



IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL, CIVIL AND ADMIRALTY DIVISION

MISC CIVIL APPLICATION NO. E155 OF 2021

GEOFFREY OGUNA & GERALD IHA THOYA

t/a BAYULAGE TOTAL SERVICE STATIONPLAINTIF

VERSUS

MOHAMED YUSUF OSMAN.....1ST RESPONDENT

ABDULLATIF OSMAN.....2ND RESPONDENT

MOHAMED BASHIR OSMAN.....3RD RESPONDENT

RULING

1. Through an application by way of Notice of Motion dated 22nd July, 2021 brought under the provisions of Sections 1A, 1B, 3A, and 75G of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 42 Rule 6 and Order 50 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law, the applicant seeks the following orders –

(i) Spent;

(ii) Spent;

(iii) That pending the hearing and determination of the intended appeal, the Honourable Court be pleased to grant stay of the Judgment and decree dated 10th November, 2020 and issued in favour of the respondents herein in Mombasa CMCC No. 2066 of 2015: Mohamed Yusuf Osman & 2 Others -vs- Geoffrey Oguna & another t/a Bayulage Total Service Station;

(iv) That the Honourable Court be pleased to grant leave to the applicants to appeal against the ruling and orders issued by Hon. Maureen Nabibya dated 10th November, 2020, pursuant to the applicant's Notice of Motion dated 14th January, 2020 and filed in Mombasa CMCC No. 2066 of 2015: Mohamed Yusuf Osman & 2 others -vs- Geoffrey Oguna & another t/a Bayulage Total Service Station; and

(v) That the costs of this application be provided for.

2. The application is supported by the supporting affidavit sworn on 22nd July, 2021 by Geoffrey Oguna, the 1st applicant. On 4th August 2021, the respondents filed a replying affidavit sworn on 3rd August, 2021 by the 3rd respondent who was authorized to swear the affidavit on behalf of the 1st and 2nd respondents. In a rejoinder, the applicants filed further affidavits sworn on 9th

September, 2021 by the 1st applicant and Janjo David Gideon Advocate in response to the replying affidavit by the respondents.

3. The application was canvassed by way of written submissions. The applicants' submissions were filed on 15th September, 2021 by the firm of Madhani Advocates LLP while the respondents' submissions were filed on 22nd September, 2021 by the firm of J.M. Makau & Co. Advocates.

4. Mr. Janjo, learned Counsel for the applicants submitted that the delay in filing a Memorandum of Appeal to the ruling delivered on 10th November, 2020 was caused by the restructuring of the law firm of Mohamed Madhani & Company Advocates which ended up splitting into two separate entities. He deposed that Mr. Sammy Njoka, who was the Counsel handling the matter left the employment of Messers Mohamed Madhani & Company Advocates abruptly without a proper handover of the files he was dealing with and their status. Mr. Janjo deposed that it was only upon receipt of a Notice to Show Cause that the applicants' Advocates established that no action had been taken after the filing of the memorandum of appearance. He indicated that an application to set aside the default Judgment had been filed.

5. He regretted the blunders of the former Advocate and prayed for the same not to be visited upon the applicants, for they risked being condemned unheard in both the primary suit and the intended appeal to the ruling delivered on 10th November, 2020. In support of his submissions, he cited the case of **Lucy Bosire v Kehancha Div Land Dispute Tribunal & 2 others** [2013] eKLR, where the Court held that mistakes of Advocates even if blunders, should not be visited on their clients when the situation can be remedied by costs.

6. On the issue of stay of execution pending appeal, Mr. Janjo urged this Court to exercise its discretionary powers in the applicants' favour. He submitted that the applicants would suffer substantial loss, which would render the intended appeal nugatory if the Garnishee Order Absolute dated 13th May, 2020 was not stayed. He added that the respondents' financial ability is unknown and in the absence of any proof to the contrary, the applicants are apprehensive that should they be compelled to settle the decretal sum, the respondents may be unable to refund the same.

7. On whether the intended appeal is arguable, he submitted that the draft Memorandum of Appeal annexed to the application raises triable issues which can only be canvassed when the intended appeal is heard on merit and after the Court considers the evidence from both parties.

