



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**MISC APPLICATION NO. E271 OF 2021**

**HARAN KIMATHI MURIUKI.....1<sup>ST</sup> APPLICANT**

**MWANGANGI SAMUEL.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**DUNCAN MWANZIA KIVULI.....RESPONDENT**

**RULING**

1. This is the notice of motion dated 8<sup>th</sup> June 2021 brought under Order 22 rule 22, Order 42 Rule 22, Order 42 Rule 6, Order 50 rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010. The application seeks the following orders:

*i. Spent*

*ii. That this honourable court be pleased to grant leave to the applicants to appeal out of time against the judgment of the honourable D.O Mbeja (Mr.) Principal Magistrate in Milimani Commercial Courts CMCC No.6136 of 2016 delivered on 7<sup>th</sup> May 2021.*

*iii. Spent.*

*iv. That this honourable court be pleased to stay execution of the judgment and decree in Milimani Commercial Courts CMCC No.6136 of 2016 delivered on 7<sup>th</sup> May 2021 pending the hearing and determination of the intended appeal.*

*v. That the annexed memorandum of appeal be admitted and be deemed as to be filed within time.*

*vi. That the costs of this application abide the outcome of the intended appeal.*

2. The application is premised on the following grounds:

*a) Judgment in Milimani Commercial Courts CMCC No.6136 of 2016 was delivered on 7<sup>th</sup> May 2021.*

*b) The applicants have now issued instructions for an appeal to be lodged over the judgment entered on 7<sup>th</sup> May 2021*

*c) The applicants are aggrieved by the judgment delivered on the 7<sup>th</sup> of May 2021 by honourable D.O Mbeja (Mr.) Principal Magistrate in Milimani Commercial Courts CMCC No.6136 of 2016 and seek leave to appeal out of time.*

*d) The applicants stand to suffer irreparable loss and damage as they risk facing execution at any time.*

*e) That the respondent's financial standing is so precarious that she will be unlikely to refund the decretal sum once the same is released to her and the intended appeal is successful.*

*f) That the applicants are ready and willing to furnish such reasonable security in form of a bank guarantee as this honourable court may deem fit.*

- g) That unless stay is granted the applicants application for stay pending appeal and the intended appeal will be rendered nugatory.*
- h) This application is timely made and without necessary delay.*
- i) The applicants have a good arguable appeal which has a high chances of success.*
- j) The respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs if this application is allowed.*

3. The application is further supported by an affidavit by Mwangangi Samuel (1<sup>st</sup> applicant) sworn on 8<sup>th</sup> June 2021. He has deponed that the impugned judgment delivered on 7<sup>th</sup> May 2021 held them 100% liable, awarded general damages of Kshs. 800,000/ and special damages of Kshs. 744,356/= plus costs and interest. That being aggrieved and dissatisfied with the said judgment he issued instructions to his advocate to appeal against the same. Annexure MS-1 is a draft of the memorandum of appeal that was prepared but the advocate inadvertently failed to issue instructions for the same to be filed within the stipulated time.

4. He avers that the memorandum of appeal cannot be filed at this point as leave of court to appeal out of time must first be sought. He further avers that the inadvertent delay on their part is highly regretted and that the applicant should not be penalized for the mistakes of their advocates.

5. He therefore prays that this honourable court grants leave to them to file an appeal out of time and stay of execution pending the hearing and determination of the appeal. He depones that the delay occasioned herein is not so inordinate as to be inexcusable and asks the court to so find.

