



REPUBLIC OF KENYA



KENYA LAW
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**Karora & another v Ogalle (Miscellaneous Civil Application
10 of 2020) [2023] KEHC 3544 (KLR) (24 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3544 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS CIVIL APPLICATION 10 OF 2020**

JK SERGON, J

APRIL 24, 2023

BETWEEN

PETER KARORA 1ST APPLICANT

JOSPHAT MWANGI NGUTHI 2ND APPLICANT

AND

DAVID OGALLE RESPONDENT

RULING

1. The Plaintiff/Respondent was involved in a road accident, he instituted a suit vide Kericho Cmcc No 353 Of 2016, David Ogalle V Peter Karora And Josphat Mwangi Nguthi, the matter was heard and determined and judgment rendered on September 19, 2019. The Defendants/Applicants herein being aggrieved by the judgment sought to appeal against quantum.
2. The Application coming for consideration in this ruling is dated March 10, 2020 seeking the following orders:
 - i. THAT the Honourable Court be pleased to grant a stay of the execution of the decree in Kericho Cmcc No 353 Of 2016, David Ogalle V Peter Karora & Another pending hearing and determination of this application inter-partes.
 - ii. THAT the Honourable Court be pleased to grant leave to the Applicant to file an appeal out of time from the judgment and decree of Kericho Cmcc No 353 Of 2016, David Ogalle V Peter Karora & Another pending hearing and determination of this application.
 - iii. THAT the Honourable Court be pleased to grant a stay of the execution of the decree in Kericho Cmcc No 353 Of 2016, David Ogalle V Peter Karora &



Another pending hearing and determination of the appeal to be filed in the High Court of Kenya Kericho.

iV THAT the costs of this application be provided for.

V THAT a date for hearing inter partes be given.

3. The Application is based on the grounds on the face of it and supported by the Affidavit of Peter Karora the applicant and owner of motor vehicle KCF 8XX G, who avers that judgment was delivered on September 19, 2019 and being aggrieved with the said judgment, instructed his advocates on record to file an appeal.
4. The Applicant avers that the period of stay granted by law had since lapsed hence necessitating the instant application.
5. The Applicant avers that the delay in filing the instant application was occasioned by the fact that parties were negotiating for an out of court settlement which had failed and the Respondent through his authorized Advocate had threatened to institute a declaratory suit (attached and marked "PK-1" is a copy of a letter by the Respondent's Advocate threatening to file a declaratory suit.)
6. The Applicant further avers that the intended appeal raises numerous triable issues and has high chances of success (attached and marked as "PK-2" a copy of the draft memorandum of appeal.)
7. The Applicant avers that he stood to suffer irreparable loss and damages if the Respondent proceeds to execute before the instant application and the intended appeal is heard and determined.
8. The Applicant avers that he is willing to abide by reasonable terms and conditions of allowing the application and further that the Respondent will not be prejudiced in any way if the orders sought are granted.
9. The Applicant avers that instant application was made in utmost good faith and without undue delay.
10. The Respondent opposed the application and filed grounds of opposition dated March 8, 2021.
11. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. I have also considered the rival written submissions and found the issues for determination put forward by both parties to be as follows:
 - i. Whether the applicant herein is entitled to leave to appeal out of time
 - ii. Whether the applicant is entitled to stay of execution of the judgment and /or decree delivered on September 19, 2019
12. On the issue as to whether the applicant is entitled to leave to appeal out of time, the Applicant cited section 79 (G) of the *Civil Procedure Act* which states as follows; "Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for 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."
13. The Applicant in support of his case cited the Court of Appeal case of *Thuita Mwangi v Kenya Airways LTD* [2003] eKLR in which the Court of Appeal listed four issues which the court ought to take into consideration in deciding whether or not to grant extension of time to appeal to wit; the



