



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS CIVIL APPLICATION NO. E019 OF 2021

KELVIN MWANGI MBUBA.....RESPONDENT

VERSUS

NEWTON KIOGORA1ST APPLICANT/INTENDED APPELLANT

DERRICK MUTUMA MUNYURA.....1ST APPLICANT/INTENDED APPELLANT

RULING

1. By Notice of Motion dated 8th April 2021 the applicant seeks leave to appeal out of time and stay of execution of the judgment of the trial court substantially as follows:

1. ...

2. *That this honourable court be pleased to grant to leave to the applicants to appeal out of time against e judgment delivered on 3rd march 2021 by the Hon magistrate J. Irura in Nkubu Prinicipal magistrates Court Civil suit NO. 101 of 2019.*

3.

4. *That this Hon court be pleased to stay execution of the judgment and decree in Nkubu Principal Magistrate’s Court Civil suit NO. 101 of 2019 pending he hearing and determination of the intended appeal herein.*

2. The application was opposed by the Respondent who filed a Replying Affidavit sworn on 19th April 2021. The court has considered the principles for the grant of leave to appeal out of time and stay of execution pending appeal.

Determination

Delay

3. The judgment was delivered on 3rd March 2021 and the application dated 8th April 2021 for leave to appeal out of time was filed on 14th April 2021 barely a week after expiry of the 30-day period allowed for appeal under section 79 G of the Civil Procedure Act, and I do not find that the delay herein was inordinate. An application for extension of time is competent even after the expiry of the time prescribed for the doing or taking of the step the doing or taking of which extension is sought. See Order 50 rule (5) of the Civil Procedure Rules, which provide that “*such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed*”. The applicant may only be mulcted in costs in accordance with the Proviso thereto as follows:

*“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.”*

4. The applicant herein brought his application for leave to appeal out of time without unreasonable delay and the same will be granted subject to payment of costs in accordance with applicable rule.

Application for stay of execution

Substantial loss if stay of execution is not granted

5. Although taken a specific ground in the Notice of Motion under paragraph (h) and paragraph 14 of e Affidavit of Kevin Ngiure that “*the*

applicants stand to suffer substantial and irreparable loss and damage as there is a likelihood that the applicants will be unable to recover the decretal sum awarded herein from the respondent”, no rebuttal on evidence, apart from a bare assertion, was offered by the respondent that he has the means to repay the decretal sum if the appeal were successful, as held in the Court of Appeal decision of **National Industrial Credit bank Ltd. Aquinas Francis Wasiske & Anor Civil Application No. Nai 238 of 2015 (2006) eKLR** by R. S. C. Omolo J, E. O. O’kubasu J and E. M. Githinji J:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”.

6. This court must, therefore, consider that the applicant has demonstrated substantial loss if the entire decretal sum was paid to avoid execution or in execution of the decretal sum, which the applicant would not be able to recover in the event of a successful appeal.

Security

7. The appellant offered security in form of a bank Guarantee. The Respondent, however, deponed that he was in need of money to meet the costs of treatment as identified by his doctor in a medical report thereon attached as exhibit KMM 2 to the affidavit of Kevin Mwangi Mbura sworn on 19th April 2021. The said report does not disclose the cost of the treatment.

8. The court considers that although the appellant is entitled to protection from loss of decretal sum by failure to recover upon successful appeal, the circumstances of the case where the respondent is shown to require funds to meet medical treatment calls for release of a limited sum of money which in the opinion of the court does not overly expose the appellant to substantial loss in the event of successful appeal. I consider the payment of a third (1/3) of the decretal sum to meet the justice of the case.

Orders

9. Accordingly, for the reasons set out above, the court makes the following orders:

1. Leave to appeal out of time is granted.
2. The appellant shall file the Memorandum of Appeal with seven (7) days and the Record of Appeal with thirty (30) days from today.
3. There shall be stay of execution of the judgment and decree of the trial court on the condition that the appellant shall within fourteen (14) days pay to the respondent the sum of **Ksh.300,000/-** approximating one third (1/3) of the decretal sum of Ksh.921,720/- and lodge with the court a Bankers Guarantee or Insurance Bond for the payment of balance of Ksh.621,720/-, interest and costs.
4. In default of compliance with Order NO. 3 above, the stay of execution herein granted shall lapse and be of no effect.
5. In accordance with Order 50 Rule (5) Proviso of the Civil Procedure Rules the appellant/applicant shall pay the costs of the application for extension of time to file appeal herein.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF APRIL 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kimondo Gachoka & Co. Advocates for the Applicant.

M/S Mutuma & Koskei. Advocates for the Respondent.