



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL APPLICATION NO. E038 OF 2021

ROBERT THURANIRA KABERIA.....1ST APPLICANT

CYPRIAN MUJUMBE KANYARU.....2ND APPLICANT

VERSUS

PENINA MUTHONI.....RESPONDENT

RULING

1. Before the Court is an application dated 5th July 2021 seeking leave to appeal out of time as well as stay of execution of the Judgment and/or Decree delivered in Maua CMCC No. 114 of 2019.

Applicant's Case

2. The Application is supported by the grounds on the face of it and by the Applicant's supporting affidavit sworn by the 1st Applicant. The Applicants' case is that Judgment was delivered in the lower Court awarding the Respondent a total of Ksh 1,211,427/= which is inordinately high for the injuries sustained. That they expressed dissatisfaction of the outcome of the Judgment to their insurers' and thereafter left his insurers to and then issue instructions to his Advocates to lodge an appeal. That the instructions from his insurer to the Advocates were issued on 30th June 2021, one day after the time allowed for filing an appeal had lapsed. That they are still keen on the appeal but they have been advised that they first need to seek leave of Court. That the appeal raises arguable issue and has high chances of success. That the Respondent is an impecunious individual with no known assets or property and will not be able to refund the decretal sum if paid to her at the successful conclusion of the appeal. That they are ready to offer security. That the Respondent is in process of executing and it is necessary that stay of execution is granted.

Respondent's Case

3. The Respondent opposes the application by her replying affidavit sworn on 12th July 2021. She gives a brief background of the matter which involves an accident where she was a pillion passenger and sustained injuries. She avers that liability was entered at 10:30 in her favour and she was awarded a total of Ksh 1,211,427 plus costs of the suit and interests which were assessed at Ksh 204,426. That as Judgment was delivered in the presence of Counsel of both parties, the Applicants have always been aware of the Judgment and have not explained why they did not lodge the appeal on time. That contrary to the allegation that she is impecunious, she is a prominent miraa farmer and trader in Igembe South and is therefore capable of refunding the decretal amount in the event the appeal is successful. That she has already instructed auctioneers to execute and the said auctioneers are entitled to their costs since they already proclaimed.

Issue for Determination

4. The two issues for determination are as follows: -

i) Whether or not to grant leave to file appeal out of time.

ii) Whether or not the Court should grant the Applicant stay of execution pending hearing of the Appeal.

Determination

Leave to appeal out of time

5. This Court extensively dealt with the issue of leave to appeal out of time in the case of ***Meru Misc Application No. 70 of 2020 Lydia Kiaruthi Kaaria & Ano vs Florence Kinairote M'imanyara***. Extension of time is a matter of discretion. The law gives this Court jurisdiction

to extend time upon application, even when the time for doing the act in question has already lapsed. See section 79 G of the Civil Procedure Act, Cap 21 Laws of Kenya provides as follows: -

79G. Time for filing appeals from subordinate courts

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.

6. See also Order 50, Rule 6 of the Civil Procedure Rules and Section 95 of the Civil Procedure Act, Cap 21 Laws of Kenya and Section 59 of the Interpretation and General Provisions Act.

7. The general principles to be considered in such application for leave to appeal out of time were well settled in the Court of Appeal case of ***Omar Shurie Vs Marian Rashe Yafar (Civil Application No. 107 of 2020)***. There are four main issues which the Court is enjoined to consider as follows: -

i) ***the length of the delay***

ii) ***the reason for the delay***

iii) ***the chances of the appeal succeeding if the application is granted***

iv) ***the degree of prejudice to the respondent if the application is granted***

8. On the length of delay, the Judgement sought to be appealed was delivered on 31st May 2021. And the instant application was filed on 5th July 2021. There was a delay of about 5 days. This may not be termed as inordinate.

9. On the reasons for delay, the Court observes that the Applicants blame their insurers for issuing instructions late to the Advocates. Indeed, they have annexed correspondence which confirms that despite the insurance company knowing of the outcome of the Judgment in good time, they only issued instruction to appeal on the evening of 30th June 2021. This Court is aware that in accident claims, most of the instructions and facilitation of court activities are in fact controlled by the insurance company and it is the insurance companies that communicate with the Advocates for purposes of issuance instructions. This Court will therefore be inclined to give the Applicants the benefits of the doubt.

10. On the chances of the appeal succeeding, the Applicant has annexed a draft Memorandum of Appeal dated 5th July 2021 raising 5 grounds of appeal all touching on quantum of damages. The Applicants' case is that the damages awarded were inordinately high. It is however not for this Court to go into the merits of the claim at this stage. All in all, an appeal challenging damages awarded for an accident claim is indeed arguable.

11. On prejudice, this Court is not satisfied that there is any real prejudice to be suffered by the Respondent if leave is granted. On the other hand, if leave is denied, the Applicant will have lost on opportunity to access justice.

12. This Court will therefore exercise its discretion and grant leave to the Applicants to file their appeal out of time.

Stay of Execution

13. The test for applications for stay of execution in the High Court is set out in Order 42 Rule 6 of the Civil Procedure Rules. The conditions that an Applicant has to meet and/or demonstrate for the court to grant a stay of execution are as follows: -

a) *substantial loss will result to applicant if stay is not granted; and*

b) *security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and*

c) *the application has been brought without unreasonable delay.*

Substantial Loss

14. The Judgment being appealed awarded to the Respondent a total of Ksh 1,300,000/= as general damages. As this Court has previously held, in money decrees, substantial loss is proven by the Respondent's inability to make a refund should the Applicants be successful in their Appeal.

15. The Applicant has expressed fears of inability of the Respondent to refund the monies. The Respondent, has responded to this allegation and said that she is able to refer any such sums as may be due in the event the Applicants succeed in their appeal. She claims to be a

prominent business lady dealing in the miraa industry in Igembe South. This Court finds that Respondent indeed discharged the burden to rebut any such allegations of inability to pay as was required of her. See case of *Equity Bank Limited v Japhet Kubai Ikiamba & Another Meru HCCA No. E007A of 2020*. See also *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR*. For this reason, this Court finds that substantial loss has not been proven by the Applicants.

Security for due performance of decree

16. The Applicant has indicated his willingness to offer security for the due performance of the decree. This Court takes note of the possibility of the Ksh 1,300,000/= being reduced and although the Respondent has indicated its ability to refund, this Court finds that it would be in the best interests of justice to allow the application on condition that security is provided.

Delay

17. Judgment in the trial Court was delivered on 31st May 2021. The Applicant filed the instant application for stay on 5th July 2021. This was about 35 days later. This period is cannot be termed as inordinate so as to amount to undue delay.

Orders

18. Accordingly, for the reasons set out above the court makes the following orders: -

i) Leave is hereby granted to the Applicants herein to file an Appeal out of time against the Judgement and Decree delivered on 31st May 2021 by Hon C. K. Obara in Maua CMCC No. 114 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 31st May 2021 by Hon C. K. Obara in Maua CMCC No. 114 of 2019.

iii) The Applicant shall within Thirty (30) days pay to the Respondent the sum of Ksh 430,000/= being approximately 1/3 of the decretal sum.

iv) The Applicant shall within Thirty (30) days deposit the balance of the decretal amount being the sum of Kshs 870,000/= in a joint interest earning account opened in the names of the parties' respective Advocates.

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 appellant shall pay the costs of the o to be agreed or taxed in default of agreement.

i) The costs of this application shall abide the outcome of the appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 29TH DAY OF JULY, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mithega & Kariuki Advocates for the Applicant

M/S Nkunja & Co. Advocates for the Respondent