co. Advocates for the Applicant

M/S Ayub Anampiu & Co. Advocates for the 1st Respondent

M/S Mutembei & Kimathi Advocates for the 2nd Respondent



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