



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL APPEAL NO. 8 OF 2020

FELIX MAINA.....APPELLANT

VERSUS

DORIS WANGUI MUTURI.....RESPONDENT

RULING

1. The applicant's prayers are two-pronged: Firstly, that time for filing of the appeal be *enlarged*; and, secondly, for *stay of execution* of the decree pending the determination of the appeal.
2. The notice of motion is dated 25th September 2020. The intended appeal is against the judgment dated 24th February 2020 in *Murang'a Chief Magistrates Civil Suit No. 23 of 2019*.
3. The pith of the motion is that unless leave is granted, the appeal will be lost. In the deposition sworn by *Lydia Mwangi*, the applicant blames the delay on the *Covid-19* pandemic and the subsequent closure of courts. It is also pleaded that on 14th April 2020, the applicant paid to the respondent the "*undisputed sums*" save for Kshs 282,275 for special damages and interest which are the subject of the intended appeal. Finally, the applicant has offered to provide security for the due performance of the decree.
4. The motion is contested by the respondent. There is a replying affidavit sworn on 6th October 2020 by her counsel on record, *Peterson Kiama*. The objections are on a three-strand: Firstly, that the delays are lengthy and ill-explained; secondly, that the present appeal was lodged without leave and hence incompetent; thirdly, that there is no arguable appeal because the impugned special damages were pleaded and proved.
5. In the alternative, the respondent contends that any stay should be pegged upon payment of the assessed costs, further fees on the decree and accrued interest.
6. The appellant filed submissions on 19th November 2020. Those by the respondent are dated 23rd October 2020 and received online by the court on 27th October 2020.
7. I will commence with the prayer for extension of time. The legal parameters are well settled: This court has wide and unfettered *discretion* to extend time. The discretion must however be exercised *judiciously*. Some of the factors to be considered include the length of delay, the reasons for the delay, the nature of the intended appeal and whether the respondent will suffer prejudice if the court extends the time. See *Leo Sila Mutiso v Rose Mwangi*, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported), *Nicholas Salat v IEBC & 7 others*, Supreme Court, Application 16 of 2014 [2014] eKLR.
8. I agree with the respondent that there was substantial delay of nearly five months between the date of decree on 24th February 2020 and the date the "appeal" on 16th July 2020. The instant motion for leave to appeal out of time was not presented until 28th September 2020.
9. I readily find that the appeal filed on 16th July 2020, unless cured by the court, would be incompetent for want of leave. But I take judicial notice that soon after the decree, the Republic experienced its first case of *Covid-19*; and, that on 15th March 2020, the courts were shut down. But I also take judicial notice, that soon thereafter, the Chief Justice issued practice directions on hearing of matters remotely or electronically.
10. I am thus not impressed by the allegations that the applicant was completely hamstrung to file an appeal earlier; or, to approach the court for leave. So can justice still be done without dismissing the intended appeal? The answer is in the affirmative for four main reasons: Firstly, there is an arguable appeal on whether the impugned award of special damages was specifically pleaded and strictly proved. For reasons that

will become evident, it would be *prejudicial* to comment at length on the depositions by the parties; or, the merits of the intended appeal.

11. Secondly, the applicant has demonstrated good faith by paying the undisputed award of Kshs 500,000 back in April 2020.

12. Thirdly, the claim relates to an award of damages for negligence. I am inclined to pay heed to the *overriding objective* to do justice to the parties. See generally **Article 159** of the **Constitution**. See also **Harit Sheth v Shamas Charania**, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.

13. Fourthly, unless time is extended, the entire appeal may be rendered nugatory. I say that carefully as this is a money decree. Justice is however a two-way street. The respondent will be prejudiced from enjoying the full fruits of the decree. Certainly, there will be delayed closure of the litigation. But this has been largely mitigated by the partial payment of Kshs 500,000 towards the decree. The appeal relates to only Kshs 282,275 for special damages and interest.

14. Granted those circumstances, I will exercise my *discretion* under section 79G of the **Civil Procedure Act** and extend the time for filing of the appeal to the intent that the appeal filed on 17th July 2020 shall be deemed to have been filed within the requisite time. That is the justice of the case.

15. I will now turn to the prayer for stay of execution. The present motion is largely predicated upon Order 42 rules 6 of the **Civil Procedure Rules**. The court *may* grant a stay if *substantial loss* may occur; that the application has been made *without delay*; and, that the applicant furnishes *security* for the due performance of the decree that may ultimately be binding on him.

16. I have already found that there was delay in presenting the motion. I also found that it was mitigated by the *Covid-19* pandemic and the temporary closure of the courts.

17. In **Butt v Rent Restriction Tribunal** [1982] KLR 417, Madan JA (as he then was) quoted with approval the views of Brett L.J. in **Wilson v Church** (No 2) 12 Ch. D [1879] 454 at 459-

I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory.

18. I have found that there is an arguable appeal. I have also said that the applicant has demonstrated some good faith by paying the undisputed award of Kshs 500,000 back in April 2020; and, offered to provide security for performance of the decree. I remain alive that as a general proposition, the execution of a *money decree* does *not* constitute substantial loss. **Kenya Shell v Benjamin Karuga** [1982-88] 1 KLR 1018.

19. But to ensure that the applicant is not left holding the short end of the stick, I will attach some conditions to ensure that the appellant stays wide awake.

20. My final orders are as follows:

- a) That the time for filing the appeal be and is hereby enlarged to the extent and intent that the appeal filed on 17th July 2020 shall be deemed to have been filed within the requisite time.
- b) That there shall be a stay of execution of the decree pending the hearing and determination of this appeal.
- c) That in the interests of justice, the appellant shall cause the record of appeal to be lodged not more than *ninety days* from today's date; and, shall ensure that the appeal is presented to the judge in chambers for admission or directions within a *further thirty days*.
- d) That costs shall be in the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 26th day of January 2021.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the appellant.

No appearance by counsel for the respondent.

Ms. Dorcas Waichuhi, Court Assistant.