



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. E021 OF 2020**

**ELIAS KITHINJI KARIA.....APPLICANT**

**VERSUS**

**SILAS KIMATHI JAPHET.....RESPONDENT**

**RULING**

1. Before the Court is a Notion of Motion dated 5<sup>th</sup> November 2020 seeking the following orders: -

***i) Spent***

***ii) Spent***

***iii) THAT this Honourable Court be pleased to grant leave to the Applicant herein to file an Appeal out of time against the decision, Judgement and Decree in Meru CMCC No. 18 of 2018 (Silas Kimathi Japhet vs Elias Kithinji Kaaria)***

***iv) THAT upon granting the orders in prayer No. 3 above, this Honourable Court be pleased to issue an order for stay of execution of the Judgment and Decree in Meru CMCC No. 18 of 2018 pending the filing, hearing and determination of the said intended Appeal.***

***v) THAT the costs of this application be costs in the Appeal.***

2. The genesis of the matter is a claim for general and special damages brought by the Respondent against the Applicant in Meru CMCC No. 18 of 2018 following injuries sustained in a road traffic accident that occurred along Meru-Katheri road on 9<sup>th</sup> May 2017 when the Respondent, being a passenger in motor vehicle registration number KCD 713B Toyota Belta which was being driven by the Applicant got injured.

3. By Judgment delivered on 30<sup>th</sup> September 2020 by Hon. M. A. Odhiambo RM, the Applicant was found 100% liable and the Respondent was awarded Ksh.800,000/= as general damages and Ksh 24,230/= as special damages.

4. Being dissatisfied with the said Judgment, the Appellant herein intends to appeal to this Court but having failed to file the appeal within prescribed time, now seeks leave of court to file an Appeal out of time as well as stay of execution pending hearing and determination of the Appeal.

***Applicant's Case***

5. The Application is supported by the supporting affidavit of the Applicant sworn on 5<sup>th</sup> November 2020 setting out a case for an appeal against the quantum. He avers that despite having agreed with his Insurer to Appeal against quantum, his Insurers, who were the ones supposed to issue instructions to his Advocates only got to issue the said instructions on 31<sup>st</sup> October 2020, one day past the date within which the Appeal ought to have been filed. He contends that he has an arguable appeal which raises triable issues as shown in his draft Memorandum of Appeal. He contends that his appeal has a high probability of success; that it is necessary that stay of execution be granted so that his Appeal will not be rendered nugatory; and that he stands to suffer irreparable loss and damage if stay is refused. He contends that the Respondent is an impecunious individual, with no known assets, property or any source of income who will not be able to refund the decretal sum should the Appeal succeed. He also indicates that he is ready, capable and willing to offer a reasonable security for the satisfaction of any reasonable resultant decree that may be issued in favour of the Respondent at the conclusion of the Appeal. He contends that the application has been brought without undue delay and if allowed, the Respondent will not be prejudiced in any way.

***Respondent's Case***

6. The application is opposed and the Respondent filed a replying affidavit sworn on 17<sup>th</sup> November 2020. He claims that the Applicant is dishonest as he is challenging the judgement on liability despite the same having been entered by consent after Meru CMCC No. 17 of 2018, the test suit was determined. He contends the Applicant's Advocates, having taken 31 days to give instructions to file an appeal, the same constitutes inordinate delay. He contends that he suffered serious injuries leading to loss of his upper limb and that no substantial loss will be suffered by the Applicant should he pay this amount. He contends that the Applicant has been indolent and the reasons advanced for the delay are not sufficient. He contends that the appeal is not an arguable one because the Ksh 800,000/= awarded to him as general damages was inordinately low and he believes that he was entitled to more. He contends that the Applicant's application does not disclose what loss is to be suffered should stay not be granted. He contends that the Applicant has failed to show that if his appeal succeeds, he will be unable to recover the sums awarded and/or that the decretal sum is so large compared to his financial status thereby rendering the Appeal nugatory. He contends that the Applicant has come to Court with unclean hands, not having provided any security and should not be aided to curtail his rights. He contends that in the event the Applicant's application is allowed, the decretal amount should be put in a joint interest earning account. He contends that he ought to be allowed to enjoy the fruits of his judgment. He prays for the application to be dismissed with costs.

