



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**MISCELLANEOUS CIVIL APPLICATION NO. 81“A” OF 2019**

**MICHAEL MURAYA KIRARA.....1<sup>ST</sup> APPLICANT**

**PATRICK GITHINJI WANJAGUA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**PETER MWANGI WWACHIRA.....RESPONDENT**

**RULING**

1. The applicants' notice of motion is two-pronged: Firstly, that *leave* be granted to lodge an appeal out of time; and, secondly, for *stay of execution* of the decree pending the determination of the appeal.
2. The notice of motion is dated 18<sup>th</sup> July 2019. It is predicated upon two depositions of *Rina Welemba*, a legal officer of the applicants' insurers sworn on 18<sup>th</sup> July 2019 and 18<sup>th</sup> September 2019 respectively.
3. The intended appeal is against the judgment dated 24<sup>th</sup> February 2020 in *Murang'a Chief Magistrates Civil Suit No. 406 of 2018*.
4. The substance 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.
5. The application is contested through a replying affidavit of the respondent, *Peter Mwangi Wachira*, sworn on 12<sup>th</sup> September 2019.
6. Both parties have filed submissions with attached precedents on 18<sup>th</sup> June 2020 and 18<sup>th</sup> August 2020 respectively.
7. I will embark first on the prayer for *leave* to enlarge the time to appeal.
8. The impugned decree was passed on 27<sup>th</sup> May 2019. The period to lodge an appeal elapsed thirty days thereafter. However, the present motion was not presented until 18<sup>th</sup> July 2019; some 12 days or so outside after the expiry of time. That delay is not well explained save for the averment that "*the appellants/applicants inadvertently delayed to instruct their advocates on record to appeal*".
9. In the further affidavit, the applicants refer to two letters dated 6<sup>th</sup> June 2019 and 27<sup>th</sup> June 2019 respectively addressed to the respondent's counsel seeking a compromise on the decretal sum and requesting for supporting documents on filing fees. Instead of a reply, they were served with a copy of the decree on 4<sup>th</sup> July 2019.
10. I thus reach the following three conclusions: Firstly, that the applicants were dissatisfied with the judgment of the lower court from the very beginning. Secondly, that the unilateral attempt to negotiate the decree in the month of June 2019 was not a sound explanation for the delay. Thirdly, the applicants did not apply for the copies of proceedings and judgment until 16<sup>th</sup> July 2019 when the time for lodging an appeal had expired.
11. I thus agree with the respondent that there was unexplained delay which overshoot the statutory period of presenting an appeal by about *twelve days*.
12. 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.

13. So can justice still be done without dismissing the intended appeal? The answer is in the affirmative for four main reasons: Firstly, the delay was for about *twelve days*. Secondly, from the draft memorandum of appeal, there is on the face of it, an arguable appeal. That is *not* to say that the appeal will succeed.

14. Thirdly, I must 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.

15. Fourthly, unless time is extended, the entire appeal may be rendered nugatory. I say that very carefully as this is a money decree.

16. 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.

17. Regarding the prayer for *stay* of execution, I am well guided by 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.

18. I have already found that though ill-explained, the delay was a short one; for only twelve days before presenting the motion.

19. 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.

20. As I stated earlier there is an arguable appeal. I reiterate that it does *not* mean that the appeal will succeed. In ground (f) of the motion and paragraph 8 of the original affidavit, the applicants have offered to provide security for performance of the decree.

21. 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. The applicants aver that the respondent is a man of straw. The respondent has not countered on his capacity to refund the decretal sum if the appeal were to succeed.

22. But to ensure that neither party is left holding the short end of the stick, I will order that the principal sum be deposited in a joint interest earning account of both counsel. I had granted a conditional stay *ex parte* on 18<sup>th</sup> July 2019 but I have not seen sufficient evidence of the deposit was placed before the Deputy Registrar by 19<sup>th</sup> September 2019. The deposit must now be made into a reputable bank within 14 days of today's date. In default, execution shall issue.

23. 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 principal sum of Kshs 1,611,068 in a joint interest earning account of both counsel in a reputable bank within *14 days* of today's date. In default, execution shall issue.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A this 25<sup>th</sup> day of February 2021.**

**KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Nyakirega holding brief for Mr. Mukasa for the applicants instructed by Menezes & Partners Advocates.

Mr. Maina for the respondent instructed by Waweru Maina & Company Advocates.

Ms. Dorcas Waichuhi & Susan Waiganjo, Court Assistants.