- length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice if the application is granted.
14. The Applicant faulted the trial court for failing to issue a judgment notice prior to delivery of the judgment, therefore, the said judgment was delivered in the absence of the Applicants and/or their representative and failing to issue any stay of execution orders, when they eventually were issued with a notice of entry of judgment, the time to file an appeal had lapsed.
 15. The Applicant submitted that upon realizing the lapse, the applicant filed an application dated February 21, 2020 for stay of execution declaring their intention to appeal; which application was heard and determined on April 20, 2020 and the trial court directed the applicants to deposit the entire decretal amount which order was complied with.
 16. The Applicant reiterated that the intended appeal has a high chance of success, the Applicant contended that the trial court awarded Kshs 1,114,730/= as general damages which are highly excessive under the circumstances, the Plaintiff/Respondent sustained minor soft tissues injuries with no permanent disability or residual effects.
 17. The Applicant submitted the Respondent had not filed an affidavit of means to show that he would be able to pay back the money in the event of a successful appeal while citing the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Anor* [2006] eKLR. The Applicant reiterated that no prejudice would be suffered by the Respondent if the application for leave to apply out of time was allowed and further that the Applicant was willing to deposit half of the decretal award pending appeal and should the trial court judgment be upheld on appeal, the amount and interest can be released to the respondent allowing him to enjoy the fruits of his judgment whilst relying on *APA Insurance Limited v Micheal Kinyanjui Muturi* [2016] eKLR.
 18. On the issue of stay of execution of judgment and decree in Kericho Cmcc No 353 Of 2016, *David Ogalle V Peter Karora & Another*, the Applicant relied on the provisions of order 42 rule 6 (2) of the Civil Procedure Rules and the case of *Halai & Anor v Thornton & Turpin (1963) LTD* [1990] eKLR where the court stated as follows; “The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause, secondly, the court must be satisfied that substantial loss would emerge from refusal to grant a stay and thirdly, the applicant must furnish security. The application must of course be made without unreasonable delay.”
 19. The Applicants reiterated that they had ably demonstrated that they were deserving of the prayers sought in their application.
 20. The Respondent filed submissions in response to the application dated March 10, 2020.
 21. The Respondent argued that the instant application was incompetent, misconceived and otherwise an abuse of the court process and therefore meant to defeat the overriding objective of the court as per the provisions of section 1A & B of the *Civil Procedure Act*. The Respondent urged the court to take judicial notice of the applicant’s indolence, delays and time lapses not only in the making but also in the service and prosecution of the application herein.
 22. On the issue of leave to file appeal out of time, the Respondent cited section 79 (G) of the *Civil Procedure Act* and the Supreme Court case of *Mombasa County Government v Kenya Ferry Services & Anor* (2019) eKLR which set out the principles for extension of time as outlined in *Nicolas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* SC App No 16 of 2014; [2015] eKLR (the Nick Salat Case) and further argued that the applicants had failed to meet



- the said principles set by the Supreme Court and had not laid any basis for the court to exercise its discretion in their favour.
23. The Respondent contended that the application to file appeal out of time has been made five (5) months after the expiry of the prescribed time and further that it had taken a further two (2) years to prosecute the same due to the indolence of the applicants and a multiplicity of applications on record by the applicants.
 24. The Respondent further contended that there was no good reason given for the delay in filing the intended Appeal within the prescribed time or the delay in making the instant application in view of the fact that notice of delivery of judgment was given to both parties via their respective email on July 9, 2020 and a copy of the judgment was emailed to both parties thereafter.
 25. The Respondent contended that he would suffer prejudice by the extension of time and further that it was almost three (3) years since the judgment sought to be appealed against was delivered.
 26. The Respondent reiterated that the application was not merited and made in bad faith and only meant to deny the respondent the enjoyment of the fruits of the judgment and decree.
 27. On the issue of stay of execution, the Respondent argued that order 42 rule 6 (2) envisages a pending appeal, in the instant matter there was no appeal pending warranting issuance of stay of execution orders and that the applicants herein had not satisfied the conditions laid down in the Civil Procedure Rules for stay of execution pending appeal while citing the Kenya Shell Limited v Karuga & Another (1982-1988) 1 KAR 1018.
 28. The Respondent contended that the applicants failed to demonstrate substantial loss they would suffer if the decretal amount herein is paid and further that in the intended appeal, the appellants were not contending the entire award.
 29. The Respondent contended the fact that the judgment sought to be appealed against was delivered on September 19, 2019 whereas the application was made on March 10, 2020 which was over six (6) months after the fact, there was no reasonable explanation given for the delay in making the instant application.
 30. The Respondent was cognizant of the fact that the applicants had offered security.
 31. The Respondent reiterated that the applicants had not satisfied the principles for enlargement of time and for stay of execution and further that the delay herein was inordinate and no reasonable and/or plausible explanation for the delay had been given and that the instant application ought to be dismissed with costs.
 32. On the issue of leave to appeal out time, on one hand, I find that the applicants have not offered a good and reasonable explanation for the delay in filing the appeal within the stipulated timelines and further that the instant application has been filed after inordinate delay. On the other hand, I find that the proposed appeal is arguable and therefore it is in the interest of justice to allow the applicant to ventilate their issues on appeal and have the appeal determined on its merits, least they are condemned unheard, I therefore grant leave to the applicants to file their appeal out of time, furthermore, section 95 of the Civil Procedure Act provides as follows; “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.”
 33. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No NAI 255 of 1997 (unreported) the Court of Appeal held that: “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. On the issue of stay of execution pending appeal, I find that applicants have met the following conditions for stay pending appeal as stipulated in order 42 rule 6 (2) and have ably demonstrated that there is sufficient cause, they will suffer substantial loss and that they are willing and ready to offer security which is a mark of good faith.
35. Accordingly, I find that the application dated March 10, 2020 is meritorious and hereby grant leave to appeal out of time and stay of execution of judgment and decree in Kericho Cmcc No 353 Of 2016, *David Ogalle V Peter Karora And Josphat Mwangi Nguthi* pending hearing and determination of the intended appeal on the following conditions;
 - i. The Applicants shall deposit half of the decretal sum into an interest earning account in a reputable commercial Bank, to be held by both advocates for the parties to this appeal, within 45 days of this ruling.
 - ii. Costs of this application to abide in the appeal

DATED, SIGNED AND DELIVERED AT KERICHO THIS 24TH DAY OF APRIL, 2023

J. K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

Miss Obaga for the Respondent

No Appearance for the Applicant

