



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. E430 OF 2021

JOHN ODHIAMBO ANDITI.....PLAINTIFF

VERSUS

CHARLES MAINA MWENDA.....1ST DEFENDANT

ROBERT NGATIA KIHARA.....2ND DEFENDANT

RULING

The application dated 20th August 2021 seeks the following orders;

1. Spent
2. Spent
3. **THAT pending the hearing and determination of the intended Appeal inter partes, or for further orders of the Court, this Honourable Court be pleased to grant the Applicants herein interim stay of the Judgment/Decree delivered on 23rd April, 2021 by the Hon. E. Wanjala Principal Magistrate, in Milimani Civil Suit No. 2149 of 2015.**
4. **THAT the Applicants be granted leave to appeal out of time.**
5. **THAT this Honourable Court be pleased to grant any other orders that it may deem fit.**
6. **THAT costs of this Application be in the cause.**

The application is supported by the affidavit of **Kevin Ngure** sworn on even date. Counsel for the applicant submitted that the applicants seek leave to appeal out of time as well as orders staying execution. The application was filed approximately after the expiry of ninety (90) days from the date of judgment. The reason for the delay, it is submitted, is that the applicants instructed their advocates to lodge an appeal but the counsel who was handling the matter failed to do so. Counsel referred to the case of **PATRICK MAINA MWANGI –V- WAWERU PETER (2015) eKLR** where the court held:-

“This court finds that the failure to comply with the order has not occasioned the respondent any prejudice which cannot be compensated by an award of costs. On the other hand, the applicant, unless he is accorded an opportunity to ventilate his grievances, will be greatly prejudiced. He will be ousted from the judgment seat unheard, given the circumstances of the case. It is therefore, in my view, and which has been explained to the satisfaction of the court that the delay is not unreasonable.”.

Counsel for the applicants further contend that substantial loss will be suffered if execution is not stayed. According to counsel, the trial court made an exorbitant award in form of general damages as the injuries suffered have fully healed. The respondent was awarded Kshs. 1,352,000 plus costs and interest. Counsel relies on the case of **MT. VIEW MATERNITY & NURSING HOME –V- MIRIAM MAALIM BISHAR & ANOTHER (2018) eKLR** where the court held:-

‘It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful

It was further submitted for the applicants that the delay in filing the application was occasioned by the applicants' counsel and it should not be revisited on the applicants. The applicants are willing to furnish security in form of a bank guarantee for the entire decretal sum from Family Bank Kenya Limited.

Counsel made reference to the case of **FOCIN MOTORCYCLE CO. LTD –V- ANN WAMBUI WANGUI & ANOTHER (2018) eKLR** where it was stated:-

“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. The Applicant has offered to provide security and has therefore satisfied this ground for stay.

The respondent opposed the application and filed an affidavit sworn on 21st September, 2021. Counsel for the respondent submitted that the applicants have not shown what substantial loss will be suffered if the decretal sum is paid. There has been no threat of execution. Counsel contend that substantial loss cannot mean ordinary loss of decretal sum or costs which must be settled by the applicant. Counsel contend that the application is made in bad faith and is intended to frustrate the respondent's efforts to enjoy the fruits of his judgment.

On the issue of leave to appeal out of time, it was submitted that the application was filed after the expiry of five (5) months from the delivery of the judgment on 23rd April, 2021. No proper account has been made for the delay. The application was only filed after counsel for the applicants received a second letter dated 10th August, 2021 reminding them to have the decree settled. Counsel referred to the case of **ANNAH MWIHAKI WAIRURU –V- HANNAH WANJA WARURU (2017) eKLR** where the court referred to the holding in the unreported case of **LEO SIRA MUTISO –V- ROSE HELLEN WANGARI MWANGI (Nairobi, C.A No. 255 of 1977)** where it was held: -

“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”.

The application essentially seeks two main orders, extension of time to file appeal and stay of execution. The judgment of the trial court was delivered on 23rd April, 2021. The application was officially filed on 31st August, 2021. This is after the expiry of four (4) months. The explanation for the delay is that counsel for the applicants was instructed to file the appeal but failed to do so. In the case of **GITHIAKA –V- NDURIRI (2004) 2 KLR**, it was held:-

“In the exercise of its discretion, the Court's primary concern should be to do justice to the parties. The Court should, among other things, consider: -

- the length of the delay in lodging the notice and record of appeal;
- where applicable, the delay in lodging the application for extension of time, as well as the explanation thereof;
- whether or not the intended appeal is arguable;
- the prejudice to the respondent if the application is granted.
- the public importance, if any, of the matter; and
- generally the requirements of the interest of justice in the case.

Similarly, in the case of **KIRAGU –V- KIRAGU (1990) KLR 323**, the Court of Appeal held inter alia:-

“An application for an extension of time for lodging an appeal may be made even after the prescribed time has expired. However, failure by an applicant to explain away the delay in prosecuting his appeal may lead to the extension being refused.”

It is evident that there was delay in filing the current application. The discretion of the court to enlarge time to file an appeal also has to consider the other factors apart from the aspect of delay. The overriding objective is to do justice to the parties. The dispute arises from the award of damages by the trial court. According to the applicants, the award is inordinately high and they would like to pursue an appeal. Counsel for the applicants must have been jolted into action by the letter dated 10th August, 2021 from the respondent's counsel. I do find that despite the delay of four (4) months, the interest of justice requires that the applicants be allowed to pursue an appeal against the decision of the trial court.

The trial court awarded the respondent KShs.1,350,000 as general damages. The total decretal sum including cost as per the letter dated 7th September 2021 by the respondent's counsel was KShs. 1,564,065. This is a substantial sum and it cannot be said that payment of that amount before the determination of the appeal cannot amount to substantial loss. Although the results of the appeal are unknown, settlement of that amount without any possibility of recovery should the appeal succeed calls for the court's intervention. The respondent has not stated

that he is in a position to refund that amount.

In the case of **BUTT –V- RENT RESTRICTION TRIBUNAL (1982) KLR 417** the court held:-

“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.”

The applicants are willing to provide security. This is a sign of goodwill on their part and it excludes the apprehension that the appeal is mainly intended to delay the respondent from enjoying the fruits of his judgment. Counsel for the respondent urged the court to release at least half of the decretal sum to the respondent. I have seen the medical report by Dr. Wokabi dated 22nd May, 2013. The respondent was involved in a road traffic accident and was admitted for four (4) days. It is not indicated in the pleadings herein how the accident occurred. I do appreciate that the draft Memorandum of Appeal does not raise any issue on liability. However, it is my considered view that the respondent should wait for the outcome of the appeal first before enjoying the fruits of his judgment.

In the end, I do find that the application dated 20th August 2021 is merited and the same is granted in the following terms:-

1) Leave to file appeal out of time is hereby granted. The applicants to file their Memorandum of Appeal within fourteen (14) days hereof.

2) Execution of the judgment/decreet in Milimani CMCC No. 2149 of 2015 is hereby stayed pending the hearing and determination of the Appeal.

3) The applicants to provide a bank guarantee for the entire decretal sum of KShs. 1,564,065 within forty-five (45) days hereof.

4) The applicants to file the record of Appeal within ninety (90) days hereof.

5) Costs of the application shall follow the outcome of the appeal.

Dated and signed at Nairobi this 28th day of February, 2022

S.J. CHITEMBWE

JUDGE