Wambugu v Muchiri (Miscellaneous Application 24 of 2024)
[2024] KEHC 7128 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7128 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MISCELLANEOUS APPLICATION 24 OF 2024

HM NYAGA, J

JUNE 12, 2024

BETWEEN

HARON WAMBUGU ..... APPLICANT

AND

SIMON MUCHIRI ..... RESPONDENT

RULING

1. This ruling determines the applicant's Notice of Motion dated 24th February, 2024 and filed on the 27th February, 2024 brought under the provisions of Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 42 Rule 6, Order 22 Rule 22, Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*, and Article 159 of *the Constitution*.

2. The Applicant seeks the following orders:

    a. Spent

    b. That this Honourable Court be pleased to enlarge time to file the appeal and thereafter mark the Memorandum of Appeal dated 23rd February,2024 as duly filed.

    c. Spent

    d. That this Honourable Court be pleased to stay execution of the judgement dated 4th October,2023, the resultant decree and the warrant of arrest issued pending the hearing and determination of the Appeal.

    e. That costs of the application be provided for.

3. The Application is based on grounds on its face and supported by an affidavit of Haron Wambugu, the Applicant herein sworn on the even date.

4. The Applicant's case is that the delay in filing the appeal was not deliberate but was caused by his erstwhile advocate who became uncooperative and failed to abide by his instructions in regards to filing of an appeal within the stipulated timeframe.

5. He deposes that his appeal has high chances of success and that granting of leave to lodge an appeal out of time would serve the interest of justice and ensure a fair opportunity for him to present his case before the Appellate court.

6. He believes the Respondent will not be prejudiced if the orders sought are granted.

7. He is apprehensive that the Respondent will commence execution of the lower court judgement, he shall stand to suffer substantial loss and damages and his appeal rendered nugatory if stay is not granted.

8. He prayed that the Application be allowed.

9. The Respondent opposed the Application through his Replying Affidavit sworn on 17th April, 2024. He avers that the application is malicious, an abuse of the court process and bad in law.

10. It is his deposition that the current Applicant's advocate on record similarly acted for him in the lower court matter as evidenced by the coram at the last page of the copy of the Judgement and that it is thus perplexing for the Applicant to pretend to blame his advocate whom he continues to instruct to shield himself from failure or ignorance to exercise vigilance.

11. He avers that after the delivery of the judgement he served the decree, notice to show cause and an order requiring compliance upon the Applicant but he remained adamant and even after he was served with warrants of arrest he still failed to comply.

12. He believes the Applicant has been awakened by the warrants of arrest and his efforts herein are merely aimed at frustrating him from enjoying the fruits of the judgement.

13. He states that the Applicant has not advanced any plausible reasons for delay in filing the intended appeal and that the Application does not meet the threshold set for granting of orders of stay of execution pending Appeal.

14. He urged this court to strike out the application under Order 2 Rule 15 of the Civil Procedure Rules.

15. He also prayed that this Honourable Court dismisses the Application dated 24th February 2024 in the interest of justice with costs to him.

16. The Application was urged through written submissions.

Applicant's Submissions

17. Citing the Provisions of Section 79 G of the *Civil Procedure Act* and the case of *Thuita Mwangi vs Kenya Airways* [2003] eKLR where the court listed the factors that aid courts in exercising discretion whether to extend time to file an appeal out of time, the Applicant submitted that the period of delay in filing the instant application and the appeal is not inordinate and that failure to file the appeal on time was occasioned by his previous advocate's firm Odhiambo Paul Xistus & Co. Advocates who failed to file an appeal on time.

18. The Applicant citing the case of *Veronica Gathoni Mwangi & Another vs Samuel Kagwi Ngure & Another* [2016] eKLR urged the court to allow the extension of time so that substantial justice may be achieved.

19. The Applicant submitted that he will suffer substantial loss if stay is not granted as the respondent will proceed with execution. He argued that the respondent has not demonstrated that he is able to refund the sum if the appeal succeeds. In support of this position, he relied on the case of G.N. Muema P/A (Sic) *Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another* [2018] eKLR.

20. On the issue of time, the Applicant submitted that the delay is not inordinate and he has advanced sufficient reasons for failure to file this application within time.

21. On security for costs, the Applicant submitted that he is ready and willing to offer security that may be imposed by this court. He cited the case of *Nicholas Stephen Okaka & another vs Alfred Waga Wesonga* [2022] eKLR for the proposition that to grant or refusal of an application for stay of execution pending appeal is discretionary, however, the court when granting the stay must balance the interests of the Appellant with those of the Respondent.

