



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**MISC CIVIL APPLICATION NO E 052 OF 2020**

**MAGANJO PETER.....1<sup>ST</sup> APPLICANT**

**SHADRACK WAWERU GICHUNGU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**RASHID JUMA OGONGO & VALRED ODHIAMBO OGONGO**

**(Suing as the Legal representatives of the estate of**

**RODNEY OTIENO JUMA (DECEASED).....RESPONDENTS**

**RULING**

1. In their Notice of Motion dated 14<sup>th</sup> December 2020 and filed on 15<sup>th</sup> December 2020, the Applicants sought an order for leave to lodge an appeal out of time against the Judgment and decree of Honourable Patrick Olengo (SPM) that was delivered against them in **Nyando SPMCC No 190 of 2017** on 5<sup>th</sup> May 2020.
2. They further sought an order of stay the execution of the said judgement and decree pending the hearing and determination of the intended appeal. The Application was supported by an affidavit that was sworn by Kelvin Nguni, Claims Manager, Directline Assurance Company Limited on 14<sup>th</sup> December 2020.
3. The Applicants contended that they paid the decretal sum of Kshs 993,780/=. However, the Respondents sought and obtained a review of the judgment on 5<sup>th</sup> May 2020 which enhanced the general damages for lost years bringing the total to Kshs 1,681,180/=. They averred that they were aggrieved by the said whole judgment on quantum but the time to file an appeal lapsed.
4. They stated that they had an arguable appeal, which had overwhelming chances of success. They were apprehensive that they would not be able to recover the decretal sum in the event they paid the Respondents the decretal sum and were successful on appeal. They contended that they were willing, ready and able to furnish security.
5. They contended the delay in not filing the present application was not inordinate and was excusable. They further averred that the Respondent would not suffer any prejudice that could not be compensated by way of costs. They therefore urged this court to allow their application as prayed.
6. In opposition to the said application, on 22<sup>nd</sup> January 2021, the Respondents filed a Replying Affidavit that was sworn on even date. They admitted that the Applicants paid them a sum of Kshs 993,780/= leaving a balance of Kshs 872,785/=-.
7. They asserted that the present application had been brought eight (8) months after the judgment was delivered in the lower court and that the Applicants failed to file their appeal within a period of thirty (30) days as stipulated by the law. It was their contention that the delay in bringing the said application was inordinate. They further stated that the said application as an afterthought, incompetent, misconceived, vexatious, mischievous and an abuse of the court process and asserted that the same was intended to derail justice.
8. They averred that in the event the court were to grant the Applicants the orders they had sought, then they should be ordered to deposit the sum of Kshs 872,785/= in a joint interest earning account in the names of the counsels on record within thirty (30) days failing which execution to issue.
9. The Applicants submitted that Section 79 G of the Civil Procedure Act Cap 21 (Laws of Kenya) provided that an appeal could be filed out

of time and that Section 95 of the Civil Procedure Act gave power to court to enlarge court for doing an act even though the time originally fixed had expired. They were categorical that they should not be denied the right of appeal due to procedural technicalities. In this regard, they relied on the case of **Edith Gichugu Koine vs Stephen Njagi Thoithi [2014] eKLR**.

10. They further submitted that their intended appeal was arguable and that they had met the conditions for grant of order for stay of execution as provided by Order 42 Rule 6(2) of the Civil Procedure Rules and urged this court to exercise its discretion and grant the same pending the hearing and determination of the intended appeal. To buttress this point, they relied on the case of **Francis Njakwe Githiari & Another vs Daniel Toroitich Arap Moi T/A Moi Educational Centre [2006] eKLR**.

11. The Respondents relied on the following the cases of **Machira T/A Machira & Co Advocates vs East African Standard** (eKLR citation not provided) to support their argument that the Applicants have not adduced sufficient cause to warrant being granted an order for stay of execution pending appeal.

12. Under Section 79G of the Civil Procedure Act, appeals from the subordinate courts to the High Court must be filed within a period of thirty (30) days from the date of the decree or order from which the appeal lies. The above proviso to the said Section is also clear that a court can also grant a party leave to file an appeal out of time where sufficient cause has been shown.

13. That being said, the guiding principles to be met in an application seeking leave of the court to file an appeal out of time/extension of time were then laid out in the case of **Thuita Mwangi vs Kenya Airways Limited [2003] eKLR** and were reaffirmed in the case of **Growth Africa (K) Limited & another vs Charles Muange Milu [2019] eKLR**. The first and second principles concern the length and reason for the delay respectively.