#### ***Applicant's Submissions***

7. The Application was canvassed by way of written submissions. The Applicant filed submissions dated 14<sup>th</sup> January 2021. He contends that good grounds have been given as to why the Appeal was not filed within time. He submits that the delay was not inordinate since the instructions to lodge the appeal were issued by the insurer only one day after the end of the thirty (30) day period. He submits that the Application has been brought in utmost good faith and it does not in any way prejudice the Respondent's interests and case and that the Respondent has not tendered any proof to show that he shall be prejudiced if the application is allowed. With respect to the prayer for stay of execution, the Applicant submits that he moved the Court without any unreasonable delay; that the Respondent has not demonstrated that he is in a position to refund the decretal amount should the Appeal succeed and that he is apprehensive that should his Appeal succeed, he will not be able to recover the money from the Respondent. He relied on among others, the case of ***Antoine Ndiaye Vs African Virtual University*** wherein (2015) eKLR wherein the Court cited the case of ***Tropical Commodities Supplier Ltd & Others vs International Credit Bank Limited (In Liquidation)***, Misc Application No. 379 of 2003 (unreported) where it was held that substantial loss does not represent any particular mathematical formula but is rather a qualitative concept which refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal. The Applicant argues that during hearing of the matter before the trial Court, it came out clearly that the Respondent is impecunious and has no source of income and as such would not be in a position to repay the amount in the event the Appeal is successful. He contends that the evidentiary burden shifts to the Respondent to prove his capacity to repay the decretal amount when the Applicant raises doubts and/or concerns and he relied on the case of ***National Industrial Credit Bank Limited vs Aquinas Francis Wasike & Another***, Civil Application No. NAI 238 of 2005 (UR. 14/2005), ***Alhyder Trading Company Limited vs Lucy Jepnetich Mibe*** (2016) eKLR and ***Kenya Orient Insurance Co. Ltd vs Paul Mathenge Gichuki & Another*** (2014) eKLR. He finally contends that he is capable and willing to offer a reasonable security as may be directed by the Court. He submits that unless stay is granted, he will be exposed to serious loss and damage and the intended appeal would be rendered nugatory.

#### ***Respondent's Submissions***

8. The Respondent filed his submissions dated 20<sup>th</sup> January 2021. Therein, he outlined the conditions for grant of stay of execution as per Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010. He submits that the Applicant has failed to demonstrate what substantial loss he is going to suffer if stay is not granted. The Respondent argues that the award of Ksh 800,000/= was made after judgment on liability was entered following a consent to adopt the findings of the Court on liability in the test suit and as such, the Appeal does not raise any triable issues and is frivolous. He contends further that the Applicant has failed to demonstrate that should the Appeal succeed, he would not be able to repay as he is a man of straw. He contends further that following delivery of Judgment on 30<sup>th</sup> September 2020, the Applicant knew very well that time was running and thus the delay in filing the Appeal was inordinate and unreasonable. He contends further that since the Applicant has not deposited any security for the due performance of the decree, then this is an indication that he is unable to raise the security for both the decretal sum as well as costs. He contends that he should not be made to incur more costs in responding to the Appeal which if it fails, then there would be no prospects of collecting any costs awarded. He contends that the reasons for the delay advanced by the Applicant, that it was for the insurance company to instruct the Advocate is not convincing and that the delay was intentional and inordinate, going by the fact that the insurance company has a panel of Advocates who are well aware of the effect of legal procedure. He contends that the Applicant has not given enough reason on the nature and quality of inadvertence alluded to and this is a mere case of inaction which is not excusable and cannot amount to a mistake. He urges that the Applicant having failed to satisfactorily explain the delay and having failed to satisfy the grounds for extension or enlargement of time to file an appeal out of time, the Application must fail. He urges that the Application is only meant to buy time and block the Respondent from enjoying the fruits of his judgment after suffering loss and damage from the negligence of the Applicant.

