



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**MISCELLANEOUS CIVIL CASE NO. E041 OF 2021**

**JOSEPH ODIDE WALOME.....APPLICANT**

**VERSUS**

**DAVID MBADI AKELLO.....RESPONDENT**

**(Application for leave to appeal out of time and for stay of execution of decree issued on 25<sup>th</sup> March, 2021 in Siaya Principal Magistrate's Court Civil Suit No. 44 of 2017 by Hon J.O. Ongondo, SPM)**

**JUDGMENT**

1. This ruling determines the Notice of Motion application dated 23.11.2021 brought under Certificate of Urgency by the applicant Joseph Odide Walome. The application is dated 11.2021 and filed in court on the same day in which the applicant seeks the following orders:

a. Spent

b. That this Honourable Court be pleased to stay the execution of the decree that has been issued in respect of the judgement entered herein on 25th March 2021 and any other order that may be issued pursuant thereto, pending appeal.

c. That the defendant/appellant be allowed to file his memorandum of appeal out of time.

d. That the costs of this application be provided for

2. The application was premised on grounds a-h on the face of the Notice of motion and a supporting affidavit sworn by the applicant on 23.11.2021. The application was canvassed by way of written submissions.

3. The applicant's case is that he has an arguable appeal with a high probability of success and that if stay of execution is not granted, his appeal will be rendered nugatory exposing him to irreparable damage as the respondent may levy execution against him.

4. The applicant further avers that he is ready, willing and able to deposit such sum as the court deems to be deposited in a joint escrow account with the respondent.

5. The applicant avers that he was represented by the firm of Rogo, Okello, Wangari & Co. Advocates before the trial court, who later failed to turn up in court when the matter was proceeding leading to judgement being entered against him on the 25<sup>th</sup> March

2021. He further avers that he became aware of the judgement when he was served with warrants of attachment and a letter from Odongo Investment Auctioneers dated 17<sup>th</sup> November 2021.

6. The applicant further deposed that he also sought to be allowed to file his appeal out of time as he had annexed a memorandum of appeal and informed the court that he was yet to receive typed copies of proceedings which would enable him to file further grounds of appeal.

7. In response, the respondent through his advocate on record, Linda Agatha, swore a replying affidavit contending that the applicant was misleading the court that his advocate failed to appear on his behalf leading to judgement being entered against him whereas the applicant had taken over his case after his former advocates on record ceased acting on his behalf and that as such, the applicant was well aware when judgement was entered against him.

8. It was further deposed that the applicant had brought the instant application in bad faith as it was done 8 months after judgement was entered against him after having participated in the proceedings and only after execution was levied upon him signalling that the applicant only wanted to defeat the execution process.

9. The respondent further contended that the delay of 8 months from the date of judgement delivered amounted to an inordinate delay for which the court's discretion ought not to be exercised and further that the explanation for the delay given by the applicant was not reasonable or plausible and amounted to false information.

10. It was further deposed on behalf of the respondent that the applicant had not attached the memorandum of appeal to enable this court examine the grounds therein and their probability of success.

11. Further contention was that summary judgement had been entered against the applicant to the tune of Kshs. 180,000 vide a court ruling on the 6<sup>th</sup> July 2017 and that the matter between the parties proceeded to full hearing over a disputed sum of Kshs. 40,000 which was determined by the judgement dated 25<sup>th</sup> March 2021 and it was thus not clear which judgement the respondent was appealing against. The respondent further contended that the application for extension of time did not meet the criteria in law for grant of such extension.

12. The parties herein agreed to file submissions to dispose of the application.

### **The Applicant's Submissions**

13. The applicant acting *pro se* submitted that the delay in filing the intended appeal was necessitated by his former advocates on record, the firm of Rogo Okello, Wangari & Co. Advocates who failed to appear in court to prosecute the matter when the matter was proceeding and effectively abandoned his case, and that he only got to know about the Judgement when he was served with warrants of attachment from Odongo Investment Auctioneers on 17<sup>th</sup> November 2021. The appellant thus submitted that he merited a grant of stay of execution as well as extension of time to enable him put in his appeal as well as further grounds of appeal.

### **The Respondent's Submissions**

14. It was submitted that the the period of 6 months from 25<sup>th</sup> March 2021 to the date when the instant application was filed is not explained at all by the applicant and that this would entitle this court to dismiss the application without further ado, since the discretion of the court can only be unlocked by a cogent, full, honest and plausible disclosure for the reason of the delay.

