



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. CIVIL APPLICATION NO. E040 OF 2021

JULIUS THURANIRA MURIUNGI.....APPLICANT

VERSUS

GRACE KATHURE (Suing as legal administrator of the estate of

ANTHONY KIMATHI (Deceased).....RESPONDENT

RULING

1. Before the Court is an application dated 7th July 2021 seeking stay of execution of the Judgment delivered on 6th May 2021 by Hon. Gesora in Maua CMCC No. 178 of 2019 and leave to appeal out of time.

Applicant's Case

2. The application is premised on the ground that the Applicant has an arguable appeal with high chances of success and that the damages awarded by the trial Court were inordinately high. That the delay in filing the appeal was occasioned by the fact that the impugned Judgement was delivered without notice despite the Court having indicated that notice would be issued. That the delay is not inordinate. That the Applicant is likely to suffer substantial loss if the application is not allowed since there as threatened execution. That the Applicant is willing to comply with any conditions that the Court may impose.

Respondent's Case

3. The application is opposed by the Respondent's replying affidavit sworn on 19th July 2021. The Respondent urges that the Applicant's Counsel who failed to attend Judgment approached her Counsel seeking consent for stay of execution, which was agreed and granted for 30 days with the promise of the Applicant settling the decretal sum before the end of the 30 days, which was never done. That it is only after she realized that the Applicant would not pay that she instructed auctioneers. That the appeal has no merit. That despite filing the application on 7th July 2021, the Applicant only served it on 19th July 2021 so as to cause an adjournment. That no plausible reasons have been offered for the inordinate delay. That the Applicant has a good insurance company. That the applicant never filed an application to file her appeal out of time and as her consequence, her appeal has been filed out of time. That if the Court is inclined to grant stay, she prays that half of the decretal amount be released to her and the other half be deposited in Court.

Determination

Leave to Appeal out of time

4. The Applicant intends to appeal a Judgment on quantum urging that the damages awarded were inordinately high and that the trial Court failed to apply its mind on the principles of quantum of damages. This is an arguable appeal. An arguable appeal is not one which must necessarily succeed, but one which raises arguable points of law or fact. It is also not for this Court to go into the merits of the appeal at this time.

5. Judgment having been delivered on 6th May 2021, the Appellant ought to have filed an appeal within 30 days which would run up to 6th June 2021. The application before Court was filed on 9th July 2021, making the delay one of about one month. This cannot be said to be inordinate.

6. The Applicant claims that despite the Court having indicated that Judgement would be delivered on notice, his Advocates did not receive the notice. Surprisingly, the Applicant does not disclose how and when he eventually came to know of the Judgment. This Court does not find his explanation for the delay convincing. It is also questionable how one party was aware of the Judgement and attended its delivery and

the other party failed to so attend. Should the Court ultimately grant leave, the Applicant will have to pay the costs of this application.

7. On the nature of prejudice to be suffered by the Respondent if leave is granted, this has not been demonstrated. Despite the omission to offer a credible explanation as to why there was delay, this Court finds that considering that the delay herein is not inordinate and bearing in mind the constitutional principle on access to justice, it would be in the best interests of justice to grant the Applicant leave to appeal out of time.

Stay of Execution

8. An applicant seeking for stay of execution is required under the Civil Procedure Act to demonstrate that he is likely to suffer substantial loss should stay not be granted; that he is ready and willing to offer security for payment of any sums that may be found due to the other party after the appeal, and that he has come to Court without unreasonable delay.

9. The Applicants urges that he is likely to suffer substantial loss in view of the threatened execution. Execution is a natural consequence of a Judgment requiring payment of money and this Court finds that execution alone in itself does not demonstrate substantial loss. In money decrees, substantial loss is demonstrated by the inability of the Respondent to pay the decretal sum should the appeal be successful. The Applicant has not expressed any such fears and there is therefore no need to require the Respondent to confirm her financial capability to pay. This Court finds that the Applicant has not adequately demonstrated the likelihood of suffering substantial loss if stay is not granted.

10. The Applicant indicated willingness to comply with any conditions that the Court may impose. The Respondent have urged that should the Court be inclined to grant stay, then half the decretal amount should be paid to him and half be deposited in Court. This Court observes that the intended appeal being one on quantum following a fatal accident, the Appellant will inevitably have to pay the Respondent some amount of money and payment to the Respondent of some amount of money will not entirely be prejudicial.

ORDERS

11. Accordingly, this Court makes the following orders:-

i. Leave is hereby granted to the Applicant herein to file an Appeal out of time against the Judgement and Decree delivered on 6th May 2021 by Hon Gesora in Maua CMCC No. 178 of 2019 on condition that the Memorandum of Appeal is filed within 7 days from the date of this Ruling.

ii. The court grants an order for stay of execution of the Judgement and Decree delivered on 6th May 2021 by Hon Gesora in Maua CMCC No. 178 of 2019.

iii. The Applicant shall within Thirty (30) days pay to the Respondent the sum of Ksh 1,063,000/= being a half of the decretal sum.

iv. The Applicant shall within Thirty (30) days deposit the balance of the decretal amount being the sum of Kshs 1,063,000/= in Court.

v. In default of the payment and deposit as per orders iii) and iv) above, the stay of execution herein granted shall lapse and be of no effect.

vi. The Respondent shall have the costs of this application.

Order accordingly

DATED AND DELIVERED ON THIS 30TH DAY OF JULY, 2021

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kiruki & Kayika Advocates for the Applicant

M/S Mutembei & Kimathi Advocates for the Respondent.