#### ***Issues for Determination***

9. There are 2 issues which the instant Application presents for determination: -

***i) Whether or not this Court should extend the time within which to file the Applicant may file its intended Appeal.***

***ii) Whether or not this Court should grant stay of execution pending Appeal.***

***Extension of the time within which to file the intended Appeal.***

10. The general statutory power to extend time is provided for under Section 59 of the Interpretation and General Provisions Act as follows: -

***Where in a written law a time is prescribed for doing an act or taking proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.***

11. As regards civil procedure, section 95 of the Civil Procedure Act, provides as follows: -

***Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.***

12. On the extension of time with regard to appeals, discretion of the Court to extend time exists upon application even after the time for doing the act in question has already lapsed as specifically provided in section 79 G of the Civil Procedure Act, as follows: -

**79G. Time for filing appeals from subordinate courts**

***Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***

***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.***

13. The provision for extension of time generally is elaborated in Order 50 Rule 6 of the Civil Procedure Rules which provides as follows: -

***“Power to enlarge time [Order 50, rule 6.]***

***6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:***

***Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”***

14. In the case of *Omar Shurie v. Marian Rashe Yafar* (Civil Application No. 107 of 2020), Asikhe Mahandia, JA. of the Court of Appeal, cited the leading case of *Sila Mutiso v. Hellen Wangari Mwangi* (1999) 2EA 231 which laid down the parameters of deciding an application for extension of time to file a Notice of Appeal in the Court of Appeal as follows: -

***“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”***

Although the said case was in the Court of Appeal, the parameters and principles applicable are relevant to this Court as well.

15. In the present application, the length of the delay, the time period between the last day (i.e thirtieth day) on which the Appeal ought to have been filed and the time of making the instant application was 5 days. A delay of 5 days is not inordinate.

16. On the reasons for the delay, the Applicant has explained that she relied on the insurance company to issue out instructions to his Advocates. This, he came to learn was only done on 31<sup>st</sup> October 2021, one day after the timeline had lapsed. The Respondent argues that is not an excuse good enough. This Court however takes note that in such accident claims, it is normal and it is in fact expected that the insurance company will take charge of the litigation process. In fact, it is the insurance company that has the burden of making the payment once an award has been made. There is indeed an email from APA insurance addressed to the law firm of Mithega & Kariuki Advocates which was sent out on 31<sup>st</sup> October 2020 which has been annexed to the Applicant’s affidavit. From the email thereon, although the previous thread has not been annexed, it appears that the email was done in reaction to a previous one. There must have been an earlier email where the Advocates had given a proposal on way forward following delivery of Judgment. The delay must have been on the part of the insurance company as pleaded. This situation was beyond the Applicant.

17. On the chances of the Appeal succeeding, the Applicant has annexed a draft Memorandum of Appeal and the grounds thereon all touch on quantum. The question that the Appeal raises is whether the quantum awarded by the trial Court was excessively high when considered against the injuries suffered. In the case of *Butt v. Khan* the principles for interfering with an award of damages were settled, as held in *Shabani v. City Council of Nairobi* (1985) KLR 516, 518-9 as follows:

***“The test as to when an appellate Court may interfere with an award of damages was stated by Law JA in Butt v Khan, Civil Appeal 40 of 1977 (a case referred to in another context by the learned judge) as follows:***

***“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that the misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”***

18. There is clearly an arguable case in the intended appeal as to whether the award of damages was excessively high. The Respondent confirms this fact since he has pleaded in his replying affidavit that according to him, the damages awarded were in fact inordinately low and

he believes that he ought to have been awarded more. An arguable case does not mean one that must eventually succeed and it is not for this Court to go into the merits of the claim at this stage. See the above mentioned case of **Omar Shurie v. Marian Rashe Yafar (Civil Application No. 107 of 2020)** where Asikhe Makhandia JA, held as follows:

***“As regards the chances of success of the intended appeal, it is not my role to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. In Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015 this Court stated as follows:***

***“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”***

19. This Court finds this to be indeed an arguable Appeal. The Respondent seems to have misconceived the intended Appeal as at some point, as he contends that the same is on liability and thus lacks merit because liability was entered by consent in the trial Court. This is incorrect; from the contents of the Memorandum of Appeal, the appeal is on quantum.

20. On the nature of prejudice to be suffered by the Respondent, the Respondent has not given any prejudice that he is likely to suffer. He only contends that the delay is denying him the fruits of his judgment, which though valid argument this Court also has a duty to balance the interests of the parties to ensure that the ends to justice are met.

