



China Jiangxi International (K) Ltd & another v Kiragu (Suing as the legal representative of the Estate of Nahashon Kiragu Mbuthia (Deceased)) (Civil Appeal E025 of 2021) [2022] KEHC 11367 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEHC 11367 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL E025 OF 2021
CM KARIUKI, J
MAY 26, 2022**

BETWEEN

CHINA JIANGXI INTERNATIONAL (K) LTD 1ST APPLICANT

PAUL MACHARIA THIONGO 2ND APPLICANT

AND

MARY WANGUI KIRAGU RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NAHASHON
KIRAGU MBUTHIA (DECEASED)**

RULING

1. By an application dated July 28, 2021 applicant seeks extension of time to lodge appeal against lower court decree/judgment and stay of same pending appeal which is opposed.
2. The parties were directed to canvass same via submissions.

Applicants' Submissions:

3. The lower court delivered judgment on 30th February, 2021 in favour of the respondent without notice to the applicant side.
4. The applicants only came to learn about delivery of judgment upon being served with the respondent's letter dated June 28, 2021, during which time, the period for filing appeal had already lapsed
5. It is for this reason that court is urged to enlarge the time for filing of the appeal. The case of *Mwangi v Kena Airways Ltd* [2003]
6. The applicants are aggrieved and dissatisfied by the judgment particularly since the trial Magistrate erred both in law and in fact by awarding the Respondent a sum of Kshs.1,140,216/- as damages for



pain and suffering, loss of expectation of life and loss of dependency which sum was manifestly excessive outside the confines of reasonableness compared to the cited authorities and not commensurate with the nature of the case and the injuries sustained by the Respondent.

7. It is because of the foregoing and other issues raised in the draft memorandum of appeal.
8. It is admitted that the respondent is not a man of means that if the decretal sum together with costs is paid to the respondent, it would be impossible or rather problematic and difficult to recover the same from the respondent should the applicant's appeal, which has high chances of success, succeed.
9. The applicant is a reputable company insured by a reputable insurance company and as such, there is no whatsoever possibly and doubt that if the appeal does not succeed it would not pay the decretal amount and the costs emanating therefrom without any difficulty.
10. That notwithstanding the applicant is willing and able to furnish any security that the court will direct.
11. Since the grant of an order for stay of execution is discretionary, the courts have held that when exercising this discretion, the court should be guided by the following principles as enunciated by the Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 cited with approval in the case of *Amal Hauliers Ltd v Abdulnasir Abukar Hassan* [2017] eKLR.

Respondent's Submissions:

12. The respondent submits that, applicants have not demonstrated the substantial loss they will suffer if stay of execution of decree is not granted.
13. Leave to extend time to appeal out of time is discretionary but the court is supposed to put into consideration the delay and reasons occasioned in making such an application as well as the prejudice that the parties involved will suffer.
14. The only explanation given by the applicant's Advocates for failing to file the appeal within the prescribed time is that they were not aware of the date when the judgment was delivered.
15. The applicants and their Advocates on record ought to have followed up on their matter.
16. In the unlikely event that this court deems fit to stay of execution of decree and extend time to appeal, the applicants ought to deposit security as held in the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR.

Issues and determination

17. After going through the record, I find after concession on leave to appeal is deponed to, what merit there is in application for stay for execution pending appeal and costs.
18. The instant application is premised on two limbs, one for extension of time to appeal of time and secondly for stay pending appeal. On the first limb, I grant it on concession of the respondent vide her affidavit sworn on 8.10.2021 para 3 where she depones that "iam not opposed to leave being granted ..for appeal to be filed against the judgement..."
19. The on stay, I find there was judgement on liability apportioned at a rate of 70% ;30% in favour of the respondent. Essentially the appeal is tied to one issue of quantum as appellants feels that the award was excessive in all circumstance of the case.
20. The applicant submits that the respondent is not a man of means that if the decretal sum together with costs is paid to the Respondent, it would be impossible or rather problematic and difficult to recover



the same from the Respondent should the Applicant's appeal, which has high chances of success, succeed. Thus will suffer substantial loss therefore warrant for grant of stay of execution.

21. The applicant is a reputable company insured by a reputable insurance company and as such, there is no whatsoever possibly and doubt that if the appeal does not succeed it would not pay the decretal amount and the costs emanating therefrom without any difficulty. That notwithstanding the applicant is willing and able to furnish any security that the court will direct. The respondent response is that she is a person of means and if appeal succeeds she will be able to refund the decretal amount in event same is paid before appeal is determined and appeal succeeds thereafter. In alternative she urges court to order deposit of decretal security to secure payment of decretal amount.
22. I find no difficulty in determining the instant application on the parties submissions and affidavit. There is no doubt the single issue in appeal is whether the respondent should get a reduced amount or the awarded figure which will then be subjected to apportionment as agreed .
23. The parties are on the same page on grant of leave and also on grant of conditional stay thus the court makes the following orders;
 - (i) The extension of time for filing appeal is allowed and same appeal be filed and served within 14 days.
 - (ii) The stay of execution is allowed on condition that the entire decretal amount will be deposited in interest earning joint account of parties advocates within 30days of the of this ruling.
 - (iii) In default of any of the above (i) and (ii) the application herein to stand dismissed and execution to proceed.
 - (iv) Costs in the main appeal.

DATED AND SIGNED AT NYAHURURU THIS 26TH DAY OF MAY, 2022.

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CHARLES KARIUKI

JUDGE

