



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

MISCELLANEOUS CIVIL APPLICATION NO. 43 OF 2020

BENSON WANYOIKE NYAMBURA.....1ST APPLICANT

ZAWERO BUNDI THIRUAINA.....2ND APPLICANT

VERSUS

ESTHER MUTHONI GICHIMU.....RESPONDENT

RULING

1. The applicant craves two reliefs: 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 30th August 2020. The intended appeal is against the judgment dated 24th February 2020 in *Kigumo Senior Principal Magistrates Civil Suit No. 231 of 2017*.
3. The core of the motion is that the applicants have an arguable appeal; and, that unless the leave and stay are granted, the appeal will be rendered nugatory.
4. The application is contested through a replying affidavit of *Esther Muthoni* sworn on 21st September 2020.
5. Both parties have filed comprehensive submissions with lists of authorities on 27th November 2020 and 26th January 2021 respectively.
6. I will commence first with the prayer for *leave* to lodge an appeal out of time.
7. There is a deposition sworn by *Daniel Mwangi*, counsel on record for the applicants. He concedes that the impugned decree was passed on 29th July 2020. However, the present motion was not presented until 8th September 2020. That delay is not well explained save his averment that “*the appellant (sic) being dissatisfied with the same has instructed their advocates to institute an appeal*”.
8. I also note that the applicants had been granted a stay in the lower court for thirty days and only approached the High Court nine days from the lapse of the right of appeal. I thus agree with the respondent that there was unexplained delay which overshoot the statutory period of presenting an appeal by *nine days*.
9. 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.
10. So can justice still be done without dismissing the intended appeal? The answer is in the affirmative: Firstly, the delay was for about *nine days* only. Secondly, there is on the face of it an arguable appeal on quantum of damages. I say so because liability was settled by *consent* in the lower court in the ratio of 90:10 in favour of the respondent. The respondent in her submissions concedes that the appellants have an undoubted right of appeal.
11. 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.

12. I am also minded 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. So much so that unless time is extended, the entire appeal may be rendered nugatory. I say that very 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. I am thus minded to grant the respondent thrown away costs assessed at Kshs 10,000 to be paid within 14 days. The intended appeal must be filed and served within 14 days of today's date. In default of any of the two conditions, the leave granted shall automatically lapse.

14. 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.

15. I have already found that there was some slight but ill-explained delay for nine days before presenting the motion.

16. 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.

17. As I stated earlier there is an arguable appeal on quantum of damages. That does *not* mean that the appeal will succeed. In ground number 8 of the motion, the applicants have 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.

18. But to ensure that neither party is left holding the short end of the stick, I will order that the entire decretal sum be deposited in a joint interest earning account of both counsel in a reputable bank within *60 days* of today's date. In default, execution shall issue.

19. My final orders are thus as follows:

- a) That the time for filing the appeal be and is hereby enlarged. The intended appeal must be filed and served within 14 days of today's date.
- b) That I grant the respondent thrown away costs assessed at Kshs 10,000 to be paid within 14 days of today's date.
- c) In default of any of the two conditions above, the leave granted shall automatically lapse.
- d) That there shall be a stay of execution of the decree pending the hearing and determination of this appeal. The stay is conditional upon the applicants depositing the sum of Kshs 1,365,845 in a joint interest earning account of both counsel in a reputable bank within *60 days* of today's date. In default, execution shall issue.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 25th day of February 2021.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the applicants.

Ms. Boore holding brief for Mr. Mbuthia for the respondents.

Ms. Dorcas Waichuhi & Susan Waiganjo, Court Assistants.