#### ***Stay of Execution Pending Appeal***

21. On the second issue, i.e whether the Applicant has met the threshold for grant of stay of execution, this Court has to consider the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010, as follows:

***‘No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***No order for stay of execution shall be made under sub rule (1) unless: -***

***a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.***

***b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.’***

#### ***Substantial loss and whether the Appeal will be rendered nugatory***

22. On whether substantial loss may result to the Applicant unless the order is made, this Court observes that subject matter of the matter is the award of Ksh 800,000/= as general damages.

23. The Applicant has argued that should he be successful in the Appeal, the same is likely to be rendered nugatory and he will thereby suffer substantial loss because the Respondent is a man of straw and has no assets and/or known source of income. He contends that this fact was confirmed during hearing at the trial Court. On the other hand, the Respondent contends that the Applicant has failed to demonstrate that he, (the Respondent) will be unable to settle the decretal amount should the Appeal be successfully. This begs the question, who has the burden of proving ability and/or inability of the respondent decree-holder to pay. As was held by the Court of Appeal in ***National Industrial Credit Bank Limited -V- Aquinas Francis Wasike and Another (UR) C.A. 238/2005***, the evidential burden is on the respondent to prove that he is able to refund.

24. See ***Bonface Kariuki Wahome v. Peter Nziki Nyamai & Another*** Kajiado Civil Appeal No. 43 of 2018 (2019) eKLR, per Nyakundi J. and ***Amal Hauliers Limited v Abdulnasir Abukar Hassan*** Civil Appeal No. 18 of 2017 [2017] eKLR per W. Korir J, applying ***National Industrial Credit Bank Limited*** case, supra.

25. It is, therefore, clear that after an Applicant has raised doubts concerning the ability and/or inability of the Respondent to settle the decretal amount if an appeal is successful, the burden shifts to the said Respondent to prove that he has the means to pay. This coincides with the duty to prove special knowledge under section 112 of the Evidence Act as follows:

***“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”***

26. The Respondent herein failed to discharge this burden and merely attempted to shift the burden to the Applicant. This Court finds that there is a likelihood of the Applicant suffering substantial loss should the Appeal be successful to the extent that the Respondent’s financial capability is not known.

*Application without delay*

27. As to whether this application for stay was made without unreasonable delay, this Court finds that in the circumstances as explained, the same has indeed been made without unreasonable delay. The Judgment was delivered on **30<sup>th</sup> September 2020** and the instant application was filed on **6<sup>th</sup> November 2020** slightly over a month later. This is not unreasonable or undue delay in any circumstances, not to mention the current Covid -19 situation the hampering effect of which the court must take judicial notice.

### **Security**

28. On security, the Applicant has confirmed that he is ready, willing and able to offer security as may be directed by the Court. Such security is for the due performance of such decree as may eventually be adjudged against the appellant upon hearing and determination of the appeal.

29. The Court finds merit in the instant application. In the interests of justice, to ensure that the money is available to the eventual successful party with interest thereon, the Court will order that the Applicant deposits the entire decretal sum of Ksh.800,000/= in a joint interests earning account in the joint names of their respective Advocates for parties.

### **Orders**

30. Accordingly, for the reasons set out above, this Court makes the following orders: -

- 1. Leave is hereby granted to the Applicant herein to file an Appeal out of time against the Judgement and Decree in Meru CMCC No. 18 of 2018 (Silas Kimathi Japhet v. Elias Kithinji Kaaria).**
- 2. An order for stay of execution of the Judgment and Decree in Meru CMCC No. 18 of 2018 pending the filing, hearing and determination of the said intended Appeal is hereby issued.**
- 3. The Applicant shall with fourteen (14) days deposit the entire decretal sum of Ksh.800,000/= in a joint interest earning account in names of the respective Advocates for the parties, in default hereof execution to issue.**
- 4. There shall be no order as to costs.**

*Order accordingly.*

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF FEBRUARY 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

M/S Mithega & Kariuki Advocates for the Appellant.

M/S Gichunge Muthuri & Co. Advocates for the Respondent.