22. The Applicant urged the court to grant stay of execution pending Appeal.

Respondent's Submissions

23. In regards to whether the Applicant's Application is merited, the respondent reiterated that the same advocate for the Applicant herein was acting for him before the trial court as evidenced by coram on the last page of the Court's judgement. He posited that the said advocate was prosecuting the matter under the firm of Odhiambo Paul Xistus & Co. Advocates and urged this court to resist the invitation by the Applicant to drag it in its crafty and malicious scheme of denying him from enjoying the fruits of his judgement.

24. He posited that even if its assumed that the failure was due to laxity on the part of his Advocate, the applicant ought to have exercised due diligence in following up his matter with his advocate and come up with a possible cause of action within time. To this end, he referred this court to the case of *Bi-Mach Engineering Limited vs James Kahoro Mwangi* [2011] eKLR where it was stated the applicant has a duty to pursue his advocate to find out the position on litigation. In this matter, there is no evidence tendered to show that actions, if any, the applicants took to find out the outcome of their case from their advocate on record. It is not enough to simply accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter.

25. The Respondent submitted that the applicant has not shown any plausible reasons for the delay in filing the intended appeal.

26. The Respondent also submitted that the Applicant has not met the threshold for grant of stay of execution. In buttressing his submissions, he relied on Order 42 Rule (6) of the *Civil Procedure Rules*, HGE vs SM [2020] eKLR which quoted with authority the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto [*2012] eKLR on the definition of substantial loss and affirmed the findings in *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, *Mwaura Karuga T/A Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR & *Arun C Sharma vs Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014 eKLR on security for costs.

Analysis & Determination

27. The issues that fall for determination are :-

    a. Whether the application seeking leave to appeal out of time is merited.

    b. Whether stay orders sought should be granted.

28. Section 79G of the *Civil Procedure Act* provides that:

> " 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."

29. Section 95 of the *Civil Procedure Act* provides thus: -

> " Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

30. The applicant approaching the Court under this section must demonstrate "good and sufficient cause" for not filing the appeal in time. In Thuita Mwangi vs Kenya Airways [supra], the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso vs Mwangi* [1997] KLR 630 as follows:

> " 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 general the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."

31. While the discretion of the court is unfettered, the applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor.

32. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 others* [2014] e KLR set out the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

> " The underlying principles a court should consider in 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 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.

33. These principles were also considered in the earlier case of *Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi* Civil Appeal 255/ 1997, where the court held as follows: -

> "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."

34. These principles were also reiterated in *First American Bank of Kenya Ltd vs Gulab P. Shah & Others* HCC 2255/2000 [2002] IEA 65 and listed them as follows: -The explanation if any, for the delay;The merits of the contemplated action, whether the appeal is arguable;Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.

35. I will therefore proceed to determine whether the Applicant has advanced plausible grounds for delay in filing the appeal.

36. In Nairobi HCC No. 32 of 2010, *Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & another* [2014] eKLR, the Court in considering what amounted to inordinate delay had this to say;

> "Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable"

37. The Court of Appeal in Nakuru Civil Appeal No. 1/2007;- *William K. Too vs Simion K. Langat* [2007] eKLR, refused to interfere with the ruling of the High Court, where the learned judge found that an unexplained delay of forty two days was inordinate.

38. The Court of Appeal in *Aviation Cargo Support Limited vs St. Mark Freight Services Limited* [2014] eKLR held as follows:

> "For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to court as soon as was practicable."

39. Rule 30 of the Small Claims Court Rules provides that;

> "30. A person aggrieved by the judgment or order of the Court may, pursuant to section 38 of the Act, appeal to the High Court in accordance with Order 42 of the *Civil Procedure Rules,* 2010."

40. Thus, whereas the Act has its own procedures all appeals from the said court are dealt with just like any appeal from other subordinate courts. It is thus clear that even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. (See also *Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet* [2018] eKLR.)

41. It should be remembered that the Small Claims Court was established in order to expedite the determination of matters that involve claims of little monetary value. Strict timelines are given as to the filing of pleadings, hearing of the claims and determination of the same. Whereas the appeals from the court are to be dealt with like any other, the court is not oblivious to the need to have such appeals also expedited. It would not make sense to expedite the case in the Small Claims Court and then send it to park in the High Court on appeal.

42. The lower court's judgement was delivered on 4th October, 2023 and subsequently the Applicant filed the instant application on 27th February, 2024. That is 4 months and 23 days after the Judgement. He blames his erstwhile advocate for the delay in filing the appeal for reason that he had instructed him to lodge an appeal in good time but he failed to do so. The Respondent deposed that the applicant is just being crafty as the advocate representing him herein is the same one who represented him before the lower court.

43. A perusal of the lower court judgement on the coram supports the Respondent's averment. The Applicant in his submissions did not dispute that the advocate herein acted for him but stated that the firm of Odhiambo Paul Xistus was on record for him. Further the applicant categorically stated that the advocate who was representing him failed to lodge the appeal as instructed and not the aforementioned firm. Clearly, the Applicant does not have a good ground for failing to file his appeal on time and is just being crafty, as rightly observed by the Respondent.

