



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
MISCELLANEOUS APPLICATION NUMBER 58 OF 2020
PETER NDIRANGU WAWERU.....APPLICANT
VERSUS
DISMAS ODOYO OTUNDOH...RESPONDENT
RULING

Before me is the Notice of Motion dated 29th April 2020 brought under **Orders 42 rule 1 2 and 6, 50 rule 1, 51 rule 1,3 and 5 of the Civil procedure Rules, 2010, sections 3 3A and 7G of the Civil Procedure Act Article 159 (2) (d) of the Constitution of Kenya 2010 and all enabling provisions of the law.**

It sought orders inter alia: for stay of execution of the judgment in Nakuru Chief Magistrate's Civil Case Number 1059 of 2018 delivered on 18th December, 2019 pending the hearing and determination of the appellant's intended appeal, the appellant be granted leave to file a Memorandum of Appeal as per the attached draft, and be allowed to deposit half the decretal sum as security for the due performance of the judgment/decreed pending the hearing and determination of the appeal.

The grounds for the application were set out on the face of the application and in the Supporting Affidavit of *Isabella Nyambura* Legal Officer Directline Assurance Company Limited the insurers of the motor vehicle at whose instance the claim was being defended.

The main ground is that the judgment was delivered on the 18th February 2019. The applicant was not granted stay of execution pending appeal. By the time the copy of the judgment was delivered to the Insurance company, the deponent was on maternity leave and was not in a position to go through the same and give the appropriate instructions. By the time she resumed duty the time for filing the appeal had lapsed.

The respondent **Dismas Odoyo Otundoh** opposed the application vide the Replying Affidavit sworn on the 2nd June 2020. He depones that Judgment was delivered on the 18th December 2019. That the applicant had not demonstrated good reason for the unreasonable delay, and that the draft Memorandum of Appeal raises no triable issues. Further that if the application was allowed then the applicant be ordered to deposit half the decretal sum in court and the other half be paid to the respondent, in the interests of justice.

Parties agreed to proceed through written submissions. For the applicant through the firm of *Kimondo Gachoka Advocates*, and for the respondent through *Nancy Njoroge, Kairu & Company Advocates*.

For the applicant it was argued that under **Section 79(G) of the Civil Procedure Act** an appellant has to first seek leave to file an appeal out of time, and then proceed to file the same.

That the court of appeal in **Thuita Mwangi vs Kenya Airways Ltd [2003] eKLR** set the parameters for consideration in determining whether to extend time for filing an appeal. That these are;

- a. The length of the delay
- b. The reason for the delay
- c. The chances of success of the appeal if the application is granted
- d. The degree of prejudice to the respondent if the application is granted.

The applicant's position is that he has fulfilled the four (4) parameters, urging this court to follow **Banco Arabe Espanol vs Bank of Uganda [1999] 2 EA 22** where it was held that the administration of justice requires that disputes be determined according to their merits, and mistakes and errors ought not to debar a litigant from the pursuit of his rights, unless the failure to follow rules should only render the appeal process difficult and inoperative.

The appellant further argued that he had complied with **Order 42 rule 6(2) (f) of the Civil Procedure Rules, 2010**

In their submissions, counsel for the respondent argued that this court was being urged by the applicant to exercise its discretionary powers under **Order 42 rule (6) (2)**. The court was referred to **Butt vs Rent Restriction Tribunal (1982) KLR 417** where the court gave guidance on how judicial discretion should be exercised.

It was further argued for the respondent that the applicant was found 100% liable for the accident; that the appeal was only against quantum, that money decrees are never rendered nugatory. Court was referred to **Amal Hauliers Limited vs Abdulnasir Abukar Hassan Malindi Civil Appeal No. 18 of 2017**, **Peter Gacheru Njoroge vs Benard Mwangi Nakuru Civil Appeal No. 38 of 2017** in the event that the applicant's appeal is successful, and it was upon the applicant to demonstrate the substantive loss he would suffer.

Finally that the court had to take into consideration the length of, and the reason for the delay, the degree of prejudice to the respondent and whether the applicant had an arguable appeal.

I have carefully considered the provisions of the law, the submissions and authorities cited by each side. I am properly guided by the laid down principles on granting stay of execution pending appeal, extending time to file an appeal and the interests of justice.

For the court to exercise its discretion and grant an order of stay of execution pending appeal, the applicant must establish sufficient cause, substantial loss would emerge from the refusal of the order, and that furnish security. The application must be filed without delay.

Judgment was delivered on 18th December 2019. Application was filed on 11th May 2020. Explanation given for the delay was inter alia, that the Isabella Nyambura, the Legal Officer for Directline Assurance was on maternity leave and could not give the requisite instructions to the company's advocates.

This fact was not contested by the respondent and although no documentary evidence was attached to support the same I have no reason to doubt that counsel was on maternity leave as deponed. However the timelines are so vaguely expressed as to appear to clearly obfuscate the fact that from 18th December to 11th May 2020 is five months. When did counsel's maternity leave begin? It says sometime in December 2019? When did it end? When did their advocates deliver the Judgement to them?

The other explanation is the effects of the Covid 19 pandemic on the justice system, where courts temporarily were not working and the challenges of electronic filing. This is an acceptable explanation as from March 2020 there were challenges in the justice sector caused by Covid 19 pandemic, and may have contributed to the delays in filing. Though the delay is unreasonable, it is explained.

The amount involved is not substantial. The respondent argues that it was what the respondent deserved in accordance with the injuries that were sustained. It was urged for the applicant may not be capable of refunding the money should the appeal succeed. See **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another [2006] eKLR** where the Court of Appeal found that where the applicant had demonstrated that the respondent may be unable to repay the decretal sum, the intended appeal would be rendered nugatory.

The applicant is not fighting liability but the quantum. The judgment of the trial court was not attached to the application so submissions made by the applicant with regard to the same could not be verified.

It would not be in the interests of justice also to keep the successful respondent away from the fruits of his judgment. He sustained injuries and was a successful litigant as far as liability is concerned, and while the applicant may contest the quantum, they still retain liability and that in my view is a good reason for part of the award to be released to the respondent through his counsel.

The respondent has demonstrated that if part of the decretal sum is deposited with his counsel he would be satisfied.

The applicant has demonstrated the willingness to provide security for the performance of the decree.

In the end I make the following orders:

1. The application for stay of execution of the decree in Nakuru CMCC 1059 of 2018 pending appeal is allowed.
2. The applicant is granted leave to file a Memorandum of Appeal as per the attached draft.
3. Within 30 days hereof, the applicant to deposit
 - i. half the decretal sum in court as security for the performance of the decree pending the hearing and determination of the appeal
 - ii. the other half of the said sum be released to counsel for the applicant.

4. In default of 3., above, the stay to lapse and execution to issue.

5. Costs of the application to the respondent.

6. Right of Appeal 30 days.

Dated this 9th January, 2021.

Mumbua T. Matheka

Judge

Not Delivered at virtually this 13th day of January, 2021.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant: Edna

Kimondo Gachoka Advocates for the Applicant: Mrs Musili

Nancy Njoroge, Kairu & Co Advocates for the Respondent Not Present

Mrs Musili: The client settled the claim. The same be marked as settled.

Court: This Ruling was ready for delivery. However the matter is marked as settled.

13th January 2021

Mumbua T Matheka

Judge