



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. E610 OF 2021

IBRAHIM NG'ANG'A NJUGUNA.....1ST APPELLANT/APPLICANT

LEONARD NG'ANG'A.....2ND APPELLANT/APPLICANT

-VERSUS-

JAMLICK CHOMBA IERI.....RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 7th 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 advocate Frerick Nyabuti. The orders being sought are for leave to appeal out of time against the judgment and decree in Milimani CMCC NO. 11504 OF 2018 delivered on 22nd October, 2021 and a further order for a stay of execution of the aforesaid judgment pending the hearing and determination of the appeal. The applicants also sought for an order for provision of security by way of a bank guarantee from the Family Bank.
2. The respondent responded to the Motion by way of the replying affidavit he swore on 6th January, 2022.
3. At the interparties hearing of the Motion, the parties' respective advocates relied on the averments made in the respective affidavits.
4. I have considered the grounds laid out on the body of the Motion; as well as the facts deponed in the supporting and replying affidavits respectively.
5. Before I delve into the merits thereof, I note that the respondent raised a preliminary issue regarding the appeal, wherein he argued that the appeal is premature for the reason that the applicants did not attach a copy of the judgment/decree being appealed against and whose execution is to be stayed. The applicants did not offer any response to this issue.
6. Upon my consideration of the above assertions, I am of the view that they do not hold any water since the appeal is yet to be filed and in any event, the respondent is not denying the existence of the judgment and decree in question. There is no mandatory requirement for the applicants to annex a copy of the judgment/decree at this stage. Consequently, I will now address the merits of the Motion.
7. From a reading of the instant Motion it is evident that the orders sought therein are two-fold. The first is the order seeking for leave to appeal out of time against the impugned judgment and decree.
8. The provisions of Section 79G of the Civil Procedure Act are clear that the timelines for lodging an appeal against the decision of a subordinate court are within 30 days from the date of the decree or the order being appealed against. Furthermore, under the provisions of Section 95 of the Civil Procedure Act and Order 50, Rule 6 of the Civil Procedure Rules, the courts have discretionary power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
9. In the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** the Court of Appeal developed various conditions to offer guidance in deciding whether to extend the period for filing an appeal out of time and which I will address hereunder.
10. The first condition concerns the length of delay. In his supporting affidavit, Frerick Nyabuti states that the Motion has been brought without unreasonable delay. In retort, the respondent states that the Motion is a mere afterthought.

11. Upon my perusal of the record, I note that none of the parties availed a copy of the impugned judgment for this court's reference. Nevertheless, it is apparent that the judgment was delivered on 22nd October, 2021 while the Motion was brought less than two (2) months later sometime on or about the 7th December, 2021. I therefore do not find the delay to be unreasonable.
12. Concerning the reason(s) for the delay, it is the applicants' assertion that the delay was occasioned by the time taken by their advocate in receiving instructions to lodge an appeal against the impugned judgment. In contrast, the respondent avers that the explanation given for the delay is not valid.
13. Upon taking into account the aforementioned averments, I find the explanation offered by the applicants for the delay to be reasonable in the circumstances.
14. On the principle touching on whether an arguable appeal exists, the applicants submit that they have an arguable appeal with overwhelming chances of success, whereas the respondent is of the view that no arguable appeal exists since the trial court properly considered the material placed before it and arrived at a reasonable finding.
15. It is apparent from the grounds to the draft memorandum of appeal annexed to the instant Motion that the intended appeal is challenging the finding of the trial court on both liability and quantum. In the premises, I am satisfied that the applicants have raised arguable grounds in their appeal.
16. On the final condition touching on prejudice, the applicants on the one hand state that the respondent will not be prejudiced in a manner that cannot be adequately compensated by way of costs if the orders sought are granted. On the other hand, the respondent states that any further delay will cause him to suffer greater harm.
17. In the absence of any credible evidence of prejudice to be suffered by the respondent, I am convinced that it would not be in the interest of justice to deny the applicants an opportunity to challenge the trial court's decision on appeal. I therefore find it reasonable in the circumstances to extend the time required for the applicants to lodge their appeal.
18. The second order sought is that of a stay of execution of the decree pending appeal.
19. The guiding provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the following conditions in determining an application for stay.
20. The first condition stating that the application must have been made without unreasonable delay has already been addressed above.
21. The second condition touches on substantial loss to be suffered by an applicant. In his supporting affidavit, Frerick Nyabuti portrays the applicants' apprehension that unless an order for a stay of execution is granted, it is likely that the applicants will not be able to recover the decretal sum from the respondent once the same is paid to him and the appeal succeeds. In reply, the respondent states that the question of his financial capability cannot constitute reason enough for this court to grant the order for a stay of execution sought herein.
22. The question on who has the burden of proof on the issue of refund of the decretal sum was aptly discussed by the Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** where it held thus:
- “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...”**
23. In the absence of anything to indicate or ascertain the respondent's financial capacity here and upon considering the interest of justice, I am satisfied that the applicants have reasonably shown the likelihood of substantial loss occurring should the order for a stay of execution be denied.
24. Under the final condition which is the provision of security for the due performance of such decree or order, the applicants have indicated their readiness and willingness to furnish a bank guarantee as security, whereas the respondent states that the amount in question is not a substantial sum which would warrant a bank guarantee.
25. Upon considering the rival sentiments above, I concur with the position of the respondent that a bank guarantee would not be suitable in the circumstances.
26. Consequently, the Motion dated 7th December, 2021 is allowed

Thus giving rise to issuance of the following orders:

- i. The applicants are granted leave to file an appeal out of time within 14 days from today's date.**

ii. There shall be an order for stay of execution of the judgment delivered on 22nd October, 2021 on the condition that the applicants deposit the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within 45 days from today, failing which the order for stay shall automatically lapse.

iii. Costs of the application to 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 1st and 2nd Appellants/Applicants

..... for the Respondent