



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC APPLICATION NO E022 OF 2020

BENARD KIGADA.....1ST APPLICANT

BONIFACE OCHIENG OMOLLO.....2ND APPLICANT

VERSUS

TOM OCHIENG ODENY.....RESPONDENT

RULING

1. In their Notice of Motion dated 24th November 2020 and filed on 25th November 2020, the Applicants sought an order for leave to lodge an appeal and file a memorandum of appeal out of time against the Judgment and decree of Honourable F. Rashid (SRM) that was delivered against them in **Winam Civil Suit No 174 of 2019** on 13th October 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 Pauline Waruhiu, Senior Claims Manager, Directline Assurance Company Limited on 24th November 2020.
3. The Applicants contended that they were aggrieved by the entire judgment of the Learned Trial Magistrate and had instructed their advocates to appeal against the same. 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 Respondent the decretal sum and were successful on appeal. They contended that they were willing, ready and able to furnish security.
4. They contended that by the time they instructed their advocates to appeal against the decision, the time for appeal had long lapsed. They apologised for the delay but averred that the delay 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.
5. In opposition to the said application, on 9th December 2020, the Respondent filed a Replying Affidavit that was sworn on 4th December 2020. He contended that the present application had been brought two (2) months after the judgment was delivered in the lower court. He termed the said application as an afterthought, incompetent, misconceived, vexatious, mischievous and an abuse of the court process and asserted that the same intended to deprive him the fruits of his judgment.
6. He averred that the Applicants had not disclosed sufficient reason why the said application should be granted. He pointed out that in the event the court were to grant them the orders they had sought, then they should be ordered to pay him half of the decretal sum in the sum of Kshs 255,000/= and the balance of Kshs 255,000/= be deposited in a joint interest earning account in the names of the counsels on record and the party and party costs to be assessed within thirty (30) days failing which execution to issue.
7. 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 hence they should not be denied the right of appeal due to procedural technicalities. In this regard, they relied on the case of **Samuel Mwaura Muthumbi v. Josephine Wanjiru Ngugi & Another [2018] eKLR.**
8. 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. They argued that they would suffer substantial loss if they paid the Respondent the decretal sum of Kshs 600,000/=. To buttress this point, they relied on the case of **G.N Muema P/A (Sic) Mt. View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] e KLR.**
9. They further submitted that their insurance, Directline Insurance was a reputable institution and was willing to deposit a bank guarantee with Diamond Trust Bank to the performance of the decree. They referred this court to the case of **Justin Mutunga David vs China Road & Bridge Corporation (K) Limited [2019] e KLR** where the court therein noted that a bank guarantee was an acceptable mode of furnishing security.

10. The Respondent relied on the case of Machira & Co Advocates vs East African Standard (No. 2) [2002] KLR 63 to support its case. He argued that it was the Applicants who were required to satisfy the conditions for stay and not to bring in a stranger like in this case, a bank. In response to the Applicants' submissions that he was not a man of means, he maintained that the court must balance between the Applicants and his interests.

11. He argued that it was the Applicants who were required to satisfy the conditions of stay and not to bring a stranger like in this case, a bank. In response to the Applicants' submissions that he was not a man of means, he maintained that the court must balance between the Applicants and his interests.

12. Under the provisions of Order 50 Rule 6 of the Civil Procedure Rules, 2010, courts have power to enlarge the time required for the performance of any acts stipulated in the Rules notwithstanding the fact that such time has expired. It therefore follows that whether to extend time is a matter of judicial discretion.

13. 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.

14. 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 v Kenya Airways Limited [2003] eKLR and were reaffirmed in the case of Growth Africa (K) Limited & another v Charles Muange Milu [2019] eKLR. The first and second principles concern the length and reason for the delay respectively.

15. From the record, it is apparent that the impugned judgment was delivered on 13th October 2020. The present Notice of Motion application was filed on 25th November 2020. One and a half (1½) months had since passed. Although the Applicants did not explain the reason for the delay, only apologising for the same, this court came to the firm conclusion that the length of the delay was not inordinate and/or unreasonable.

16. The court perused the draft memorandum of appeal that was annexed to the said Notice of Motion application and noted that the appeal essentially sought to challenge the award of damages, which the Applicants believed to be excessive in the circumstances. At this point in time, it is not the duty of this court to consider the merits of the appeal. Nonetheless, the court found and held the question as to whether or not the award of damages was excessive in the circumstances of the case warranting interfering by the appellate court was an arguable ground of appeal, which the Applicants ought to be given an opportunity to canvass on merit.

17. The fourth principle concerns itself with the prejudice, which would befall the Respondent, should the Applicants be granted leave to appeal out of time. This court was not satisfied that the Respondent would suffer any prejudice if the Applicants exercised their constitutional right of appeal. If there was any prejudice, he did not demonstrate the same.

18. 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.

19. 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.

20. 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.

21. The decretal sum herein was Kshs 600,000/=. It was not a colossal amount of money. However, the Respondent did not file an Affidavit of Means to demonstrate that it would refund the Applicants the said sum in the event they were successful in the intended appeal.

22. In the case of G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another (Supra), 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.”

23. 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...”

24. 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. The court addressed the question of releasing half of the decretal sum to the Respondent herein later in the Ruling herein.

25. 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.

26. The Applicants’ insurer had indicated 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.

27. 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 not honouring the bank Guarantee as the bank that would issue the same would not be a party to the suit herein making it difficult for the Respondent to enforce any orders it would get regarding the said bank guarantee, if at all. This court therefore determined that the security to be furnished would be in form of money.

28. Further, as the Applicants were not contesting the issue of liability, it was the considered view of this court that the Respondent would be entitled to a certain amount of money. As it was not clear to this court what the injury and/or loss was, it was hesitant to order that the Applicants release half of the decretal sum to the Respondent herein but only part of it.

29. Weighing the Applicants’ right to have his 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 Respondent’s 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

30. For the foregoing reasons, the upshot of this court’s decision was that the Applicants’ Notice of Motion application dated 24th November 2020 and filed on 25th November 2020 was merited and the same be and 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 Winam Civil Suit No 174 of 2019 Tom Ochieng Odeny vs Benard Kigada & Another on condition that the Applicants shall:-

a. pay the Respondent a sum of Kshs 150,000/= within thirty (30) days from the date of this Ruling.

b. deposit into an interest earning account in the joint names of their counsel and counsel for the Respondent herein, the sum of Kshs 450,000/= 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 30(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 30(1) and Paragraph 30 (2) hereinabove.

6. Either party is at liberty to apply.

7. Costs of the application will be in the cause.

31. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL 2021

J. KAMAU

JUDGE