



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC.CIVIL APPL. NO. E425 OF 2021**

**ZACHARY GATURA NDUATI.....1<sup>ST</sup> APPLICANT**

**GEOFFREY GITHUA RITHO.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**DAVID KIBE KINYANJUI.....RESPONDENT**

**RULING**

The application dated 28<sup>th</sup> August 2021 seeks the following orders:-

**1. Spent.**

**2. THAT this Honourable court be pleased to stay execution of judgement in Milimani Chief Magistrate's Court Civil Case No. E7773 of 2020 pending the hearing and determination of this Application.**

**3. THAT this Honourable Court be pleased to grant the Applicant leave to appeal against the Ruling of Hon L. Lewa (Ms), Principal Magistrate delivered on 26<sup>th</sup> August 2021 in Milimani Chief Magistrate's Court Civil Case No. E7773 of 2020.**

**4. THAT this Honourable court be pleased to stay execution of judgment Milimani Chief Magistrate's Court Civil Case No. E7773 of 2020 pending the hearing and determination of the Applicant's intended appeal herein.**

**5. THAT the costs of this Application be in the cause.**

**6. Any other and/or further Orders that this Honourable Court deems fit to grant.**

The affidavit of Mandela K. Chege sworn on the 28<sup>th</sup> of August 2021 supports the application. The respondent filed a replying affidavit sworn by Rosalind Waweru on 14<sup>th</sup> September, 2021.

Counsel for the appellant submitted that the application mainly seeks leave to appeal out of time and stay of execution. Counsel urged the court to utilize its inherent powers under Section 3A of the Civil Procedure Act and grant the orders being sought. Section 95 of the same Act empowers the court to enlarge time. Counsel argued that the appeal is arguable. The applicant need not establish that the appeal has high chances of success. The applicant has to establish good and sufficient reason for not having filed the appeal on time. The court has wide discretion to consider and grant the application. Counsel contend that the delay in filing the appeal was due to the fact that the advocate was seeking instructions from the client and soon after instructions were issued the current application was filed.

On the issue of stay of execution. It is submitted that the applicants will suffer substantial loss if execution is not stayed. Counsel relies on the case of **TABRO TRANSPORTERS LTD –V- ABSALAM DOVA LUMBASI (2012) eKLR** where Gikonyo J held:-

**“Sufficient cause is established when the Applicant proves the following conditions on a balance of probabilities that:**

***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.”***

According to the applicants, the respondent's means are unknown and it is unlikely that he can refund the decretal sum in the event that the appeal succeeds. Counsel referred to the case of **EDWARD KAMAU & ANOTHER –V- HANNAH MUKUI GICHUKI & ANOTHER (2015) eKLR** where Aburili J held:-

**“This court appreciates that the applicants being a party seeking favourable exercise of the court’s discretion is under a legal duty to place some material before the court upon which such discretion should be exercised. In other words they should prove that the respondent is so impecunious that if the decretal sum is paid then they will not recoup should the appeal succeed, thereby rendering it nugatory. They have also argued that although the respondent is offering a bank guarantee, that is not deposited on her affidavit of means.**

**I am in agreement with the applicants that in the absence of an affidavit of means, it may be construed that the respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed. I am enjoined by the holding of the Court of Appeal in the case of NATIONAL INDUSTRIAL CREDIT BANK LTD VS AQUINANS FRANCIS WASIKE COURT OF APPEAL CIVIL APPLICATION NO. 238/2005, the Court of Appeal held:-**

**“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is un reasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that 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.”**

Counsel for the applicants further argued that there has been no inordinate delay in filing the application and that the applicants are ready to provide a bank guarantee as security.

Counsel for the respondent opposed the application. Counsel submitted that the hearing before the trial court proceeded ex-parte because counsel for the defendants did not appear. The defendant duly entered appearance and filed defence. Judgment was fixed for 30<sup>th</sup> June, 2021. The applicants were notified of the judgment on 6<sup>th</sup> July, 2021. The respondent proceeded to execute the judgment and decree. Counsel referred to the case of **SAMVIR TRUSTEE LIMITED –V- GUARDIAN BANK LIMITED, NAIROBI (Milimani HCCC No. 795 of 1997)** where Warsame J held:-

**“Every party aggrieved with a decision of this court has a natural and undoubted right to seek the intervention of the Court of appeal. And as far as this matter is concerned, I do not think this court should put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. In my understanding a stay would be granted unless there is overwhelming hindrance to the exercise of the discretionary powers of the court.**

**I appreciate and understand that the court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement, hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant.**

**It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”**

Counsel for the respondent argued that the applicants have not fulfilled the conditions necessary for granting orders staying execution. No substantial loss has been shown will occur if stay is not granted.

The dispute here is attributed to a road traffic accident which occurred on 15<sup>th</sup> May 2019 involving the respondent and motor vehicle registration number KCJ 575A. The applicants were duly served with summons, entered appearance and filed defence but did not attend the hearing. The case proceeded ex-parte. The respondent was awarded Kshs.500,000 as general damages and Kshs.115,550 as special damages. Judgment was delivered on 30<sup>th</sup> June, 2021. The applicants filed an application seeking stay of execution of the judgment but the same was not certified as urgent by the trial court and was fixed for *inter partes* hearing on 13<sup>th</sup> September, 2021 yet the applicants had been served with warrants of execution on 19<sup>th</sup> August, 2021.

The applicants were apprehensive that if their application for stay of execution was not heard and execution stayed, the warrants of execution would have been effected and they would have suffered loss. The intended appeal is not against the ex-parte judgment but against the trial court’s ruling delivered on 26<sup>th</sup> August, 2021. The current application is dated 28<sup>th</sup> August 2021. It is not clear why the applicants are seeking leave to extend time to appeal against a ruling delivered on 26<sup>th</sup> August 2021 yet the time to appeal had not lapsed. Indeed there is no ruling delivered on 26<sup>th</sup> August, 2021 but the trial court only fixed the applicant’s application for hearing on 13<sup>th</sup> September 2021. The applicants maintain that the trial court did not exercise its discretion properly as warrants had already been issued on 19<sup>th</sup> August, 2021. It is the applicants’ view that by the time their application was to be heard, execution would have been finalized.

The applicants are also seeking orders staying execution. In the case of **BUTT –V- RENT RESTRICTION TRIBUNAL**, 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.”**

As indicated herein above, the dispute relates to a road traffic accident. The respondent was pushing a handcart along park road when the accident occurred. The applicants seek to be accorded an opportunity to be heard. They are willing to provide security. Counsel for the respondent contend that the reason by counsel for the applicants that he failed to attend court as the matter was not listed cannot be true since it was on the cause list. These issues will be dealt with during the hearing of the appeal. In essence, the applicants contend that they were condemned unheard. This court will have to evaluate the record of the trial court when determining the intended appeal and see if there is any satisfactory explanation as to whether the appeal should be granted or not.

To this end, I do find that in the interest of justice, the application dated 28<sup>th</sup> August, 2021 is merited and the same is granted in the following terms:-

- 1) Leave is granted to file appeal out of time. The applicant to file the Memorandum of Appeal within 14 days hereof.**
- 2) Execution of the judgment/decree in Milimani CMCC E7773 of 2020 is hereby stayed pending the hearing and determination of the appeal.**
- 3) The applicants to provide a bank guarantee for the sum of Kshs.719,148 within 45 days hereof.**
- 4) Costs of the application shall follow the outcome of the appeal.**

**DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2022.**

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**S. CHITEMBWE**

**JUDGE**