



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO.E039 OF 2021

BETWEEN

AMINA NASSOR.....APPLICANT

VERSUS

NASSIM SHABIR.....RESPONDENT

RULING

1. The **Ruling** herein relates to a **Notice of Motion** application dated **4th March, 2021**, brought under the provisions of **Sections 1A, 1B, 3, 3A, 79G and 95** all of the **Civil Procedure Act, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3** all of the **Civil Procedure Rules, 2010** and all other enabling provisions of the law.

2. The Applicant is seeking for orders: -

a) Spent;

b) That this Honourable Court be pleased to grant leave to the Applicant/intended appellant to appeal out of time against the Judgment of the Honourable Magistrate E. Muchoki, Resident Magistrate in Mombasa Magistrate's Court Civil Suit No.21 of 2018 and Judgment delivered on 11th December, 2020;

c) That this Honourable Court be pleased to stay execution of the Judgment and Decree in Mombasa Magistrate's Court, Civil Suit No.21 of 2018, pending the hearing and determination of this application and intended appeal therein;

d) That upon the grant of order (2) above, the Honourable Court direct the Executive Officer, Mombasa Chief Magistrate's Court deliver the entirety of the court file, inter alia, for Mombasa Magistrate Court Civil Suit No.21 of 2018 for appeal;

e) That the costs of this application abide the outcome of the intended Appeal.

3. The application is premised on the grounds on the face of it and an **affidavit** of even date, sworn by the Applicant's Legal Counsel, **Paruline Waruhiu**. Briefly, she deposed that on **11th December, 2020, Judgment** was delivered against the intended appellant ordering him to pay the Respondent General Damages for Pain and Suffering of Kshs. 1,200,000/=, future medical expense of Kshs.120,000/= and Special Damages of Kshs.1,372,144/= plus costs and interest of the suit.

4. The Applicant avers that since delivery of the said Judgment there has been no stay of execution, and execution is eminent, and being aggrieved and dissatisfied with the said whole Judgment on special damages, the Applicant has instructed **Ms. Kimondo Gachoka & Co. Advocates** to appeal against the said Judgment.

5. The Applicant avers that the intended appeal is merited, arguable and raises pertinent points of law, thus it has overwhelming chances of success.

6. On substantial loss, the Applicant avers that the decree entered is of a substantial sum of money and she is apprehensive that if the Respondent is paid, and the appeal is successful, they might not be able to recover the same from the Respondents whose means are unknown.

7. The Applicant also avers that she is willing and ready to furnish such reasonable security in the form of a Bank Guarantee as this court may deem fit.

8. On the delay to file the intended appeal, the Applicant has averred that the delay in filing the appeal was inadvertent and the same is highly regretted, thus prays that she should not be penalized for the mistake of the advocate.

9. Further, the Applicant prays that this court extends time for filing the intended appeal, and leave be granted for her to appeal out of time against the award on damages by the trial court.

10. In conclusion, the Applicant has averred that the Respondent will not suffer any prejudice or any damage that is not capable of being compensated by way of costs but she stands to suffer prejudice and irreparable substantial loss if the application is disallowed.

THE RESPONSE

11. The application was opposed vide the Respondent's **Replying affidavit** sworn on **18th March, 2021**. He avers that the application is non-meritorious, actuated by bad intent, and is designed to deny him the fruits of Judgment.

12. The Respondent also avers that the instant application is premature, a non-starter, vexatious and a waste of the court's time, since there is no eminent execution, and no Appeal or Memorandum of Appeal has been filed to warrant orders of stay under **Order 42 Rule 6** of the **Civil Procedure Rules**.

13. It has been averred by the Respondent that the application for stay has been filed three months after delivery of Judgment and no explanation has been offered about the delay in seeking for stay of execution.

14. The Respondent avers that the Applicant has not demonstrated the substantial loss she would suffer if the orders of stay are not granted. Further, the Respondent avers that the mere fact that the Applicants can offer a bank guarantee as security should not be a basis of granting the orders of stay of execution, since a tortfeasor who has not suffered any harm ought not to be allowed to benefit from an order of stay.

15. The Respondent avers that it is evident that the intended appeal is limited to the Special Damages awarded. However, the Applicants are silent on the payment of the general damages which are not contested, and costs which have since accrued.

SUBMISSIONS

16. **Mr. Momanyi**, Learned Counsel for the Applicant reiterated the contents of the Applicants' affidavit and submitted that extension of time is discretionary. He also submitted that the Applicant need not be punished for the delay by her insurer since the instruction by the insurer were issued after the lapse of 30 days.

17. On stay of execution, **Mr. Momanyi** submitted that if the orders sought are not granted, then the intended Applicant shall suffer irreparable loss and the intended appeal would be rendered nugatory.

18. The Respondent's submissions are not on record despite the Respondent having been directed by this court to file the same on **11th May, 2021**.

DETERMINATION

19. Having considered the pleadings and submissions of the parties in this matter, I believe that only two issues arise for determination.

a) Whether the court should exercise its discretion to grant the Applicants/appellants leave to file her appeal out of time.

b) Whether an order of stay of execution pending appeal should issue.

a) Whether leave to file the appeal out of time should be granted

20. **Section 79G** of the **Civil Procedure Act** provides that:

“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.