44. In view of the foregoing, I find that there was inordinate delay and there is no reasonable cause advanced for the said delay.

45. With regard to whether the intended appeal is arguable, I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case as that is under the purview of the appellate court after hearing the merits of the same. The court should therefore only be concerned with the question of whether or not the appeal will be rendered nugatory.

46. Section 38 of the *Small Claims Court Act* provides for appeals from the said court. It provides as follows;

> " 38. Appeals
>
> (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
>
> (2) An appeal from any decision or order referred to in subsection (1) shall be final."

47. A cursory look at the Memorandum of Appeal shows that the grounds raised therein are both on facts and law. One issue of law raised is that of jurisdiction of the lower court. I note that even though this was not raised during the trial, the applicant is not barred from raising it at this stage. A question of jurisdiction can be raised at any stage. It is also debatable whether an appeal on a finding of a fact by the lower court amounts to point of law or not.

48. In my view the grounds as presented are triable. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate court overturn that of the trial court. I therefore find that the Appellant's Appeal is arguable.

49. The other limb is whether the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. The answer is in the affirmative. I find that no prejudice will be caused to the Respondent that cannot be compensated by an award of costs if the Application is allowed.

50. Should the court grant a stay of execution? The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:

> "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside."

51. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:

a. Substantial loss may result to him/her unless the order is made;

b. That the application has been made without unreasonable delay; and

c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

52. These principles were enunciated in Butt vs Rent Restriction Tribunal [1982] KLR 417 where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

> "The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
>
> Secondly, 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 the appeal court reverse the judge's discretion.
>
> Thirdly, 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.
>
> Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse."

53. Under the head of substantial loss, an applicant must clearly state what loss, if any, he stands to suffer. This principle was expressed in the case of *Shell Ltd vs Kibiru and Another* [1986] KLR 410. Platt, JA which set out two different circumstances when substantial loss could arise as follows:-

> "The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the applicant, either in this 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 repay the decretal sum plus costs in two courts...."

54. The learned judge continued to observe that:-

> "It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.

55. On whether the applicant will suffer substantial loss, the Applicant submitted that the respondent means is unknown and he has not demonstrated that he is able to refund the decretal amount if the appeal succeeds. In the case of *National Industrial Credit Bank Ltd. vs Aquinas Francis Wasike & Another* [2006] eKLR the Court of Appeal held as follows:

> "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. In my view, the respondent was unable to discharge his burden".

56. In the instant case, the Applicant did not raise the above issue in the application or his supporting affidavit to enable the Respondent respond to the same. It is thus my finding that the applicant has not met the legal threshold set out in the above cited case. It is on this premise that I disregard the Applicant's submissions in this regard.

57. However, as already observed above, the annexed memorandum of appeal raises triable issues and it will be rendered nugatory should the decision of the appellate court overturn that of the trial court. I therefore find that the Applicant will suffer substantial loss should the execution proceed.

58. Regarding security for costs, the Applicant submitted that he is willing to offer any security as may be imposed by this court.

59. The determination of what amounts to a suitable security is a matter of court's discretion. *In Focin Motorcycle Co. Limited vs Ann Wambui Wangui & another* [2018] eKLR, the court stated that:

> " Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security...."

60. Going by the above, I find that the Applicant has similarly succeeded on this limb, by submitting himself to the discretion of the court.

61. To succeed, an applicant in the circumstances of the applicant herein must satisfy all the three conditions for grant of stay. The court in *Trust Bank Limited vs Ajay Shah & 3 Others*, [2012] eKLR at page 23 stated that :-

> " The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff's Notice of Motion dated 24th April, 2012 it without merit."

62. From the foregoing, I find that the Applicant herein has succeeded on all limbs of his application, save for the delay in filing the appeal and making the application. I think that despite this he deserves a chance to ventilate his appeal.

63. As for the respondent I think that adequate measures can be given to ensure that the fruits of his judgment are secured to some extent.

64. After evaluating all the material before me, I allow the Application dated 24th February,2024 on the following terms;

a. The appellant/applicant's application to appeal is allowed out of time.

b. **The Memorandum of Appeal is to be filed and served within the next 7 days from the date of this ruling.**

c. The appellant/applicant to file and serve the record of appeal within the next 21 days.

d. There shall be a stay of execution of the decree of the lower court on condition that the applicant shall, within 30 days from the date of this ruling, deposit the decretal sum in a joint interest earning account in the names of the advocates herein.

e. In default of order (b) above then the leave granted shall lapse and in default of order (d) the stay orders shall stand vacated without further reference to this court.

f. The applicant shall bear the costs of this application in any event.

Dated, Signed and Delivered at Nakuru this 12th day of June, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Jeniffer

Mr. Wanjir for Respondent

Mr. Bomet for Applicant