



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**(CORAM: R. MWONGO, J.)**

**MISC. CIVIL APPLICATION E019 OF 2021**

**JOHN NGIGE REGINAH.....APPLICANT**

**VERSUS**

**DAVID KAMAU GITHIYI & DAN GITHIYI WAMBUI**

**(sued as the legal administrators of the Estate of NANCY WAMBUI GITHIYI)....RESPONDENTS**

**RULING**

1. The application herein dated 19<sup>th</sup> April 2021 seeks stay of execution and extension of time to file an appeal against the judgment of Hon. Karanja delivered on 13<sup>th</sup> January 2021 in **Naivasha CMCC 284 of 2019**. The judgment awarded Kshs 666,197.50 plus costs. The appeal is on quantum only.

2. The applicant's grounds are essentially that **at the time of being notified of the judgment the appeal period had lapsed; That the judgment was delivered electronically in the absence of both parties as directions had been issued that it would be delivered later; That the applicant has a good appeal on quantum of damages which he should be allowed to ventilate; That the applicants appeal against the said judgment be admitted out of time and leave be given to file a memorandum of appeal within 20 days of courts order; That the court has power to enlarge time;**

3. Further, the applicant argues he is at risk of execution of the judgment since there is no stay and pray that execution of the said judgment be stayed; That substantial loss will result if stay of execution is not ordered as prayed above; That the respondents are persons of unknown means and will not be in apposition to refund the decretal amount in the event the execution proceeds.

4. The applicant relies, essentially, on the High Court decision of Mombasa HCCA No 40 of 2014 Kenya Orient Insurance Co Ltd v Paul Mathenge Gichuki & another [2014] eKLR allowing a stay application quoted in Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another (UR) where the Court of Appeal stated that:

*“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 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 – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”*

5. To this end the applicant indicated through the affidavit of Ms Linda Chorio, the applicant's insurer's Legal Officer, that the insurer is willing and ready to furnish security by depositing the full judgment sum in a bank account in the joint names of the two firms of advocates on record for the Applicant and Respondents.

6. The respondent's position is that Section 79G of the CPA has not been fulfilled in that the appellant has not satisfied the court that he had a good and sufficient cause for not filing the appeal on time; that the application is thus merely meant to delay the execution of the judgment and day of reckoning; that in terms of Order 42 Rule 6(2)(a)(b) the applicant has not shown that substantial loss may result unless the order is made

7. The respondent contends that the applicant has not stated the exact loss he shall suffer if the Application is not allowed. He placed reliance

on the authority of **Mutula Kilonzo v Kioko David Machakos [2008] eKLR**, where Lenaola J held that one must produce evidence of means or lack thereof and in the absence such the court will not entertain the application.

8. The respondent contends that the Applicant having submitted that they will suffer substantial loss if the application is not allowed, this being a money decree, the same can be reimbursed by the Respondent if the appeal is successful. Relying on **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR** where the court stated that: **"It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made,"** the respondent further argued that releasing the entire decretal sum to the Respondent will not render this appeal nugatory since the appeal is not on liability but on quantum.

9. I think that the questions arising are: whether the applicant has given sufficient reason to justify the exercise of the court's discretion as to late filing; whether the applicant will suffer any loss if the application is not allowed; and whether the applicant is willing to secure the decretal sum.

10. As always the court must carefully consider the matter exercising its discretion to balance the parties' rights. In my view this is a straight forward and simple application for stay.

11. On the issue as to the delivery of judgment in the absence of the parties and without proper notice being given, this point has not been addressed or denied by the respondent in the replying affidavit.

12. As to whether the applicant will suffer any loss if the application is not allowed, it is my view that the risk is always there in the sense that recovery proceedings can be lengthy and complicated, once the decretal sum is paid in execution.

13. As to whether the applicant is prepared to furnish security for the due payment of the decretal sum, the supporting affidavit of the applicant clearly indicates that they are prepared to place the full decretal sum in a joint interest earning account. I further note from an attachment to the applicant's supporting affidavit (Exhibit LC3) that the applicant's insurers had given their lawyers:

***"...instructions to engage third party advocates and seek some concession on quantum to settle the matter at Kshs 370,000/- or Kshs 400,000/- all inclusive..."***

14. In light of the foregoing, I think the appropriate and just order to make is to allow the application, which I hereby do, and grant stay on the following terms:

- a. The applicant shall pay the amount of Kshs 370,000/- to the respondent's counsel, being the undisputed amount they are willing to pay in any event; the said amount to be paid within twenty one (21) days of the date of this ruling;
- b. The applicant shall within twenty one (21) days of the date hereof pay the balance of the decretal sum and costs into a joint interest earning account in the joint names of the counsel for the parties;
- c. The parties shall co-operate expeditiously in the setting up of the said joint account;
- d. The applicant shall file the record of appeal within forty five (45) days and prosecute the same expeditiously in accordance with directions to be given by the court within forty five days.
- e. In the event of failure to comply with the directions, execution to proceed forthwith

15. Orders accordingly.

**Delivered at Naivasha on this 25<sup>th</sup> day of February, 2022**

**R MWONGO**

**JUDGE**

Delivered in the presence of:

1. Wanjiru for Applicant
2. Mboga for Respondent
3. Court Assistant - Kamau