21. Clearly, this provision provides for the period within which a party is expected to appeal against a decision or order. It also provides for courts' discretion to admit an appeal filed out of time if a party offers good and sufficient reason for not having complied with time line provided by law.

22. Under the provisions of **Order 50, Rule 6** of the **Civil Procedure Rules**, the 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 or not is a matter of judicial discretion. The discretionary power of the courts was reaffirmed by the Court of Appeal in the case of **Leo Sila Mutiso –vs- Rose Hellen Wangari Mwangi, Civil Application No. NAI 255 of 1997 (unreported)** cited by the Applicant, when it held that:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the Respondent if the application is granted.”

23. Thus, an Applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so, since, as was held in the case of **Feroz Begum Qureshi & Another –vs- Maganbhai Patel & Others [1964]EA 633**, there is no difference between the words “sufficient cause” and “good cause”.

24. It was therefore held in the case of **Daphne Parry –vs- Murray Alexander Carson [1963] EA 546** that although 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 causing injustice and hardship to the appellant.

25. In this case, the decision that the appellants seek to appeal against was delivered on **11th December, 2020**. The application for leave to file the appeal out of time was filed on **8th March, 2021**. The Applicant alleges that it was the mistake of her advocate that led to the inadvertent delay in filing of the intended Appeal.

26. In the case of **Andrew Kiplagat Chemaringo –vs- Paul Kipkorir Kibet [2018] eKLR**, the court held that: -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

27. The period between the delivery of the Judgment and the filing of this application is about 86 days. This means that the appellant was about 56 days out of time for filing the appeal. In my humble view, I find that the delay in filing the present application was not unreasonable. Therefore, in the circumstances of this case, the interests of justice demand that the Applicant be granted leave to appeal out of time.

28. It is evident that the Applicant is dissatisfied with the award of special damages alone in the Judgment delivered on **11th December, 2020**. The same is also evident from the copy of draft **Memorandum of Appeal** that has been annexed to the application by the Applicant. The dictates of justice therefore demand that he gets an opportunity to ventilate his Appeal on special damages.

29. Accordingly, I proceed to grant leave to the Applicant to file the appeal out of time as prayed, but within a period to be prescribed by the court.

30. However, relying on the equitable maxims, that ‘*He who seeks equity must do equity*’ and ‘*He who comes to equity must come to court with equity*’, since the award of general damages is not disputed, I find and hold that the Applicant pays the Respondent the General damages awarded in the sum of Kshs.1,080,000/=which has not been disputed.

b) Whether orders of stay of execution should issue

31. The court has considered the material canvassed in respect of the **Motion** by the Appellants. In order to succeed, an Applicant invoking the provisions of **Order 42 and 6(1) and (2)** of the **Civil Procedure Rules** is required to satisfy three conditions. He must: -

i. approach the court without unreasonable delay.

ii. satisfy the court that substantial loss may result unless the order sought is granted.

iii. furnish security for the due performance of the decree appealed from.

32. The Applicant argues that if the decretal sum is paid to the Respondent, it will be out of her reach, and the appeal may be rendered nugatory as the Respondent’s means are unknown. I am alive to the fact that the courts have time and time again addressed the subject on who has the burden of proof on the issue of refund of the decretal sum. I am both guided and bound by the Court of Appeal’s analysis in the case of **National Industrial Credit Bank Ltd –vs- 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...”

33. On the third and final condition relating to the provision of security for the due performance of the decree, the Applicant has expressed her willingness to furnish a Bank Guarantee as this Court may deem fit. I associate myself with the position adopted in the case of **Focin Motorcycle Co. Limited - vs- Ann Wambui Wangui & Another [2018] eKLR**, that: -

“...Where the Applicant proposes to provide security as the

Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruits of Judgment. My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay...”

34. I also agree with the views expressed by **Nagillah, J** in **Civil Appeal No. 5 of 2016 - Patrick Mwenda –vs- Evans Omari Mwita [2016] eKLR** that:

“...In my view this rule gives the court unfettered discretion to issue any orders pending the hearing of the appeal. I have no doubt therefore that I have power to order such security for the due performance of decree or order and that the appellant did not have to furnish such security upfront before arguing the application for stay pending appeal. In any event where the court orders for security deposit and there is default then the orders for stay are rendered useless for a defaulting party...”

35. In the premises the orders which commend themselves from the stay application dated 4th March, 2021 are as follows:-

a. The Applicant be and is hereby granted leave to file an appeal in court within thirty (30) days from the date hereof;

b. That there be a stay of execution of the Judgment and Decree in Mombasa CMCC No.21 of 2018 pending the hearing and determination of the appeal on condition that the Appellant pays to the Respondent a sum of Kshs.1,080,000/= awarded as general damages, which has not been disputed.

c. That the Applicant do furnish a bank guarantee issued by a reputable bank for the sum of Kshs.1,494,144/= awarded as special damages.

d. The Applicant to comply with conditions (a), (b) and (c) above, within a period of Thirty (30) days, during which period, for the avoidance of doubt, execution to issue.

It is so ordered.

DATED and SIGNED at MOMBASA this 26TH day of JULY 2021

D. O. CHEPKWONY

JUDGE

DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JULY 2021

A. ONG'INJO

JUDGE