REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. E049 OF 2021

EMMANUEL EBEI OYEN.....APPLICANT

VERSUS

RICHARD NJUGUNA WARIARA.....RESPONDENT

RULING

1. This is the notice of motion dated 5th February 2021 brought under sections 1A, 1B, 3, 3A, 79G and 95 of the Civil Procedure Act and Order 42, Rule 6 of the Civil Procedure Rules. It seeks the following orders:

> *1. Spent.*
>
> *2. That the applicant herein be granted leave to appeal against the decree emanating from the judgment of the Chief Magistrates court in Milimani CMCC No. 9462 of 2018, Richard Njuguna Wariara vs. Emmanuel Ebei Oyen out of time*
>
> *3. Spent.*
>
> *4. This Honourable Court do issue stay of execution in Milimani CMCC No. 9462 of 2018, Richard Njuguna Wariara vs Emmanuel Ebei Oyen pending the hearing and determination of the intended appeal.*
>
> *5. Costs of this application be in the cause.*

2. The application is supported by the grounds on its face plus the sworn affidavit of Rosemary Kangwana the deputy manager, legal services at Monarch insurance company limited the applicant's insurer. A summary of the grounds and averments is that the impugned judgment was delivered on 2nd October 2020 and the applicant embarked on acquiring a copy of the judgment by writing to the deputy registrar which was not achieved. A follow up was made on 16th December 2020 vide the judiciary e-filing system by way of an application and the same was assessed and paid for. No further communication was received on the said application from the court. The present application was then filed.

3. It's the applicant's position that his intended appeal has high chances of success as he is challenging the award of Kshs 1,000,000/= in view of the injuries suffered. He fears that if the orders sought are not granted the respondent will proceed with execution which will cause him substantial loss.

4. The affidavit by Rosemary Kangwana reiterates the grounds already set out above. She avers that it was only after receiving a copy of the judgment that they were able to give their advocates instructions on the filing of an appeal. This was on 7th December 2020 (SK-3). She annexed a draft copy of the memorandum of appeal (S.K.4) and a letter (SK5) dated 30th November 2020 threatening them with execution.

5. Annexed as (SK6) is the email trail between the applicant's advocates, the e-filing team and the high court registry to confirm why there was delay in filing the present application. She confirmed the applicant's willingness to comply with any conditions the court may impose for them to be allowed to file the appeal out of time.

6. In his replying affidavit sworn on 26th February 2021 the respondent opposed the application saying the same is misconceived, fundamentally flawed, incompetent, unmerited, frivolous, pretentious etc. He has deposed that no good reason has been given to warrant the granting of the leave sought. He further avers that after delivery of judgment the counsel for the applicant sought and was granted 45 days stay of execution. That he was therefore aware of the contents of the judgment.

7. He has also disputed the claim on late receipt of a copy of the judgment since his advocates applied for the same and received it well before the expiry of the time for lodging an appeal (RNW1). The deponent further refers to communication between their advocates

(RNW2-4) and states that the applicant never had any intention of appealing against the judgment, as he was said to have been processing the payment for settlement of the matter.

8. He avers that no good reason has been given for the failure to file the appeal in good time. The application is therefore an abuse of the court's process. He adds that the intended appeal is not arguable as the award made was commensurate with the injury he suffered. Further no basis has been demonstrated for the grant of stay of execution. He depones that the grant of the orders sought will deny him the right to enjoy the fruits of his judgment.

9. The application was disposed of by written submissions. Upon pointing out the salient facts of this matter Mr. Kiruki for the applicant identified the issues for determination to be as follows:

(i) Whether the applicant should be granted leave to appeal out of time; and

(ii) Whether this honourable court should issue stay of execution pending hearing and determination of the intended appeal.

10. On the first issue counsel has referred to sections 79G and 95 of the Civil Procedure Act and submits that the applicant has satisfactorily explained the cause of delay which explanation is reasonable. Upon failure to get instructions on the application filed and paid for on 16th December 2020 (SK-6) he was forced to file the present application.

