



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCC MISC APPL. NO. E006 OF 2021

MWANIKI JOHN.....1ST APPLICANT

AHMED ALI.....2ND APPLICANT

-VERSUS-

PETER MUTISYA MWANGANGIRESPONDENT

RULING

1. Before me is a Notice of Motion dated 21st January 2021 filed by M/s Kimondo Gachoka & Co advocates for the Applicants Mwaniki John and Ahmed Ali.

2. The application seeks several orders, some of which have been spent as follows:-

1) (Spent)

2) (Spent)

3) That the court be pleased to order stay of execution of the judgment in Tawa Civil Suit No. 124 of 2017 delivered on 17/10/2019 and stay of declaratory suit Tawa Civil Suit 160 of 2019 pending the hearing and determination of the Appellant's intended appeal.

4) That the honourable court be pleased to grant the Applicant /intended Appellant leave to file a memorandum of appeal as attached draft against the ruling/judgment delivered on 23/10/2019 in Tawa Law Courts.

5) That the honourable court be pleased to extend time and grant leave to the Applicants/Appellants to lodge a memorandum of appeal out of time against the judgment and decree entered against the Applicant herein.

6) That, such other additional, suitable and or alternative orders be made as are just and expedient all circumstances of the case and this application considered.

7) That, costs of this application be provided.

3. The application has grounds on the face of the Notice of Motion and was filed with a supporting affidavit sworn by Kelvin Nguni, Legal Officer of Directline Assurance Company Ltd on 28th January 2021.

4. The application is opposed through a replying affidavit sworn on 22nd February 2021 by Anne Munyao advocate for the Respondent.

5. The application proceeded through filing of written submissions. The Respondent's counsel filed written submissions on 17th March 2021 and the Applicants' counsel filed written submissions on 12th April 2021. I have perused and considered the written submissions on both sides.

6. This is an application for stay of execution of judgment or decree as well as an application for stay pending proceedings, and also an application for extension of time to file an appeal.

7. With regard to the request for stay of execution of judgment or decree which Respondent's counsel did not address in their written submissions, the provisions of the law applicable is Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which provides as follows –

6(2) No order for stay of execution shall be made under subrule (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; and

(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.

8. In our present case, in my view, the Applicants have shown the court through documents filed and in submissions that they will suffer substantial loss, if the orders of stay of execution are not granted with regard to Tawa magistrates Civil Case No. 124 of 2017. They say the award of damages was inordinately high, and have offered to deposit half of the decretal amount in court as security. I will grant stay of execution of judgment or decree on specific conditions.

9. I now turn to the request for stay of the proceedings in the declaratory suit No. 160 of 2019. In this regard, courts and tribunals are called upon by the Constitution to ensure expeditious disposal of disputes under Article 159 of the Constitution which states as follows:-

159(1) Judicial authority is derived from the people and vests in and shall be exercised by the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

a)

b) Justice shall not be delayed

c)

10. It follows from the above constitutional provisions that courts are required to dispose of cases without delay and that there have to be demonstrated adequate grounds for granting orders of stay of pending court proceedings. In this regard, each court has powers to fix the hearing dates for cases pending before them, according to their respective diaries and may adjourn the hearing to another date. Thus, for this court to stay proceedings pending in another court, there have to be sufficient grounds demonstrated by an Applicant to justify such a decision. In the present case, in my view, the Applicants have not shown or demonstrated any such sufficient grounds for stay of proceedings in the magistrates' court. They have already filed a defence and have not for example demonstrated that they have been prevented from participating in those proceedings, or demonstrate any obstacle to their so participating. I thus decline to stay the proceedings in the Tawa court – in the declaratory suit No. 160 of 2019.

11. I now turn to the request for enlargement of time to appeal out of time. Section 75 G Civil Procedure Act (Cap 21) is relevant and it states as follows –

“75G. 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.”

12. I note that in the grounds supporting the application, the Applicants gave only one reason under ground (e) for the delay in filing appeal in time, which is that the Appellants/Applicants were unable to file a memorandum of appeal on time since the advocate who had earlier held the Applicants' brief had since left the firm. In the supporting affidavit however, they did not rely on that ground, but instead stated as follows, under paragraphs 5 and 10 of the supporting affidavit –

“5. That the court sessions were destabilized by the Corona virus pandemic and directions for e-filing were issued in 2020 which was after the lapse of the 30 days stay of execution.

10. That the delay in filing the above mentioned appeal has been occasioned by the fact that Corona virus pandemic destabilized the entire nation including Judiciary system and filing of documents could not take place until after the directions on e-filing were granted.

13. Though it is trite that in an application for extension of time to file an appeal out of time, this court has unfettered discretion in deciding whether to grant such extension of time. See the case of **Leo Mutiso –vs- Rose Wangare (1999) 2EA 231**, the onus is upon the applicant to satisfy the court upon reasons that there exist sufficient legal grounds for such extension of time. In my view, an applicant for extension of time has to explain to the court the length of the delay, the reasons for the delay, and lastly whether there will be no prejudice to the Respondent, in order to persuade the court to grant such extension of time to file an appeal.

14. In my view, the explanations given herein by the Applicants on the reasons for the delay in filing appeal are not convincing as they do not even give the duration of delay between the date of judgment of the trial court and the time they filed this application. They also refer to the Covid-19 pandemic but do not attempt to give any indication on the date or months when restrictions were imposed. Infact from their supporting affidavit, it appears that the Covid-19 complications arose long after the lapse of the 30 days allowed for filing appeal, and thus in effect could not affect the period of 30 days in which they were required to file their appeal.

15. Having said so, in view of the confusion that has followed the outbreak of Covid-19, I will give them the benefit of the doubt and grant them leave to appeal out of time.

16. To conclude, I order as follows:-

i. The request to stay proceedings in Tawa declaratory suit No. 160 of 2019 is hereby declined.

ii. I grant leave to the applicants to appeal out of time. Appeal will be filed within 14 days from today.

iii. I grant stay of execution of judgment or decree in Tawa magistrates civil suit No. 124 of 2017, subject to the applicant paying the decree holder Kshs.100,000/= of the decretal amount within 30 days from today.

iv. If the applicant fails to pay the decree holder the amount of Kshs.100,000/= in (iii) above as directed herein, the stay of execution orders granted by this court will automatically lapse.

v. Costs of the application will follow results of the appeal.

Delivered, Signed & dated this 29th day of April, 2021 in open court at Makueni.

GEORGE DULU

JUDGE