15. The respondent's counsel submitted that it is evident that the Applicant does not have any reason as to why he did not file his appeal within the prescribed timelines and that in a desperate attempt to convince this Honourable Court to exercise its discretion in his favour, he has chosen to dupe the court that he was not aware of the proceedings in this matter yet he participated in the proceedings and as such, this court should not exercise its discretion in favour of a litigant who attempts to circumvent the cause of justice by misleading the Honourable court. The respondent relied on the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR** where the Supreme Court pointed out that *Extension of time is not a right of a party, it's an equitable remedy that is only available to a deserving party at the discretion of the court.*

16. Further submissions was that the intended appeal is not arguable and that in any event, the applicant has not annexed any draft memorandum of appeal to the instant application and thus this court is not in a position to know which appeal he is referring to; and what its grounds of appeal are; and whether it has any chances of success and thus the court would not be in a position to tell whether the applicant has succeeded in proving by evidence that he has good appeal with chances of success; and therefore whether there would be any substantial loss that would be suffered by the applicant in the event that his application is not allowed.

17. The respondent's counsel further submitted that the Applicant will not be prejudiced if the extension to file an appeal is denied as he had a fair opportunity to be heard before the subordinate court and that from his own conduct, he appears not to be interested in pursuing the appeal and only came up with the instant application as an afterthought after the Respondent commenced execution proceedings.

18. On whether the Court should grant stay of execution pending appeal, it was submitted that the applicant must show by evidence that his appeal would be rendered nugatory if the order for stay of execution is not granted and that he would suffer irreparable loss. Further, that in the instant application, the applicant has not annexed the purported Memorandum of Appeal or the supporting affidavit so that the court can establish its likelihood of success and therefore whether substantial loss is proved hence the application should be dismissed on this aspect.

19. It was submitted that for the Honourable court to grant stay of execution, the application has to be made without any unreasonable delay but that in this case, the applicant did not bother to follow up on the matter, and has brought the instant application 8 months after delivery of the judgment without any explanation at all whatsoever for the delay and that therefore he does not merit grant of orders of stay of execution.

#### **Analysis & Determination**

20. I have considered the application, the grounds and supporting affidavit as well as the submissions of the parties and the applicable law. The main issues for determination are whether the applicant deserves the orders for extension of time to file an appeal and secondly, whether this court should stay execution of decree in the lower court.

21. Commencing with the issue of whether the prayer for extension of time is merited, it is trite that extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court. That discretion, however, must be exercised judiciously. An appeal from a subordinate Court to the High Court is governed by the provisions of *Section 79G* of the *Civil Procedure Act* which 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 a good and sufficient cause for not filing the appeal in time”.**

22. The Court of Appeal in the case of **Edith Gichugu Koine v Stephen Njagi Thoithi [2014] eKLR** stated that whenever an application for extension of time is before a court, the court ought to take into account several factors specifically, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others...”

23. Odek JA in the **Edith Gichugu Koine (supra)** case added that:

**“There is also a duty now imposed on courts to ensure that the factors considered are in consonance with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.”**

24. See also this court's decision in **Stecol Corporation Limited v Susan Awuor Mudemb [2021] eKLR**.

25. Further in the case of **Paul Musili Wambua v Attorney General & 2 others [2015] eKLR**, the Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated as follows:

**“.....it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”**

26. Regarding the length of delay, it is evident from the pleading on record herein that the judgement that the applicant is seeking to appeal against was delivered on the 25<sup>th</sup> March 2021. The instant application was filed on the 23<sup>rd</sup> November 2021. This is a delay of over 7 months and two days shy of eight months. What then is the excuse for this delay"

27. It is the applicant's case that the delay was occasioned by his advocates who abandoned the case and that he came to know of the judgement entered against him on the 17<sup>th</sup> November 2021 when he was served with a warrant of attachment.

28. I have perused the application and the response by the respondent. From the pleadings on record, it is clear that the applicant is not being truthful. The applicant herein filed a Notice to Act in Person in the lower court on the 28th February 2019, which fact he has not controverted. In addition, the appellant was also said to have been present when the judgment which he is seeking to challenge was delivered on 25<sup>th</sup> March, 2021 hence he was very much aware of the judgement against him. Again this fact on oath has not been controverted by the applicant.

29. It follows that even if the delay was occasioned by his advocates as the applicant has falsely claimed through a deposition on oath, it is worth noting that the Court of Appeal in the case of **Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR** held, *inter alia* that while mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude. The Court relied on the case of **Mwangi v Kariuki [1999] LLR 2632 (CAK)** where **Shah, JA.** held that **“mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude.”**

30. The import of the **Tana & Athi Rivers Development Authority (supra)** case was that while the mistake of counsel was excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned. There is inordinate delay in this case which delay has not been explained. The attempted explanation is not truthful. The applicant is therefore guilty of unexplained inordinate delay. I find the application for extension of time an afterthought and an attempt to frustrate the respondent decree holder from enjoying his fruits of a lawful judgment. Justice cannot be served if the courts were to go forward one step and turn back ten steps in favour of an indolent litigant who does not want to settle decree.

