



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. E415 OF 2020

SUSAN NJUGUINI GACHUL.....1ST APPLICANT

SAMUEL CHEGE GITHUA.....2ND APPLICANT

VERSUS

SOPHIA NYOKABI WAMBUI.....RESPONDENT

RULING

The Applicants filed a Notice of Motion dated 6th October, 2021 under the provisions of Order 22 rule 22, Order 42 Rules 4 and 6, Order 50 Rule 4 and 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 Sections 3, 3A and 100 of the Civil Procedure Act and all other enabling provisions of the law. The prayers before this court for determination are;

1. Spent

2. THAT this Honourable Court be pleased to order stay of execution of the Judgment/Decree issued on the 10th July, 2020 by the Honourable D.W. Mburu Senior Principal Magistrate in Milimani CMCC No. 3265 of 2019 Sophia Wambui –vs- Susan Njuguni Gachui & 2 Another pending the hearing and determination of the Application.

3. THAT this Honourable Court be pleased to grant the Applicants leave to appeal out of time against the Judgment delivered on 10th July, 2020 in Milimani CMCC No. 3265 of 2019 by Honourable D.W. Mburu Senior Principal Magistrate.

4. THAT this Honourable Court be pleased to stay the execution of the Judgment/Decree delivered on 10th July, 2020 in Milimani CMCC No. 3265 of 2019 by Honourable D.W. Mburu Senior Principal Magistrate herein pending the full hearing and determination of the Applicants' intended appeal.

5. THAT this Honourable Court be pleased to deem the Draft Memorandum of Appeal attached herewith as duly filed within time.

6. THAT the application be heard inter parties on such date and time as this Honourable Court may direct.

7. THAT the costs of this Application abide the outcome of the intended Appeal.

The application is supported by the affidavit of Pauline Waruhiu sworn on even date. The respondents filed a replying affidavit sworn by Sophia Nyokabi Wambui on 4th November, 2020. The application was determined by way of written submissions. One of the prayers being sought is leave to appeal the decision of the trial court out of time. Counsel for the applicant referred to the case of **EDITH GICHUNGU V STEPHEN NGUGI THOITHI** (2014) eKLR where the Court of Appeal set out the principles to be considered in our application for leave to appeal out of time as:-

i. The period of delay.

ii. The reasons for delay.

iii. The degree of prejudice to the respondent if the application is granted.

Counsel for the applicant also referred to the case of **JULIUS KAMAU KITHAKA –V- WRUGURU KITHAKA NYAGA & 2 OTHERS, C.A No. 14 of 2013**, where the court stated:-

A look at the legislative history of rule 4 will readily show that before 1985, the court rule required an applicant to show "sufficient reason" why discretion to extend time should be exercised in his or her favour. After an amendment of the rule in 1985, that "sufficient reason" structure was removed and the Court was henceforth allowed to extend time on such terms as it thought just. As the subsequent decisions consistently show, however, the amendment did not mean that the Court will extend time merely on the asking; the party seeking extension of time has to establish the basis upon which the court should exercise its discretion in his favour.

Some of the considerations to be borne in mind while considering an application for extension of time include:-

- i. The length of the delay involved, the reason(s) for the delay,
- ii. The possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion;
- iii. The conduct of the parties;
- iv. The need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal;
- v. The need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes;
- vi. The public interest issues implicated in the appeal or intended appeal; and
- vii. Whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal."

It is submitted for the applicant that the trial court delivered its judgment on 10th July, 2020. The application for leave to appeal out of time was filed on 6th October, 2020. Counsel relies on the case of **AMAL HAULIERS LTD V ABDULNASIR ABUBAKAR HASSAN [2017] eKLR** where a four (4) months delay was held not to be inordinate. It is further submitted that the cause of the delay is that the lower court file could not be traced in the registry as courts' operation were suspended due to the Covid-19 pandemic. The applicant only managed to obtain a copy of the judgment in September, 2020 and by then time had lapsed. No prejudice will be suffered by the respondents.

The Applicants being aggrieved by the judgement delivered by Honourable D.A Ocharo Principal Magistrate on 26th June, 2020 have preferred an appeal on quantum by filing a Draft Memorandum of Appeal dated 6th October, 2020 two (2) months after the lapse of the statutory timelines. The Applicants via the present application are seeking for stay of execution of the said judgment/decree and leave to appeal out of time. It is the Applicants' contention that the appeal, if successful, will be rendered nugatory and they will suffer irreparable damage if execution is not stayed. The Applicants deposes that the Respondent has not disclosed evidence to prove her financial standing. The Applicants aver that they are willing to deposit security for due performance of the decree and that the Respondent shall not suffer any prejudice if the application is allowed as the application is brought in good faith.

