



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**MISC. APPLICATION NO. E509 OF 2020**

**JULIUS GITHAIGA CHEGE.....1<sup>ST</sup> APPLICANT**

**AMOS KITHAKA.....2<sup>ND</sup> APPLICANT**

**HENRY KAHUHO MITHIGA.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**DM (*minor suing thro' his mother and next friend HGM*).....RESPONDENT**

**RULING**

1. The applicants moved this court under certificate of urgency vide the notice of motion dated 27<sup>th</sup> November 2020. The same was not certified urgent. They sought the following orders:

- (1) *Spent*
- (2) *THAT this Honourable Court be pleased to grant the Applicants leave to file a Memorandum of Appeal out of time.*
- (3) *Spent*
- (4) *THAT this Honourable Court be pleased to order a stay of execution of the Judgment issued by the Honourable trial court on 27<sup>th</sup> October, 2020 pending the hearing and determination of the intended Appeal.*
- (5) *THAT the costs of this application abide the outcome of the Appeal.*

2. They filed another notice of motion dated 12<sup>th</sup> February 2021 which was certified urgent. It sought the following orders:

1. *Spent*
2. *Spent*
3. *THAT this Honourable Court be pleased to order a stay of execution of the Judgment issued by the trial court on 27<sup>th</sup> October 2020 pending the hearing and determination of the intended Appeal.*
4. *THAT this Honourable Court be pleased to order release of motor vehicle registration number KAK 487B that was attached by the Respondents and likely to be sold any moment.*
5. *THAT the costs of this Application abide the outcome of the Appeal.*

Both applications were argued simultaneously.

3. The application dated 27<sup>th</sup> November 2020 and filed on 1<sup>st</sup> December 2020 is supported by the grounds on the face of the application plus a sworn affidavit by Joyce Chichi an advocate representing the applicants. A summary of all this is that the applicants delayed in filing the appeal due to the late receipt of the judgment by their advocate. That by the time the advocates were getting instructions from the applicants

the period allowed for filing appeal had lapsed.

4. They further wish to challenge the award of general damages of Kshs 550,000/= by the trial court which they think is very high in the circumstances of the case. They therefore seek stay of execution of the impugned judgment. If execution proceeds its their contention that the appeal will be rendered nugatory and they will be greatly prejudiced. A copy of the draft memorandum of appeal (marked 'JC1) is annexed.

5. The 2<sup>nd</sup> application dated 12<sup>th</sup> February 2021 is supported by the grounds on its face plus a sworn affidavit by Joyce Chichi counsel for the applicants. The only new issue raised is the proclamation attachment, notification of sale of the applicants' motor vehicle registration number KAK 487B (documents marked JC1&2). It is feared that any sale of the said motor vehicle will highly prejudice the applicants who are desirous of appealing the judgment by the Magistrates court.

6. In both applications the applicants have expressed their willingness to offer a reasonable security in the form of a bank guarantee.

7. The respondent filed a replying affidavit sworn on 11<sup>th</sup> March 2021 by Hannah Gathoni Mbugua and is in respect to both applications. She has averred that the applicants are bent on further delaying this matter having done the same in the lower court. She further deposes that the applicants have not explained their failure to attend court on the date of judgment which was known to them.

8. On a without prejudice basis she deposes that in the event that the court is inclined to allow the application then it should balance the interests of both parties. It should also consider the seriousness of the injuries suffered by her minor son (annexture "B"). On release of the motor vehicle she opposed the same as it's the only security in her possession. She fears that in case of release she will be made to pay all the auctioneer's accumulated charges.

9. The applications were disposed of by written submissions. Kimondo Gachoka advocates for the applicants in their submissions gave a brief background to the matter. Relying on the cases of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR** and **Mwangi v Kenya Airways Ltd [2003] KLR 486** he cited some of the factors for consideration in a matter of this nature. They include:

- a) *The period of delay;*
- b) *The reason for the delay;*
- c) *The arguability of the appeal;*
- d) *The degree of prejudice which could be suffered by the Respondent is (if) the extension is granted;*
- e) *The importance of compliance with time limits to the particular litigation or issue; and*
- f) *The effect if any on the administration of justice or public interest if any is involved.*

10. Its submitted by the applicants' counsel, that this application was filed four (4) weeks after delivery of judgment, which is not inordinate. Referred to is the case of **Almas Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR** where a delay of four months was not found to be inordinate.

