



**IN THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARSEN**

**MISCELLANEOUS CIVIL CASE NO. E006 OF 2020**

**PHOEBIAN REHEMA KALENGA .....PLAINTIFF**

**VERSUS**

**RONALD WANJE JEMBE.....DEFENDANT**

**RULING**

This is an application by the defendant/applicant in Civil Suit No 49 of 2019 - Garsen in which he challenges, the outcome of the suit in a judgment delivered by Hon. Kadima (PM)

The application is expressed to be under Section 1(A), 3, 3(A), 79(G) and 95 of the Civil Procedure Act, order 42 Rule 6, order 50 Rule 6, order 51 Rule 1 of the Civil Procedure Rule, seeking leave of the court for an extension of time to file an appeal and subsequent stay of execution. It is made on the grounds that the Learned Trial Magistrate erred in fact and in law in awarding excessive damages of ksh. 300,000 and therefore the need to have it challenged on appeal. That the lapse of time provided under Section 79(G) was occasioned by the Trial Court failure to deliver judgment on due date and without notice to the parties, that the order on stay of execution is aimed at not rendering the intended appeal nugatory.

The application is predicated on the affidavit evidence of Pauline Waruhiu a legal officer at Direct Line Assurance Company, insurer of Motor vehicle KAR 356N of the insured defendant/applicant. The application was canvassed based on the affidavits filed by the respective parties to the suit.

**Determination**

The broad perspective which the court ought to take into account when dealing with applications of this nature are well captured, in the cases of **Salat & Independent Electoral & Boundaries Commissions & 7 others (2014) SCK, Paul Wanjohi Waruinge v Duncan Gichure (2013) EKLR, Leo Sila Mutiso v Rose Hellen Wangari Mwangi (Civil Application No. 255 of 1997)**. These decisions concur and identified the following principles a court should be guided by when it comes to applications on extension of time.

**(a) “Extension of time is not a right, it’s a discretionary remedy. As a result, the aggrieved party has the burden to give reasons for the delay. The court on the other hand has to balance the reasons for the delay and the length of it took to file the application, the prejudice likely to be caused by the parties. The significance factor on the merits of the proposed appeal”.**

In the instant application, apparently, Learned Counsel for the applicant briefed the court that there was inordinate delay on the part of the court to notify the defendant on the entry of judgment. That at an earlier stage, the due date of the judgment was adjourned to one of notice to the parties which was never issued by the court. Therefore, as a consequence time for filing of memorandum of appeal under Section 79 (G) of the Civil Procedure Act lapsed. According to the applicant counsel, the failure not to comply was not intentional to warrant sanctions from the court. Looking at this application from that perspective, Firstly, I asked whether, the applicant has satisfied the criteria in **Salat and Paul Wanjohi Mathenge cases (supra)**. From the combined effect averred in the notice of motion and Affidavit deponed by the applicant there is material and substantial reasons demonstrating his failure to comply with the timeline set in Section 79 (G) of the Act.

As, I understand the applicants case, there is a draft memorandum of appeal which prima facie show a strong and arguable case in the intended appeal. Nevertheless, these are issues which the applicant must prove on appeal. At this stage, I am not required to determine any of the grounds raised in the draft memorandum with finality. It is in my view that the applicant has justified through a chronology of events between the date the said judgment was delivered on 25.9.2020 and the 20.11.2020 when his certificate of urgency accompanied with the notice of motion seeking this court’s intervention on the matter. Against the backdrop of the law and contentions made by the applicant I would thereby exercise discretion to grant leave for extension of time to file an appeal out of time.

The next limb which falls to be decided is on stay of execution pending the intended appeal under Order 42 Rule 6 of the Civil Procedure Rules. The Law on this area is now well settled on the principles under which the court proceeds to grant or decline the orders of stay of execution.

In **Consolidated Marine v Nampijja and another CA no 93 of 1989**, “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising undoubted right of appeal are safeguarded and the appeal if succeeds fail is not rendered nugatory”

In **George Oraro v Kenya Television Network, Nairobi, Civil Case No. 151 OF 1992**, “The court does not make a practice of depriving the successful litigants of the fruits of his litigation, and locking up the fruits to which prima facie he is entitling to, pending an appeal”

As indicated in the case of **Stephen Wanjohi v Central Glass Investments Ltd, Nairobi, High Court Civil Case NO. 6726 of 1991**, “in essence for the court to order stay of execution under order 42 Rule 6 of the CPR, there must be;

- (a) No unreasonable delay
- (b) The basis on substantial laws must be established
- (c) Sufficient cause
- (d) Deposit of security for due performance of the decree.
- (e) The other aspect to consider is whether the intended appeal would be rendered nugatory if stay is not granted.

As already intimated the applicant has leave of this court to file an appeal out of time. The applicant counsel elaborately constructed his argument in this regard, that by operation of Order 42 Rule 6 the discretion be judicially exercised so as not to render the intended appeal nugatory. On substantial loss it has to be observed that the trial involved a special feature of money decree arising out of damages under the tort of negligence against the applicant as a wrong doer grounded on liability in the ensuing accident.

I see no realistic prospect that the respondent would be in a position to refund the decretal sum in the event of the appeal succeeding. Furthermore, the respondent is silent on her ability to refund the money if the circumstances and final order of the appeal demands that the sums paid out are recoverable. The fact is that the applicant prospects of being financially ruined is not subjective as is based on sound evidence. Therefore, there is existence of one or more principles in the instant application which will entitle the applicant stay of execution pending appeal.

#### **Result**

The notice of Motion dated 7.11.2020 is allowed with costs to abide the appeal. For these reasons, the draft memorandum be deemed as duly filed within time. The applicant do deposit the decretal sum in a joint earning interest account for both Counsels in a reputable financial institution within 30 days from today’s order. The record of appeal be filed and served within the aforesaid period simultaneously in this matter under the above clause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 25<sup>TH</sup> DAY OF JANUARY, 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**This Ruling has been dispatched electronically to the respective emails of the advocates in the matter.**

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