11. On the second issue counsel has relied on Order 42 rule 6(1) and 2 of the Civil Procedure Rules.

Order 42 Rule 6 (2) provides:

"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."

12. Based on this provision of the law counsel submits that the intended appeal will be contesting the award of general damages, costs and interest of Kshs 1,060,006/= which the applicant finds to be too high. A threat of execution (SK5) has already been issued by the respondent. Counsel has submitted that if the stay of execution is not granted the applicant will suffer irreparable damage in the event of an execution. He expressed the applicant's willingness to offer security as may be directed by the court pending the hearing and determination of the appeal.

13. Learned counsel has referred this court to two authorities namely: **JMM vs PM [2018] eKLR** where the honourable court held:

"As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."

14. Next is **Kenya Power & Lighting Co. Ltd v Rose Anyango & Anor [2020] eKLR** where Justice R. Aburili stated as follows:

"Order 42 rule 6 of the Civil Procedure Rules grants this court as an appellate court, as well as the trial court wide discretion to stay execution of decrees pending appeal. In the present case, there is no dispute that leave to appeal out of time has been granted and as stated above, from the draft Memorandum of Appeal, it is clear to me that it is not frivolous.

It raises triable issues of whether or not the trial magistrate erred in law and fact in holding the appellant 100% liable for the occurrence of the accident. Indeed, the decree is a money decree and therefore the question of the appeal being rendered nugatory if successful does not arise as it was not shown that the Respondent decree holder is so impecunious that she cannot refund the decretal sum awarded if the same is paid out to her.

Furthermore, in its pleadings, the appellant has not disclosed the quantum of damages awarded to the 1st respondent. It is therefore difficult for this court to establish whether such award was manifestly excessive or otherwise, and capable of interference by the court on appeal should the court find that the appellant was liable for the accident. The applicant has therefore not demonstrated that it will in any way suffer any loss in the event that stay is not granted. The applicant has offered security for the due performance of decree.

The above notwithstanding, it is also incumbent upon the Respondent decree holder to demonstrate that should the appeal be successful then she is in a position to refund the money decree paid to her. The court takes judicial notice of the fact that the appellant is monopoly in electric power supply in the whole country and therefore it is unlikely that it will be under by the time the intended appeal is heard and determined.

In addition, the appeal can be fast tracked to be heard expeditiously so that no party loses out.

For the above reasons, I exercise discretion and grant stay of execution of judgment /decree in Bondo PM CC No. 45 of 2017 until the intended appeal is filed, heard and determined, conditional upon the applicant issuing a Bank Guarantee to this court for the entire decretal sum awarded in Bondo PMCC No. 45 of 2017 from a reputable Commercial Bank within the next 21 days of this ruling in default the stay granted lapses."

15. He therefore submits that the applicant has been able to successfully demonstrate his fitness for issuance of the orders sought.

16. Learned counsel Mr. C.N. Ngugi for the respondent in his written submissions asserts that the application is incompetent and should be struck out. He challenges the root taken by the applicant in filing a Misc. application instead of the appeal itself before seeking leave to have it admitted out of time. To support this he cited the case of **Gerald M'Limbine v Joseph Kangangi [2009] eKLR** where Justice Emukule *(as he then was)* said:

"My understanding of the proviso to Section 79G is that an applicant seeking "an appeal to be admitted out of time" must in effect file such an appeal and at the same time seek the Court's leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the Court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the Court's process which under Section 79B says –

"79 B- Before an appeal from a subordinate Court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against be may, notwithstanding Section 79C, reject he appeal summarily"

It seems to me therefore, it is not open to the Court to exercise its discretion under the proviso to Section 79G of the Civil Procedure Act except upon the existence, and perusal of the appeal to be "admitted" not to be "filed out of time" Admission presupposes that the appeal has been filed, and will be "admitted" for hearing after a judge has established under Section 79 B, that there is "sufficient ground for interfering with the decree party of a decree or order appealed against."

