



**REPUBLIC OF KENYA**

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

**(Coram: Odunga, J)**

**MISC. APPLICATION NO. 93 OF 2021**

**PATRICK KINYUA KILANGULA.....1<sup>ST</sup> APPLICANT**

**ROBERT KAMAU KURIA.....2<sup>ND</sup> APPLICANT**

**=VERSUS=**

**JULIUS NDAMBUKI PETER and**

**ANNASTACIA NZULA NGUMBAU**

**(Suing as the Legal Representatives of the**

**Estate of DANIEL NGEI NDAMBUKI.....RESPONDENTS**

**RULING**

1. By a Motion on Notice dated 31<sup>st</sup> May, 2021, the applicants herein substantially seek orders that time be extended to them to lodge the memorandum of appeal out of time against the judgement delivered against them and that pending the hearing and determination of the intended appeal there be a stay of execution of the said judgement.
2. The said application was supported by an affidavit sworn by **Kelvin Ngure**, an advocate in the firm representing the applicants on the instructions of Directline Assurance Company Limited, the insurers of motor vehicle registration no. KCE 228K at whose instance this claim arose.
3. According to the deponent, on 25<sup>th</sup> February, 2021, judgement was delivered against the Applicants in which they were held 100% liable and the award was assessed in the total sum of Kshs 975,500/- with costs and interests. After the deponent informed the Applicants of the outcome of the judgement, he received instructions from the applicants to appeal the said judgement as the applicants felt that the trial court awarded the Respondent a high quantum against the evidence. However, by the time the deponent received the said instructions, the time within which to file the appeal had lapsed.
4. It was deposed that the delay was occasioned by the fact of the late receipt of the said instructions due to the fact that the applicants had not been supplied with a typed copy of the certified judgement and decree. That delay, it was deposed, ought not to be visited on the applicants.
5. It was deposed that the applicants have proper grounds of appeal as per the annexed draft memorandum of appeal which appeal is merited, arguable and raises pertinent points of law and fact thus the intended appeal against liability has overwhelming chance of success.
6. It was disclosed that the Applicants are ready, able and willing to furnish such reasonable security as this court may deem fit and in particular are ready and willing to give bank guarantee for the entire decretal amount pending the outcome of the intended appeal.
7. While it was the applicants' view that the Respondents stands to suffer no prejudice or damage that is incapable of being compensated by damages, it was their apprehension that unless the stay sought is granted, they stand to suffer substantial loss as there is likelihood that they will not recover the decretal amount if it is paid over to the Respondent.
8. The application was opposed by a replying affidavit sworn by **Julius Ndambuki Peter**, one of the Respondents on 28<sup>th</sup> June, 2021.

9. According to him, since the applicants herein did not adduce any evidence, call any witness or produce documentary evidence which would support their grounds that we were awarded excessive damages in compensation for the wrongful death of the deceased herein, the Respondents' evidence before on the issues subject of this matter is uncontroverted.

10. It was averred that the Applicants have not met the conditions for the grant of stay of execution. According to the deponent, whereas the application ought to have been brought without any unreasonable delay, this application is dated the 31<sup>st</sup> day of May 2021 while the judgement was delivered by the trial court on the 25<sup>th</sup> February 2021, approximately 4 months after the delivery of the judgement. While the delay was explained on the ground that the applicants had taken a while to reach their advocates in regard to instructions to file an appeal, it was the Respondents' view that a matter belongs to a litigant and not the advocate. In this case there is no evidence adduced confirming that there had been a lapse in communication between the advocate and the applicants. Accordingly, it was the Respondents' position that the application has been brought with unreasonable delay and the explanation advanced does not hold any water and ought to be disregarded by this court.

11. It was further averred that though the applicants are required to offer security for the due performance of the decree, from the application, it is noteworthy that the applicants have offered a bank guarantee as security. This form of security was objected to by the Respondents on the ground that it has not even been established through evidence that the applicants are qualified for the issuance of a bank guarantee as proposed. However, in the event this court does determine that it is proper for the issuance of security, the deponent proposed that half of the decretal sum be released to themselves and the remaining half be deposited in an interest earning account.

12. It was noted that while the applicants further have to demonstrate to this court that in the event that the stay of execution is not granted, they shall suffer substantial loss and suffer irreparable harm arising from the likelihood that the Applicants will not be able to recover the decretal sum from the Respondents, the applicants have not in any way established that the Respondents will be unable to refund the realized decretal sum if execution does continue. According to the deponent, he is a person of means working and residing within this country and much capable of refunding the executed amount in the unlikely event the intended appeal succeeds. However, since liability is not disputed, it would be just for the applicants to pay half of the decretal sum as parties submit their cases on the issue of quantum.