8. On the issue of which of the parties stands to suffer more prejudice should the application dated 22nd June, 2021 be allowed, Mr. Janjo submitted that the applicants had been condemned to settle a huge sum of money, yet they had not been given an opportunity to dispute liability and have their case determined on merits. He was of the view that the respondents would suffer no prejudice should the default Judgment be stayed.

9. Mr. Makau, learned Counsel for the respondents submitted that the applicants were in clear blatant disobedience of the Court order that directed the filing of a further affidavit and not two further affidavits. He stated that since it is not the duty of the Court to choose which affidavit to rely on, both affidavits by the applicants need to be ignored or in the alternative, the affidavit by one Janjo David Gideon needs to be disregarded.

10. He further submitted that the instant application ought to be dismissed for reasons that the applicants had all along been represented by the firm of Mohamed Madhani Advocates, yet the instant application has been brought by a different law firm practicing in the style of Madhani Advocates LLP, contrary to the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

11. On the issue of substantial loss, Mr. Makau submitted that no cogent evidence had been furnished to the Court by the applicants to demonstrate the risk of substantial loss. He stated that it took nine (9) months since the delivery of the ruling for the instant application to be filed. He submitted further that it took four years for the applicant to file an application seeking to set aside the *ex-parte* Judgment, and as such, the applicants have perfected the art of being late in seeking equitable remedies, yet equity only helps the vigilant and not the indolent.

12. On the issue of security for the due performance of the decree in the event that the purported appeal is allowed, the respondents' Counsel submitted that security is a mandatory requirement under Order 42 Rule 6(2)(b) of the Civil Procedure Rules yet the applicants had not ventilated the said issue.

13. Mr. Makau also submitted that the applicants' application seeking leave of Court to file the intended appeal out of time had been brought under the wrong provisions of the law, viz Section 75(G) of the Civil Procedure Act. To buttress his submission, he relied on the finding in **Njagi Kanyunguti & Others vs David Njogu** C.A No. 181 of 1994 where the Court held that an application is defective if it is not brought under the correct provisions of the law.

14. In conclusion, he submitted that there are no triable issues raised in the applicants' written statement of defence in the lower Court since the substratum of the intended appeal is the liquidated claim, which is admitted by the applicants in paragraph 8 of the said written statement of defence.

ANALYSIS AND DETERMINATION.

15. This Court has considered the issues raised in the Notice of Motion, the affidavits in support and in opposition thereto, and the written submissions by Counsel for the parties. The issues that arise for determination are-

(i) Whether the prayer for extension of time is merited; and

(ii) Whether stay pending appeal should be granted.

16. The explanation given by Geoffrey Oguna, the 1st applicant, in his affidavit filed on 22nd July, 2021 is that he was under the impression that Messrs Mohamed Madhani & Company Advocates would file an appeal to the ruling delivered on 10th November, 2020 within 30 days as directed, but the said law firm was undergoing restructuring in an overhaul of their business, and that during restructuring, the Advocate who had the conduct of the matter left the employment of the firm without informing the remaining Advocates of the status of the matter. He averred that the delay in filing an appeal was not deliberate, and that unless stay of execution of the default Judgment was issued, the applicants stand to suffer the prejudice of not being heard in the primary suit and in the intended appeal.

17. The 1st applicant also averred that the intended appeal is arguable and raises serious grounds of appeal, a fact notable from the draft Memorandum of Appeal. He also averred that unless the Court stays the execution of the default Judgment issued in Mombasa CMCC No. 2066 of 2015, the 2nd applicant would be committed to civil jail on 29th July, 2021 unless the decree was settled.

18. The respondents in their affidavit sworn on 3rd August, 2021 deposed that the applicants had approached the Court nine (9) months after the ruling they intend to appeal against was delivered and that they are bound by their pleadings and more particularly, paragraph 8 of their statement of defence and any attempt to do otherwise was to try and rewrite their pleadings.

19. The 3rd respondent averred that the instant application is bad in law, unmeritorious and an abuse of the Court process for reasons that a Notice of Appeal (sic) was never filed; the period for stay of execution lapsed eight (8) months ago; the application for stay of execution was not filed in the Trial Court; the intended appeal is time-barred and no plausible explanation had been given for the inordinate delay; the applicants are yet to apply for certified proceedings and ruling of the lower Court.