17. He further cited the case of **Asma Ali Mohamed v Fatime Mwinyi Juma [2014] eKLR** where Justice Kasango while endorsing the position by Emukule J. *(as he then was)* in the **Gerald M'Limbine case (supra)** stated:

"7. That holding which I wholly adopt was the effect that when a party wishes to obtain leave to file an appeal out of time such a party must file the appeal and as provided in the proviso of Section 79G, then must seek leave to admit that appeal out of time. Appellant here has done that. She filed her appeal and seeks leave for it to be admitted out of time."

18. Counsel submits that before the grant of leave to file appeal out of time the applicant must demonstrate a sufficient good cause for the delay. To support this he relied on the case of **Dilpack Kenya Ltd vs William Muthama Kitonyi [2018] eKLR** where Justice Odunga stated:

"27. Therefore an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633, there is no difference between the words "sufficient cause" and "good cause". It was therefore held in Daphne Parry vs. Murray Alexander Carson [1963] EA 546 that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

28. As to the principles to be considered in exercising the discretion whether or not to enlarge time in First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65 the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant."

19. He further argues that the explanation given for delay is not convincing since there is no evidence to show that indeed the judgment was requested for as claimed. Moreso the alleged 'technicalities' and 'novelty of the e-filing system' have not been demonstrated. Counsel argues that a look at annexture RNW2 and page 9 of the replying affidavit confirms that the terms of the judgment were clearly laid out. He points out that the supporting affidavit is sworn by a total stranger to the proceedings. He adds that the communication shows that the applicant was never aggrieved by the judgment and never had any intention to appeal.

20. Counsel has submitted that the intended appeal is not arguable, since the applicant is merely challenging the award of damages and is not saying how excessive it is. See the case of **Jacinta Kendi & anor v Rose Kimonda Cheboi [2020] Eklr** where an award of Kshs 1,200,000/= was made for similar injuries. Its his argument that the respondent should not be denied the fruits of his judgment.

21. Relying on **Order 42 Rule 6 (1) Criminal Procedure Rules** and the case of **Carter & Sons Ltd vs Deposit Protection Fund Board & others (Civil Appeal No. 291 of 1997 – 1997 LLR 2142 (CAK),** counsel has submitted that the court has discretion in the grant of stay of execution but this discretion is not unfettered. The conditions to be considered are:

(a) The application must be made without unreasonable delay.

(b) The applicant must satisfy the court that substantial loss may ensue to him if stay is declined.

(c) The applicant must establish sufficient cause.

(d) The applicant must furnish security.

22. It's his contention that the applicant has not demonstrated any substantial loss that he would suffer if stay of execution is not granted. To support this he relied on the following cases;

(i) Firoze Nurali Hirji v Housing Finance Company of Kenya Ltd & anor [2012] eKLR.

(ii) Samuel Muchiri wa Njuguna v Zachary Waruiru Mukui [2007] eKLR.

(iii) Equity Bank Ltd v Taiga Adams Company Ltd [2006] eKLR.

23. He further submits that no sufficient cause has been shown to warrant any stay of execution as the applicant has failed to show that the appeal would be rendered nugatory if execution were to proceed. He referred the court to the cases of:

(i) Permanent secretary Ministry of roads and another v Fleur Investments Ltd [2014] eKLR.

(ii) Reliance Bank Ltd. V Norlake Investments Ltd [2002] 1 E.A. 227.

24. On security for due performance which counsel argued is mandatory he submitted that none had been offered by the applicant. All in all he urged the court to dismiss the application.

Analysis and determination

25. I have duly considered the application, grounds and affidavits, annextures and both submissions. The issue I find falling for determination is whether the applicant has made out a case for:

(i) Extension of time for filing an appeal.

(ii) Stay of execution.