31. As to whether there is an appeal with chances of succeeding, the applicant has not annexed any memorandum of appeal to enable this court consider the chances of success of the same. This is not to say that failure to annex a draft copy of memorandum of appeal would be fatal to the application herein but to demonstrate the arguability of the intended appeal.

32. The other limb to considered by the court as to whether it will exercise its discretion to extend time is *the degree of prejudice to the respondent if the application is granted*. This court is fully aware that the applicant has a constitutional right to appeal. However, extension of time to file an appeal out of time is a matter of exercise of judicial discretion. Therefore, where a party is aggrieved and wishes to pursue an appeal, it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate or even if the delay is inordinate, it is explained to the satisfaction of the court and the adverse party will not be prejudiced in any way.

33. In the instant case, the delay by the applicant in filing the instant appeal has not been explained by the applicant and in his attempt to explain to the court, he has blatantly lied to this court that he was made aware of the judgment on 17<sup>th</sup> November, 2021, just a few days to filing of this application, when the respondent send auctioneers to attach his property in execution of decree. The respondent has been denied the fruits of his judgement for close to one year now as the court had to hear both parties on the application after granting a temporary stay of execution of decree on 23/11/2021 and fix a date for this ruling. The applicant has accordingly come to this court with unclean and dishonest hands and therefore he does not deserve the exercise of discretion of this

court.

34. Regarding the issue of whether the prayer for stay of execution of the judgement delivered on the 25.3.2021 is merited, this court having found that the application for extension of time to file an appeal out of time is devoid of any merit and having dismissed that prayer, it follows that the court cannot stay execution of the decree of the lower court pending nothing. Nonetheless, just to satisfy the applicant who is acting in person that this court considered all aspects of his application, I will briefly address the issue of stay of execution of decree and the requirements under the law.

35. Stay of execution in the High Court is governed by Order 42 Rule 6 of the Civil Procedure Rules which provides that:

**“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.”**

36. An applicant needs to satisfy the court on the following conditions before they can be granted the stay orders:

**a) Substantial loss may result to the applicant unless the order is made,**

**b) The application has been made without unreasonable delay, and**

**c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.**

37. The applicant herein stated in his application that he is willing to provide security as may be ordered by the court. I have already discussed herein above that the delay in bringing the instant application was unreasonable and further that the unreasonable delay has not been sufficiently explained. The only thing remaining is to consider whether substantial loss may result to the applicant if the order is not made.

38. The onus of proving that substantial loss would occur unless stay is granted rests upon and must be discharged accordingly by the applicant. It is not enough to merely state that loss will be suffered, the applicant ought to show the substantial loss that he will suffer in the event the orders sought are declined.

39. The Court of Appeal in the case of **Charles Wahome Gethi v Angela Wairimu Gethi [2008] eKLR** stated that:

**“The applicant does not claim that the respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the appeal is determined..... In the circumstances of this case, the applicant would suffer substantial loss rendering the appeal, if successful nugatory only if the suit land is disposed of before the appeal is determined. The applicant does not claim that the suit land would be disposed of. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.”**

40. In the case of **James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR** the Court held the following on the issue of substantial loss;

**“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.”**

41. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein N. Chesoni [2002] 1KLR 867**, and also in the case of **Rhoda Mukuma v John Abuoga [1988] eKLR**. In the latter case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under ***Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules***, respectively, the court emphasized the centrality of substantial loss thus:

**“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”**

42. In the instant case, I find that the applicant other than merely mentioning that he would suffer substantial loss has failed to demonstrate what loss that he is likely to suffer if execution of the decree passed way back in March 2021 proceeds. I must emphasize that the applicant in this case approached the court with unclean hands as he sought to hoodwink the court on the reasons for his delay in bringing this application. Further, the applicant has failed to fulfil the conditions for grant of extension of time to file an appeal out of time as well as for grant of stay of execution of decree pending appeal.

43. For all the above reasons, I find and hold that the applicant’s application dated 23.11.2021 is without merit and is hereby dismissed. Each party to bear their own costs of the application. File Closed.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 31<sup>ST</sup> DAY OF JANUARY, 2022**

**R.E. ABURILI**

**JUDGE**



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