The Applicants submits that the three (3) months delay in filing the Memorandum of Appeal is not inordinate delay as the same was occasioned by the scaling down of business and curfew restrictions due to covid-19 pandemic. The Applicant referred to the case of **Amal Hauliers Limited v Abdulnasir Abukar Hassan (2017)eKLR** where Justice Korir held that four months is not an inordinate delay. The Applicant has attributed the delay to the suspended court operations due to Covid-19 directives which made it impossible to locate the court file at the registry. Further, the Applicants submit that when structures were put in place for electronic filing by court, the Applicants were still not in receipt of a copy of the judgement in time to lodge memorandum of appeal. That it was only until the end of September that the Applicant managed to get a copy of the judgement and immediately filed this application together with a draft Memorandum of Appeal. The Applicants made reference to the case of Hellen **Wanza Maeker, Bernard Njoroge Gathua & Another** HCC Miscellaneous Application 286/2009 where the court held that delay is excusable where it is contributed to by delay by the court registry to provide typed proceedings. The Applicants have further submitted that the Respondent has not shown how he will be adversely affected or prejudiced if the Applicants are allowed to appeal out of time and have cited the ruling of **Ngugi J. in Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR**.

The Applicants submitted that they are willing to furnish security in terms of a Bank Guarantee for the entire decretal amount. They have referred to the case of **Selestical Limited vs. Global Rock Development (2015) eKLR** where the Judge held that the court has unfettered discretion to issue any orders as to preserve the subject matter pending the hearing of the appeal. It is the Applicants' further submission that their appeal has high chances of succeeding owing to the fact that what is being challenged is the quantum which was inordinately high for soft tissue injury. Reference has been made to the decision in **Athuman Nusura huma v. Afrva Mohamed Ramadhan, CA No 227 of 2015**, where the Court held that;

"This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word "possibly".

In conclusion, the Applicants submit that they have satisfied all the conditions set out in Order 42 Rule 6 and such they pray that they be granted an order of stay of execution pending hearing and determination of the Appeal.

The Respondent on the other hand submits that the supporting affidavit of Pauline Waruhiu, is fatally defective and incompetent having been

sworn by a stranger to the proceedings and as such should be struck out. The Respondent contends that Directline Assurance Company Ltd is not a party to the proceedings and as such its employees are strangers to the suit. This the Respondent contends is because the insurer's right under the principle of subrogation has not yet accrued as money has not been paid out on behalf of the insured. To buttress this position, the Respondent has referred to the holding by Justice Mutungi in the case of **P.M.M. Private Safaris v Kevin Ijatia (2006) eKLR** where the court held that an insurance company was not a party to the proceedings and therefore, the affidavit was sworn by a stranger. Further reference has been made to the case of **Kenya Power & Lighting Company Limited v Julius Wambale & Another (2019) eKLR, Civil Misc. Application No. 98 'B' of 2019; Paul Ngila and Another vs Musili Malonza & Another (Suing as the Administrators to the Estate of the late Isika Musili)** and the Court of Appeal case of **Moiwo Matanya ole Keiwua V Chief Justice of Kenya & 6 Others (2008) eKLR** where it was held that affidavits sworn by persons who are not parties to the proceedings before court are incompetent and ought to be expunged from the court record.

It is the Respondent submission that the Applicants have failed to give reasonable explanation as to why the court's discretion to extend time for filing the appeal should be exercised in their favour. Reference has been made to the case of **Monica Malel & Another v R, Eldoret Civil Application No. Nai 246 of 2008** where Aganyanya, JA (as he then was) held that a reason for delay in filing an appeal should be specific and not based on guess work.

The Respondent further contends that she has been in the corridors of justice since 2019 and is yet to enjoy the fruits of her judgment. She further states that a further delay will highly prejudice him as he is suffering from injuries sustained. He has referred the court to the case of **M/s Portereitz Maternity v James Karanga Kabia, Civil Appeal No. 63 of 1997** where the court stated that a right to appeal must be balanced against the right of the plaintiff to enjoy the fruits of judgment and that there must be a just cause for depriving the plaintiff of that right.

It is the Respondent's submission that the guiding principles for granting stay orders as enumerated in the case of **Antoine Ndiaye v Africa Virtual University (2015) eKLR** must be complied with so as to do justice in accordance with the law and to prevent abuse of the process of the court as held in the case of **Machira Tta Machira & Co. Advocates v East African Standard (No. 2) [2002]KLR 63**. The Respondent maintains that the Applicants have not proved that they would suffer substantial loss unless the stay is granted and as the application should fail. The case of **New Wide Garments EPZ (K) Ltd v Ruth Kanini Kioko (2019) eKLR** where Justice Odunga held that the applicant in that case had failed to prove substantial loss by failing to place before him evidential material to form the basis of the loss.