26. The respondent through his counsel has cited two cases from the high court where the courts found that an application seeking leave to file an appeal out of time should be filed after an appeal has been filed and not before as done by the applicant. Therefore, the application should be struck out for being incompetent on this ground.

27. The statutory provision dealing with the requisite period for filing of appeals from the subordinate courts to the high court is Section 79G Civil Procedure Act which provides:

> ***"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."***

28. The impugned judgment was delivered on 2nd October 2020. Any appeal should have been filed on or before 1st November 2020 which was not done. The application before this court is dated 5th February 2021. The request is therefore made 90 days outside the stipulated period or 120 days from the date of judgment. According to the respondent the applicant should have gone ahead and filed the Appeal first before seeking leave, to file it out of time. That's according to the rulings by Justices Emukule and Kasango which are of a persuasive nature to this court since we are of the same jurisdiction.

29. The general practice has been for a party to first seek leave of the court before filing an appeal out of time. I can see this could be changing, but where one files an application like this all she/he needs to do is to annex a copy of the memorandum of appeal to the application and satisfy the conditions set out in Order 42 Rule 6(1) and (2) of the Civil Procedure Rules. What the applicant did in filing the Miscellaneous application first cannot therefore be a ground for dismissing it.

30. It has been explained by the applicant's counsel that the application dated 5th February 2021 was the second such application after a similar one dated 16th December 2020 was never acted on by the court. The first application was filed via email since the e-filing system was down. The said application was assessed and paid for by the applicant and a temporary number Misccrisis 01 of 2020 assigned to it. Detailed email communication on this matter between the applicant's counsel and the court has been availed as (annexture SK-6).

31. The last communication on this was on thursday 28th January 2021 at 12.26pm and the applicant was not assisted in having his application processed. He cannot therefore be blamed for that. Had his application dated 16th December 2020 been addressed then he could only have been 44 days outside the stipulated period, which I do not find to be inordinate.

32. A perusal of the draft memorandum of appeal (SK-4) shows that the applicant is only challenging the award of damages. At paragraph 2 of SK4 he mentions something on liability but the judgment shows that judgment on liability was by consent. Counsel for the respondent has argued that as the applicant was said to be preparing to pay the decretal sum its clear that he never at any point intended to appeal against the judgment.

33. He has also argued that since judgment was pronounced in the presence of the applicant's counsel the applicant did not have to wait for the hard copy of the judgment before filing an appeal. I find that to be a wrong assumption. What is pronounced in court may just be the final orders. It is important for one to have the full details of the judgment before considering whether to appeal or not. These details can only be found in the full judgment.

34. Upon consideration of all these arguments and what is documented, I find that the applicant has elected to appeal against the decision of the trial court on the award of the general damages. In doing so he will be exercising his right under **Section 75 of the Civil Procedure Act.** The period of delay in exercising this right cannot be said to be inordinate.

35. On the second issue of stay of execution, the same is addressed under Order 42 Rule 6(1) and (2) Civil Procedure Rules. The damages being contested amount to about Kshs 1.2 million. It's however noted that an appeal is yet to be filed and the respondent has to be cushioned against any loss. In any event the applicant having admitted to being 80% responsible for the accident and therefore responsible for the injuries he must be prepared to compensate the respondent, to a certain degree even if it's not what is in the impugned judgment.

36. I therefore allow the application in terms of prayers No. 2 and 4:

(a) The applicant to file and serve the memorandum of appeal within fourteen (14) days.

(b) Stay of execution is granted on condition that the applicant pays Kshs 350,000/= to the Respondent through his advocate within 14 days while the balance of the decretal sum shall be secured by a bank guarantee from a reputable bank within 30 days. Failure to comply will automatically lead to vacation of the stay orders.

(c) If the memorandum of appeal is not filed within the stipulated period there shall be no further extension of the period for filing the appeal and the stay of execution shall be vacated forthwith.

(d) Costs to the respondent.

Delivered online signed and dated this 27th day of May 2021 at Nairobi.

H. I. ONG'UDI

JUDGE