20. In a rejoinder, through an affidavit sworn on 9th September, 2021, the 1st applicant averred that the suit against him was not a straightforward recovery and that the execution sought against him and the 2nd applicant was null *ab initio*, having been founded on an irregular Judgment. He deposed that the 2nd applicant was never a party to the partnership deed or the addendum, yet he was joined as a defendant in Mombasa CMCC No. 2066 of 2015.

21. The 1st applicant averred that paragraph 8 of their statement of defence was not an admission of the claim since it was never stated that the investment sums were a debt recoverable from the 2nd applicant or the 1st applicant personally. He deposed that the Trial Magistrate did not exercise her discretion properly.

22. The 1st applicant also reiterated that the failure to file a Memorandum of Appeal in time was an honest error on the part of his former Advocate on record for which he played no part, but the Court has jurisdiction to exercise its discretion and enlarge the time within which the applicants can appeal against the decision of the learned Magistrate. Further, it was averred that the respondents had not demonstrated any prejudice that they would suffer which cannot be compensated by an award of damages.

Whether the prayer for extension of time is merited.

23. Section 79G of the Civil Procedure Act is the applicable provision when it comes to enlargement of time in the filing of an appeal. The said 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."

24. The principles for extension of time were enunciated in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi** Civil Application No. Nai. 255 of 1997 (unreported), where the Court of Appeal held thus-

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

25. The Court when considering an application such as the present one has unfettered discretion and therefore needs only to concern itself with whether a justifiable cause has been shown to warrant such exercise of discretion. For this reason, the principles laid down by the Supreme Court in **Nicholas Kiptoo Korir arap Salat vs. IEBC & 7 Others** [2014] eKLR are pertinent, namely-

"(T)he underlying principles a court should consider in the exercise of such discretion include:

- 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;*
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;*
- 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;*
- 6. Whether the application has been brought without undue delay.*
- 7."*

26. In applying the aforementioned parameters outlined in **Nicholas Kiptoo Korir arap Salat vs. IEBC & 7 others** (supra) to the present application, this Court has given due consideration to the issue of delay by the applicants and the prejudice which may be occasioned to the respondents. A ruling was delivered by the lower Court on 10th November, 2020, and a Notice of Motion to extend time was filed in the High Court on 22nd July, 2021. The period of delay is about 8 months from the 30 days stipulated in Section 79G of the Civil Procedure Act. The delay though inordinate, has been explained by the applicants and more specifically in the affidavit by Janjo David Advocate. In this Court's view, the said delay which is well explained is excusable given that the Court has been persuaded that the Advocate previously on record for the applicants abruptly left the employment of Mohamed Madhani & Company Advocates at the end of November, 2020 without a proper handover of all the matters he was handling. As a consequence, none of the Advocates now practicing as Madhani Advocates LLP were aware of the status of the matters the said Advocate had dealt with or the status of the said matters.

27. The respondents' Counsel raised the issue of the prayer for extension of time having been brought under the provisions of Section 75G instead of Section 79G of the Civil Procedure Act. It is clear to this Court that was an inadvertent error on the part of the applicants and the provisions of Article 159(2)(d) come their aid. The case relied on by the respondents' Counsel in **Njagi**

Kanyunguti & others v David Njogu (supra) was determined before the new Constitutional dispensation which introduced Section 159(2)(d) of the Constitution of Kenya, 2010. This Court was urged to either disregard the two affidavits filed on behalf of the applicants or the one filed by Janjo David Advocate, as the latter was filed without leave of the Court. In order to do justice to the application before this Court, the two affidavits in issue are hereby deemed as being properly on record.

28. On the issue of legal representation, the depositions made by the applicants and their Advocate is that the law firm of Mohamed Madhani & Company Advocates was split into two and the law firm representing the applicants now practices in the name and style of Madhani Advocates LLP. The application that was filed on 22nd July, 2021 was filed by the said law firm and not by the former law firm. It is therefore clear that the applicants' Counsel did not offend the provisions of Order 9 Rule 9 of the Civil Procedure Rules. If anything, the necessity to file a Notice of Change of Advocates would only apply in the lower Court proceedings and not the proceedings herein.