Finally the Respondent rely on the decision in the case of **Edward Kamau & Another v Hanna Mukui Gichuki Misc No. 78 of 2015** and submits that this court in balancing the competing interests of the parties herein should direct that the Applicants pay part of the decretal sum of Kshs. 168,041 to the him and the balance of Kshs. 84,020 be deposited in a joint interest earning account of the parties.

Analysis/Determination:

On the first issue, the Respondent has argued that *Pauline Waruhiu* is a stranger to the proceedings and did not have capacity to swear the affidavit as the insurance company was not a party to the primary suit. The Applicants did not file a further affidavit to respond to the averments in the replying affidavit nor did they file any submissions in reply. Be that as it may, it is the court's duty to interrogate the issues raised by the respondent to establish whether or not they are factual and whether the said affidavit is incurably defective. In the supporting affidavit is sworn by Pauline Waruhiu, she describes herself as:

“...the Legal Counsel at Directline Assurance Company Limited who are the insurers of the motor vehicle registration number KBC 082S and at whose instance this claim from is claimed from and which is being appealed from and I am conversant with the issues relating to this suit and I am duly authorized and competent to make this affidavit by dint of M/s Directline Assurance Company Limited's right of subrogation under the relevant policy of insurance and at Common law and its right to defend, settle and/or prosecute any claims in the insured's name.”

It is not disputed that the deponent is indeed a legal officer working with the insurance company that had insured the motor vehicle that was involved in the fatal accident which was the subject matter of the primary suit. Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 provides that an insurance company which has issued a motor vehicle policy against 3rd party risks is under a mandatory legal duty to satisfy any judgment entered in favour of a 3rd party against the owner of the motor vehicle in question who is it insured while Section 10 (2) of the same Act provides that the insurer will only be liable to satisfy the judgment entered against its insured if it was notified of the proceedings in which the judgment was delivered before or within 14 days of the commencement of the proceedings.

This court is of the view that the above sections of the law bestows upon the insurer an interest in the proceedings, judgment, appeal and any other application thereof because it is required by law to satisfy the judgment obtained. Therefore, as an officer of the insurer, it goes without saying that Pauline Waruhiu had knowledge and was conversant with the proceedings in the trial court.

In view of the foregoing, this court finds that the supporting affidavit is competent and properly before the court. The respondent's claim that the supporting affidavit is incompetent for want of capacity by the deponent is not well founded and cannot be sustained. The insurer cannot be a bystander in the proceedings yet at the end of the dispute will be called upon to satisfy the decree.

Leave to Appeal out of Time;

Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

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 appellants 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.

Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR**. They include the following:

- i) The period of delay;**
- ii) The reason for the delay;**
- iii) The arguability of the appeal;**
- iv) The degree of prejudice which could be suffered by the Respondent if the extension is granted;**
- v) The importance of compliance with time limits to the particular litigation or issue; and**
- vi) The effect if any on the administration of justice or public interest if any is involved.**

The judgment was delivered on 26th June, 2020 while the present application was filed on 6th October, 2020, three (3) months after the lapse of the 30 days stay of execution granted by the trial court. The Applicants have submitted that the delay was occasioned by the suspension of court operations due to Covid-19 and the directives thereafter which made it impossible to locate the court file at the registry. There is however no evidence on record to show that the Applicants were not indolent and indeed followed up on the judgment with the registry. Nonetheless, this court takes judicial notice that the judgment was delivered during the downscaling of court operations due to Covid-19 and therefore, it would have taken some time to trace the judgment.

Stay of execution;

The present application invokes the discretionary powers of the court which must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 that empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows:

“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.”

The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“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 XLI rule 4(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.”

In the Court of Appeal case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** as cited by the High Court in **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR** it was held;

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a Respondent or lack of them. Once an

applicant expresses 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.”

In the case at hand, the Respondent has not disclosed any source of income that she would use to refund the Applicants half of the decretal amount should the appeal succeed, I am satisfied that the applicants have established that they will suffer substantial loss if the intended execution is not stayed. It also follows that if the respondent executes the judgement and the Applicants’ appeal succeeds, then not only will the applicants suffer substantial loss but the appeal will also be rendered nugatory. The Applicants have indicated their readiness to furnish security for the due performance of the decree by offering a bank guarantee to act as security for the entire decretal amount which is an appropriate security.

In the circumstances, I do find the application dated 6th October, 2020 is merited and the same is granted as prayed subject to the Applicants furnishing a Bank Guarantee of Kshs. 200,000 within 45 days hereof. The applicants should file and serve their Memorandum of Appeal within 14 days from the date of this ruling. The costs of the application shall abide the outcome of the appeal.

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF JULY, 2021

.....

S. CHITEMBWE

JUDGE