11. Counsel has submitted that the intended appeal is merited, arguable and raises pertinent points of law and fact, giving it an overwhelming chance of success. Counsel contends that the respondent will not suffer any prejudice if the application to enlarge time is allowed.

12. On the grant of stay of execution counsel has relied on Order 42 Rule 6 of the Civil Procedure Rules and the cases of **Amal Hauliers Limited (supra)** and **Butt v Rent Restriction Tribunal [1982] KLR 417**. In the latter case the court of Appeal gave the following guidelines on the issue:

- 1) *The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*
- 2) *The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*
- 3) *A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.*
- 4) *The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*
- 5) *The court in exercising its powers under Order 42 rule 6(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."*

13. Counsel reiterated the applicants' willingness to give a bank guarantee by Diamond Trust Bank as security and as a condition for stay. Its further argued that the respondents were well aware of the applicants' intention to appeal and should not have commenced execution and so should be condemned to pay the auctioneers charges.

14. Kibiku & Co. advocates for the respondent filed submissions on 12<sup>th</sup> March 2021. Counsel has referred to the principles to be considered in an application of this nature. In the case of **John Gakobo Macharia vs The Kenya Power & Lighting Co. Ltd [2009] eKLR** the principles laid down were as follows:

- *The length of the delay in lodging the notice of appeal and record of appeal.*
- *Where applicable, the delay in lodging the application for extension of time, as well as the explanation thereof.*
- *Whether or not the intended appeal is arguable.*
- *The prejudice to the respondent if the application is granted.*
- *The public importance, if any, of the matter and*
- *Generally the requirements of the interest of justice in the case.*

15. Counsel has submitted that the delay in filing the appeal has not been fully explained. Its contended that counsel for the applicant did not explain why he/she did not inform the applicant of the contents of the judgment. Referred to is the case of **Emmy Keino vs Board of Trustees Teleposta Pension Scheme [2016] eKLR**.

16. On whether the intended appeal is arguable counsel has referred to the injuries suffered by the respondent which were ably proved. Counsel further urged the court while determining this matter should consider the interests of both parties. Referred to is the case of **Gemstar Importers & Anor vs Edward Nthiwa Mutiso (sued as the legal representative of the estate of Charles Nzioka Nthiwa (deceased) [2018] eKLR** where it held that:

*“Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 it was held that:*

*“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”*

17. Counsel floated two conditions which should be considered if stay of execution is granted. These are:

1. *The Applicant should pay half of the decretal sum to wit Ksh 288,938 to the Respondent and deposit the other half in a joint interest earning account in the names of the advocates for the parties herein. The Applicant has already indicated its willingness to deposit the security pending the hearing and determination of the appeal.*
2. *The Applicant should pay the party and party costs of Kshs 153,100 that was awarded to the Respondent in the lower court.*

On this submission counsel referred to the cases of:

(i) **Gemstar Importers & Anor (supra)**

(ii) **Boniface Nzioka Malundu vs Jeremiah Kariuki Mwaniki [2018] eKLR** where it was held:

*“The judgment on liability was by consent and I agree with the applicant that in the event of a review of quantum on appeal, the applicant will still have some amount payable to him that will be sufficient to cover the funds he needs for medical treatment.....Having considered all the issues involved in this application, I hereby find merit in the application and allow it as follows..... That out of the amount of Kshs.1,500,000/= deposited in court, Kshs.985,096.87 cts be paid to the applicant/respondent pending the determination of the appeal.*

18. Counsel finally submitted that having failed to secure any stay of execution after delivery of judgment, the applicants should not complain about the proclamation and eventual attachment of their vehicle. The auctioneer's charges and storage charges should therefore be paid by the applicants in the event the court allows the application.

## **Analysis and determination**

19. Having keenly considered the application, grounds, affidavits, submissions and authorities I find the main issue for determination to be whether the applicants have met the required principles for grant of (a) leave to file appeal out of time and (b) stay of execution pending the hearing and determination of an intended appeal.