13. In the Respondents' view the intended appeal is not arguable.

14. The Respondents disclosed that after the judgement was delivered on the 25<sup>th</sup> day of February 2021, their advocates on record duly notified the applicants' advocates through a letter dated the 2<sup>nd</sup> day of March 2021 that the judgement had been delivered and forwarded a draft decree for approval by the said advocates. The Applicants' advocates however, failed and/or ignored to respond to the letter and this precipitated the movement towards the adoption of the decree which was executed by the court and is dated the 29<sup>th</sup> day of April 2021. Since the applicants did not exhibit any signs of payment of the decretal sum, the Applicants' advocates thereafter issued instructions to a firm of auctioneers known as Kande Auctioneers to realize the decretal sum being a sum of Kshs. 1,163,446/= and pursuant thereto, the trial court did issue warrants of attachment & sale of movable property in the execution of the decree for money. The said firm of auctioneers did fill a proclamation of attachment/repossession/distress dated the 28<sup>th</sup> day of May 2021 outlining the items that had been attached thereto and 3 days later on the 31<sup>st</sup> day of May 2021, the applicants filed the current application seeking stay of execution and leave to appeal against the judgement and decree of the trial court. This, according to the Respondents, only reads mischief in that had the proclamation not been done, the applicants would never have moved this court with the current application. In their view, the application has only been brought with malice and the same is an afterthought only intended to defeat the course of justice.

15. The Respondents lamented that they have waited for the conclusion and/or determination of this matter having filed it at the lower court in the year 2019 up to date and it seems the matter could drag for much longer at the instance of the applicants herein who don't seem to understand that litigation has to come to a conclusion at some point.

16. It was the Respondents' feeling that this application has been brought in utter bad faith and is only intended to defeat justice hence ought to be frowned upon and be dismissed with costs.

### **Determination**

17. I have considered the application, the respective affidavits and the submissions filed as well as the authorities relied upon.

18. 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.***

19. Under the proviso to section 79G of the **Civil Procedure Act**, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so. In determining whether or not there is good cause, the courts have established the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the length of the delay; (ii) the explanation if any for the delay; (iii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iv). whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

20. Regarding the length of delay, in this case, it is clear that judgement was entered on 25<sup>th</sup> February, 2021. This application was not made till 4<sup>th</sup> June, 2021. The Applicants had 30 days within which to lodge the appeal which means that delay is more than 2 months. Two months' delay is on the face of it an inordinate delay unless a satisfactory explanation is given.

21. As regards the reason for the delay, it was contended that the advocates for the Applicants informed the Applicants of the judgement and that by the time of the receipt of the instructions to appeal, the time limited for doing so had lapsed. The reason given is that there was a delay in furnishing the certified copy of the judgement. In my view, a party does not require a certified copy of the judgement to appeal. Although the Applicants deposed that they requested for a certified copy of the judgement and indicated that a copy of the letter was annexed, there was no such annexure. They further did not even indicate the kind of communication that they had with the Applicants following delivery of the judgement. In light of the averments by the Respondents that from the conduct of the Applicants, this application has been brought with malice and in bad faith and is an afterthought only intended to defeat the course of justice, the Applicants ought to have controverted this by exhibited evidence showing steps taken by them to file the appeal. There is completely no explanation from the Applicants themselves as to why they took that long to instruct their advocates to lodge the appeal and the explanation preferred by the advocate whose sworn supporting affidavit is unsatisfactory. The law is that where there is a long delay like in this case the explanation must be satisfactory. In the absence of a satisfactory explanation, the limb of the application seeking extension of time must fail.

22. It therefore follows that the limb seeking stay pending the intended appeal, must also fall by the wayside since without an appeal or an intended appeal, there can be no stay pending appeal. However, even if the application was to be considered on merit it would still fail the test for the grant of stay since the Applicants have not shown the substantial loss they stand to suffer if the stay is not granted. In this case the applicants, through an application sworn, not by themselves but, inappropriately, by their advocates, have only expressed apprehension that if the decretal sum is paid over to the Respondents, the Respondents are unlikely to refund the same in the event that the intended appeal succeeds. No grounds for arriving at this conclusion has been given and the source of this information has similarly not been disclosed.

23. In this case apart from a bare allegation, the Applicants have not laid any basis for believing that the Respondent will not be able to refund the decretal sum in question. Where the sum involved is colossal the Court may well take notice of the fact that the payment of such large amount may cripple the activities of the Applicant and may well discourage it from pursuing its appeal. In this case the amount involved is not more than Kshs 975,500/-. It has not been alleged that the payment of the said sum may adversely affect the financial position of the Applicants or their insurers.

24. Suffice to say as was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991**, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income. Apart from the foregoing the Applicants have not even identified the judgement or decree they intend to appeal against either in the body of the application or in the supporting affidavit. In my view a party seeking orders from the court ought to be precise on the order it seeks, against whom they are sought and in respect of which matter he is seeking them. In application for stay, a party ought to identify the judgement, the court that delivered it and when it was delivered.

25. In the premises it is my view and I hold that the appellant herein has failed to prove that substantial loss may result to him unless the order sought is made. Consequently, the Motion dated 31<sup>st</sup> May, 2021 fails and is dismissed with costs to the Respondents.

26. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 26TH DAY OF JULY, 2021.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Musya for the Respondent**

**CA Simon**