14. From the record, it is apparent that the impugned judgment was delivered on 5<sup>th</sup> May 2020. The present Notice of Motion application was filed on 15<sup>th</sup> December 2020. Seven (7) months had since passed. The court noted that Judgment was delivered on 30<sup>th</sup> January 2020. The Respondents filed an application for review, which application was allowed on 5<sup>th</sup> May 2020 and the judgment enhanced to Kshs 1,866,565/=. The Applicants paid part of the decretal sum of Kshs 993,780/= vide a remittance advise dated 14<sup>th</sup> October 2020.

15. The court agreed with the Respondents that the delay in filing the present application was inordinate. The Applicants did not explain the reason for the delay. Be that as it may, it was the view of this court that the delay was not inexcusable as no prejudice was occasioned to the Respondents herein. Indeed, this court was not satisfied that the Respondents would suffer any prejudice if the Applicants exercised their constitutional right of appeal. If there was any prejudice, then they did not demonstrate the same.

16. For all the foregoing reasons, the court was satisfied that this was a proper case for it to exercise its discretion to allow the Applicants the opportunity of pursuing an appeal against the lower court's decision.

17. Turning to the order for stay of execution pending appeal under Order 42, Rule 6 (2) of the Civil Procedure Rules, before such an order can be granted, an applicant has to demonstrate the following:-

**a. That substantial loss may result unless the order is made.**

**b. That the application has been made without unreasonable delay.**

**c. Such security as the court orders for the due performance of the decree has been given by the applicant.**

18. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.

19. The decretal sum herein was Kshs 1,681,180/=. The Applicants had since paid part of it. The balance of Kshs 872,785/= was not a colossal amount of money. However, the Respondents did not file an Affidavit of Means to demonstrate that they would refund the Applicants the said sum in the event they were successful in the intended appeal.

20. In the case of **G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] e KLR**, this very court held as follows:-

**“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”**

21. This court was further guided by the holding of the Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** where it held thus:

**“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...”**

22. In the absence of proof that the Respondent would be able to refund the Applicants' insurer the entire decretal sum without any hardship,

this court was satisfied that they would suffer substantial loss. The Applicants had thus satisfied the first condition of being granted an order for stay of execution pending appeal.

23. Having found that the present application had been filed without unreasonable delay, this court was satisfied that the Applicants had met the second condition of being granted an order for stay of execution pending appeal.

24. The Applicants' insurer had indicated that that they were willing to provide security and consequently, it was therefore the considered opinion of this court that they had demonstrated that they had complied with the third condition of being granted an order for stay of execution pending appeal.

25. However, this court took the view that security in form of a bank guarantee was not suitable considering that there was a possibility of the bank that would issue bank guarantee not honouring its obligations as it would not be a party to the suit herein making it difficult for the Respondents to enforce any orders it might get regarding the said bank guarantee. This court therefore determined that the security to be furnished would be in form of money.

26. Weighing the Applicants' right to have their dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondents' fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicants if they were denied an opportunity to ventilate their Appeal on merit without an order for stay of execution pending appeal being granted herein.

### **DISPOSITION**

27. For the foregoing reasons, the upshot of this court's decision was that the Applicants' Notice of Motion application dated 14<sup>th</sup> December 2020 and filed on 15<sup>th</sup> December 2020 was merited and the same is hereby allowed in terms of Prayer No (2) and (4) therein in the following terms:-

- 1. The Applicants be and are hereby directed to file and serve their Memorandum of Appeal within fourteen (14) days from the date of this Ruling.**
- 2. The Applicants be and are hereby directed to file and serve their Record of Appeal within one hundred and twenty (120) days from the date of this Ruling.**
- 3. The Deputy Registrar High Court of Kenya Kisumu is hereby directed to facilitate the expeditious typing of the proceedings in the lower court to enable the Applicants comply with the timelines within which to file their Record of Appeal as aforesaid.**
- 4. There shall be a stay of execution of the decree in Nyando SPMCC No 190 of 2017 Rashid Juma Ogongo & Another (suing as the legal representatives of the estate of Rodney Otieno Juma (deceased) vs Maganjo Peter & Another on condition that the Applicants shall deposit into an interest earning account in the joint names of their counsel and counsel for the Respondents herein, the sum of Kshs 872,785/= within thirty (30) days from the date of this Ruling.**
- 5. For the avoidance of doubt, in the event, the Applicants shall default on Paragraph 27(4), the conditional stay of execution shall automatically lapse. The Respondent shall be at liberty to take such appropriate action in the event the Applicants shall default on Paragraph 27(1) and Paragraph 27 (2) hereinabove.**
- 6. Either party is at liberty to apply.**
- 7. Costs of the application will be in the cause.**

28. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 29<sup>TH</sup> DAY OF APRIL 2021**

**J. KAMAU**

**JUDGE**