29. This Court is of the view that in the interest of justice, the mistake of the Advocate who had conduct of the matter in the lower Court should not be visited on the applicants herein. In the case of **CFC Stanbic Limited versus John Maina Githaiga & another** [2013] eKLR, the Court of Appeal held as follows-

"On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant. This Court is guided by the case of LEE G MUTHOGA V HABIB ZURICH FINANCE (K) LTD & ANOTHER, CIVIL APPLICATION NO. NAI 236 OF 2009, where this Court held: "It's a widely accepted principle of law that a litigant should not suffer because of his advocate's oversight." In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel."

30. Having considered the contents of the draft Memorandum of Appeal, I find that it raises substantial grounds for an arguable appeal. It is my finding that no convincing reasons have been advanced by the respondents to demonstrate that they will suffer prejudice or injustice during the pendency of the intended appeal. I conclude that the applicants have made out a case justifying the grant of leave for the filing of an appeal out of time. I hereby grant the said prayer.

Whether stay pending appeal should be granted.

31. On the second limb of the application, the applicants seek stay of execution pending the hearing and determination of the intended appeal which application invokes the discretionary powers of the Court, which must be exercised judiciously. The application is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 that empowers this Court to stay execution, either of its Judgement or that of the Court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided under Order 42 Rule 6(2) of the Civil Procedure Rules which states as follows-

"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."

32. In the case of **Consolidated Marine vs. Nampijja & another**, Civil App. No.93 of 1989 (Nairobi), the Court held that-

"The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory".

33. 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 appellant 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.”

a) Substantial loss

34. Substantial loss is a factual issue, which must be raised in the supporting affidavit and further supported by evidence. In dealing with the issue of substantial loss, I am alive to the fact that the applicants herein ought to establish that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicants as successful parties in the appeal.

35. In the case of **Shell Ltd vs Kibiru & Another**, Civil Appeal No. 97 of 1986, Nairobi it was stated that-

“The application for stay made before the High Court failed because the 1st of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made since the Respondents would be unable to pay the money.”

36. The applicants have averred that the respondents have not demonstrated their ability to pay back the sum of Kshs. 13,000,000/=. The issue of substantial loss was canvassed in the respondents’ submissions but their replying affidavit was silent on the issue of substantial loss. Since submissions cannot take the place of evidence, this Court finds that the issue of the ability of the respondents to refund the decretal sum if the intended appeal is successful remained uncontroverted and as a consequence thereof, the applicants have proved that substantial loss may result unless an order for stay of execution pending appeal is granted.

(b) unreasonable delay

37. The issue of unreasonable delay has already been considered and captured earlier in this ruling and there is no need to regurgitate the same.

(c) Deposit of security

33. Order 42 Rule 6(2)(b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted an order for stay pending appeal is that he must furnish security. The applicants herein have given the issue of furnishing security a wide berth. This Court notes that in **Butt v Rent Restriction Tribunal** (supra) the Court of Appeal stated that a Court can order security upon application by either party or on its own motion and that failure to put security for costs as ordered will cause the order for stay of execution to lapse

34. In the case of **Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates** [2014] eKLR, the Court held 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."

34. Bearing in mind that the nature of the security that may be deposited is left at the discretion of the Court, I hereby allow the application dated 22nd July, 2021 and make the following orders-

- (i) **The applicants are given 14 days to file and serve a Memorandum of Appeal from the date of this ruling;**
- (ii) **The applicants will deposit the sum of Kshs. 7,200,000/= in a joint interest earning bank account in the names of the Advocates for the parties herein in a reputable financial institution within 45 days from today's date;**
- (iii) **In default of satisfying the condition in paragraph (ii) above, the applicants' right of appeal is liable to being non-suited/dismissed. The respondents on the other hand will be at liberty to execute the Judgment of the Trial Court;**
- (iv) **The applicants will within 60 days of this ruling file and serve the Record of Appeal; and**
- (v) **The costs of the application herein shall abide the outcome of the intended appeal.**

DATED, SIGNED and DELIVERED at MOMBASA on this 31st day of March, 2022.

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the then Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE.

In the presence of:

Mr. Janjo holding brief for Mr. Kisinga for the applicants

No appearance for the respondent

Mr. Oliver Musundi – Court Assistant.



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