20. It is not disputed that the applicants have a right to appeal against the Magistrate Court's decision.

Section 65(1) of the Civil Procedure Act provides:

- (1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—**
- (b) from any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, on a question of law or fact;**
- (c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.**

21. Section 79G Civil Procedure Act proceeds to indicate the timelines within which an appeal should be filed. It states:

***“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.”***

22. The trial court's judgment was pronounced on 27<sup>th</sup> October 2020. Any appeal in respect to the said judgment ought to have been filed on or before 26<sup>th</sup> November 2020. This was not done. The 1<sup>st</sup> application dated 27<sup>th</sup> November 2020 was filed on 1<sup>st</sup> December 2020, which was six (6) days late. The 2<sup>nd</sup> application dated 12<sup>th</sup> February 2021 was filed on 16<sup>th</sup> February 2021 which was three (3) months three (3) weeks late. The submission that the application was filed four (4) weeks after delivery of the judgment is therefore not correct.

23. The only consolation that the applicants have is that the first application dated 27<sup>th</sup> November 2020 and which sought leave to appeal out of time was six (6) days late. It was however not certified urgent by the court, and had no hearing date by the time the 2<sup>nd</sup> application was being filed. Without going into details there was an expressed intention of appealing against the judgment, early December 2020 when the thirty days period for appealing had just lapsed.

24. The reason for the delay has been said to be the late receipt of the judgment leading to the late taking of instructions from the applicants. The respondent's replying affidavit shows that the applicants and their counsel were not present in court when the judgment was delivered. No explanation was given for this absence as put by respondent's next friend who swore the replying affidavit. Considering that the 1<sup>st</sup> application was filed not long after the expiry of the 30 days I have come to the conclusion that it's a mistake that is excusable, in order to allow the applicant, exercise his right of appeal. See **Amal Hauliers Ltd** (supra) as a persuasive authority.

25. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides for stay of execution pending appeal on conditions. It provides as follows:

***(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(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.”***

26. In the application dated 27<sup>th</sup> November 2020 the applicants annexed a copy of the draft memorandum of appeal (JC1). It is clear that they are only contesting the award of damages and not liability. From the warrants of attachment in the 2<sup>nd</sup> application (JC1) the decretal sum including interest and costs is Kshs 741,276/36. It is also not denied that the respondent suffered injuries for which he is entitled to some damages, which the applicants will have to pay, once the appeal is heard and determined. The only issue is the amount of damages.

As clearly stated in the cases of **Gemstar Importers & Anor (supra)** and **Boniface Nzioka Malundu (supra)**, the respondent is entitled to payment of some amount of damages.

27. Upon considering all these facts, I will allow the prayer for stay of execution with conditions (to be stated later).

28. From the application and submissions, it is clear that the applicants never at any time after the judgment got any orders of stay of execution of the judgment/decreed. The proclamation and attachment were therefore lawful. The ensuing charges are therefore payable by the applicants.

29. I therefore allow both applications and make the following orders:

(1) Leave to appeal out of time is granted. The appeal to be filed and served within 14 days.

(2) There shall be stay of execution of the judgment dated 27<sup>th</sup> October 2020 on the following conditions:

(i) *The applicants to pay to the respondent (through his advocates) Kshs 300,000/= within 14 days.*

(ii) *The balance of the decretal sum amounting to Kshs 441,276/36 to be secured by way of a bank guarantee from a reputable bank within 30 days.*

(iii) *The motor vehicle registration No. KAK 487B to be released to the applicants once the sum of shs 300,000/= is paid to the respondent's counsel.*

(3) The auctioneers charge and storage charges to be assessed and shall be payable within 21 days of the assessment. The same shall be paid by the applicants.

(4) Failure to comply with the order to file appeal within 14 days and/or of payment of Kshs 300,000/= will automatically vacate the order of stay of execution.

(5) Costs of this application will be in the cause.

(6) Parties shall have a right to apply.

**Delivered online signed and dated this 27<sup>th</sup> day of May 2021 at Nairobi.**

**H. I. ONG'UDI**

**JUDGE**