



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. E658 OF 2021

EASTERN BYPASS SACCO LIMITED.....1ST APPELLANT

PAUL NDERITU WANJA.....2ND APPELLANT/APPLICANT

VERSUS

VICTORIA NDUNGE ITATU.....RESPONDENT

RULING

1. This ruling is predicated on the Notice of Motion dated 29th December, 2021 taken out by the 1st and 2nd appellants/ applicants and supported by the grounds set out on its body and the facts stated in the affidavit of Ms. Harriet A. Sang their advocate. The applicants sought for an order for leave to appeal out of time against the judgment and decree delivered on 23rd September, 2021 in Milimani CMCC No. 4059 of 2018 and a further order for a stay of execution of the aforementioned judgment pending the hearing and determination of the appeal. The applicants also sought for an order to the effect that they be allowed to provide a bank guarantee from Family Bank as security for the decretal sum.
2. There was no response to the said application.
3. I have considered the grounds laid out on the body of the Motion; the facts deponed in the supporting affidavit.
4. The orders being sought in the Motion are two-fold: first is the order seeking for enlargement of time to appeal and for leave to appeal out of time against the impugned judgment and decree.
5. Section 79G of the Civil Procedure Act stipulates that an appeal against the decision of a subordinate court shall be lodged within 30 days from the date of the decree or the order being appealed against. The provision further stipulates that an appeal can be admitted out of time where sufficient cause has been shown.
6. Moreover, under the provisions of Section 95 of the Civil Procedure Act and Order 50, Rule 5 of the Civil Procedure Rules, the courts have power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
7. Under the first condition touching on length of delay, while it is apparent from the record, that the impugned judgment was delivered on 23rd September, 2021 which is close to three (3) months prior to the filing of the Motion. In my mind, while there has clearly been a delay in filing the Motion, I do not find the delay to be inordinate.
8. Concerning the reasons for the delay, the applicant explained that the delay was occasioned by the counsel who was handling this matter was forced to go on unexpected bed rest and therefore went before handing over her files. Upon considering the explanation given by the applicants, I find the same to be reasonable in the circumstances.
9. As relates to the condition on whether or not an arguable appeal exists, it is the applicants' assertion that they have an arguable appeal which raises valid points of law and fact.
10. Upon my perusal of the grounds of appeal raised in the draft memorandum of appeal annexed to the Motion, I note that the appeal is challenging the finding of the trial court on quantum. I am therefore satisfied that the applicants have demonstrated arguable points of law and fact in their appeal.
11. Upon my perusal of the record, it is apparent that the judgment was in favour of the respondent herein and against the applicants. It

therefore follows that the respondent is lawfully entitled to enjoy the fruits of his judgment. Suffice it to say that it would not be in the interest of justice to lock out the applicants who is aggrieved by the judgment of the trial court on damages. I therefore find it reasonable for the applicants to be given the opportunity of challenging the subordinate court's assessment on damages on appeal.

12. The second prayer is for stay of execution of the decree pending appeal, for which the guiding provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the conditions to be satisfied for such an order to be granted.

13. The first condition being that the application must have been brought without unreasonable delay has already been addressed hereinabove.

14. The applicants on their part are apprehensive that if the decretal amount is paid to the respondent, the likelihood of recovering the amount from the respondent should the appeal succeed is slim.

15. In the absence of anything to ascertain the respondent's financial capacity to refund the decretal sum, I am satisfied that the applicants have reasonably demonstrated that they stands to suffer substantial loss if the order for a stay of execution is not granted.

16. Under the final condition which is the provision of security for the due performance of the decree or order, the applicants state that they are ready and willing to provide security by way of a bank guarantee.

17. In the end therefore, the Motion dated 29th December, 2021 is found to be meritorious and it is allowed, therefore giving rise to a grant of the following orders:

- i. The applicants are granted leave of 14 days from today's date to file an appeal out of time.**
- ii. There shall be an order for stay of execution of the judgment and decree issued on 23rd September, 2021 pending the hearing and determination of the intended appeal on the condition that the applicants deposit Kshs.1,000,000/= of the decretal sum in an interest earning account in the joint names of the advocates and or firms of advocates within 45 days from the date of this ruling. In default the stay order shall automatically lapse.**
- iii. Costs of the Motion shall abide the outcome of the appeal.**

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

.....

J. K. SERGON

JUDGE

IN THE PRESENCE OF:

..... **FOR THE APPELLANT**

..... **FOR THE 2ND APPELLANT/APPLICANT**

..... **FOR THE RESPONDENT**