



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

MISCELLANEOUS APPLICATION NO.E28 OF 2021

TRANSPORT AND LIFTING SERVICES LTD.....1ST APPLICANT

PAUL NDUNGU MUREGI.....2ND APPLICANT

OALF OSORO KEROSI.....3RD APPLICANT

VERSUS

DANIEL OKELLO ADHIAMBO.....RESPONDENT

RULING

1. The Application coming for consideration in this ruling is the one dated 6/7/2021 seeking stay of Execution of the judgment and decree dated 25/5/2021 issued in KERICHO CMCC No.345 of 2019 and also leave to appeal.

2. The Application is supported by the Affidavit of PAUL NDUNGU MUREGI the 2nd Applicant in which it is deposed as follows; That judgment against the applicant in Kericho cmcc no. 345 of 2019 was delivered on the 25th of May, 2021, and he came to learn of the said judgment on the 3rd of July, 2021; upon inquiring from his advocates about the judgment, his advocates informed him that they had forgotten to notify the applicant and his insurer about the same. The applicant stated that he is dissatisfied by the Judgment delivered on the 25th of May, 2021 and intends to appeal the same. He stated that his failure to lodge an appeal on time was occasioned by the mistake of his advocate and he now seeks leave to appeal out of the requisite 30day period and stay of execution pending hearing and determination of this judgment.

3. The Respondent opposed the Application and filed a Replying Affidavit in which he deposed as follows;

That the applicant's application is malicious and seeks to deny him the fruits of his judgment, and that the applicants have not given any justifiable grounds to be granted the prayers sought in their application. The respondent further stated that the right to appeal, must be balanced against his rights to enjoy the fruits of the judgment, and there must be a just cause for depriving him of that right. The respondent stated that he would be greatly prejudiced if the applicant's application is allowed, as it is an afterthought and a tactic by the applicant to frustrate him and prevent him from enjoying the fruits of his judgment. He stated that the applicant was in the first instance required to move the trial court for orders sought in his application and as such his application is prematurely filed.

4. The parties filed written submissions as follows;

The applicants submitted that the delay in filing the appeal within the required time was as a result of the advocate's mistake of failing to notify the applicants of the existence of the judgment and the same should not be visited on the applicants. The applicants submitted that the respondent has failed to demonstrate how he will be prejudiced if the applicants are allowed to appeal out of time, and also that the respondent will not be prejudiced as the applicants are willing to reward the respondent with costs and interest should the intended appeal be dismissed.

5. The applicants further submitted that failure to grant leave for stay of execution, will cause the applicants to suffer irreparable loss and the intended appeal shall be rendered nugatory and an academic exercise. It was also submitted that the intended appeal has high chances of success.

6. The respondent on the other hand submitted that the applicants have an application pending before the trial court seeking for stay of execution on the same judgment issued on the 25th of May, 2021 and for the applicant to file a similar application in this court amounts to an abuse of the court process and amounts to forum shopping. The respondent also submitted that the applicants have not satisfied the

requirements for granting an order for stay of execution as provided for in Order 42 rule 6 of the Civil Procedure Rules as such their application should be dismissed.

7. The respondent further submitted that the reasons advanced by the applicants for not filing the appeal out of time are not sufficient to warrant granting of the orders sought and also that the applicants intended appeal lacks in merit and has no chances of success.

8. The issue for determination is whether the Applicant is entitled to the stay of Execution and leave to appeal.

9. The guiding provision of law on the prayer of stay of execution is Order 42 rule 6(2) of the Civil Procedure Rules which provides that :- **No order for stay of execution shall be made under sub rule (1) unless-**

a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

10. The high court in *Antonie Ndiaye versus African Virtual University (2015) eKLR*, stated as follows: - **“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:**

a) The application is brought without undue delay;

b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and

c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

11. On leave to appeal out of time, section 79G of the Civil Procedure Act, provides as follows:- **“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

12. In *Paul Musili Wambua versus Attorney General & 2others (2015) eKLR*, Koome, JA (as she then was), stated as follows:- **“ it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”**

13. In view of the above provisions, the Applicant is granted stay of Execution and leave to appeal on the following conditions;

1. THAT the decretal sum is deposited in an interest earning account held jointly in the names of the Advocates for both parties to be opened with 60 days of this date.

2. THAT the intended appeal be filed within 30 days of this date.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 25TH DAY OF MARCH, 2022

A. N. ONGERI

JUDGE