6. In opposing to the application the respondent filed the following grounds of opposition dated 30<sup>th</sup> June 2021:

- a) The application does not warrant granting of orders under section 79G of the Civil Procedure Act, Cap 21 Laws of Kenya.*
- b) The application herein is an afterthought, a non-starter, speculative, vexatious and premature.*
- c) The applicants have not satisfied the condition of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 to warrant this honourable court to grant the orders for stay of execution.*
- d) The application is only meant to deny the respondents the fruits of their judgment.*
- e) The application herein lacks merit, it's a non-starter and the same ought to be dismissed with costs.*

7. The application was canvassed by written submissions. Learned counsel for the applicants Ms. Sang in her submissions dated 16<sup>th</sup> September 2021 gave a brief background of the matter and referred to the case of **Thuita Mwangi v Kenya Airways Ltd (2003) eKLR** where the court of appeal reiterated the conditions to be considered in deciding whether or not to grant extension of time to file an appeal which were as follows:

- 1) Length of the delay and the reason for the delay,*
- 2) The chances of success of the appeal if the application is granted, and finally,*
- 3) The degree of prejudice to the respondent if the application is granted.*

8. On the first condition, counsel submitted that the said judgment was delivered virtually and that the applicant's advocate sought to have the copies of the same but was not successful as it would not be availed online. She submitted that this posed a challenge to the applicants who did not know the reasoning of the court in reaching the judgment. It was only after getting the copy of the Judgment that the client gave instructions for appeal of the lower court's decision.

9. It is therefore counsel's submission that the delay was beyond their control and the applicants' application was filed on 25<sup>th</sup> June 2021 which was exactly 47 days after the Judgment was entered and therefore seventeen (17) days late which is not inordinate delay.

10. On this counsel relied on the case of **James Njenga & Another v Samuel Ngetich (2018) eKLR** in which the court indicated that a delay of 15 days does not amount to inordinate delay for a party to file their appeal. The court granted the applicant in that case leave to file their appeal out of time.

11. On the second condition, she submitted that the respondent was given judgment in the sum of Kshs. 1,544,356/= plus costs and interest which was inordinately high and the applicants felt aggrieved by the same hence the need to appeal. She further submitted that the courts in awarding parties damages ought not to enrich them at the expense of the other party.

12. She contends that in the event the appeal is successful, then there is no evidence to show that the respondent will be able to refund the entire decretal sum as his source of income is unknown and that the appeal will therefore be rendered a nugatory.

13. To support this argument counsel relied on the case of **G. N Muema p/a (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another (2018) eKLR** where it was held that:

*“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”*

14. On the third condition, she submitted that the memorandum of appeal annexed to the application sets out the grounds which have expressly shown that the appeal is based on facts that are true and has a high chance of success. On this counsel referred to on the case of **David Owenga v John Teleyio, Kisii HCCC No. 149 of 2010 eKLR** where the court quoted the case of **Butt v Rent Restriction Tribunal (1982) KLR 7** where the court had stated that;

*“If there is no overwhelming hindrance, a stay ought to be granted so that an appeal is not rendered nugatory should the appeal succeed”*

15. Counsel submits that the Court of Appeal has held time and again that an arguable appeal is not one that will necessarily succeed but one that raises triable issues. In the case of **Amal Hauliers Limited v Abdulnasir Abukar Hassan (2017) eKLR** Justice Korir quoted with approval the Court of Appeal decision in **Butt v Rent Restriction Tribunal (1982) KLR 417** which 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.*

16. In rebuttal, Mr. Nyamu for the respondent gave a brief background of the matter and identified two issues for determination to be as follows:

*i. Whether the honourable court should issue the of stay under Order 22 Rule 22 of the Civil Procedure Rules ,2010*

*ii. Whether the applicant has satisfied the conditions of Order 42 Rule 6 (2) of the Civil Procedure Rules 2010 to warrant the grant of orders for stay of execution.*

17. On the first issue he referred to Order 22 Rule 22 of the Civil Procedure Rules,2010 which provides:

*“22(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto. (2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application. (3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.”*

18. Counsel also relied on the case of **Butt v Rent Restriction Tribunal (1982) KLR 417** which was cited in the case of **Francis Ndahebwa Twala v Ben Nganyi (2018) eKLR**. He submitted that if this court is persuaded to grant the application then the applicants ought to deposit the entire judgment sum of KShs. 1,544,356/= in an interest earning account in the joint names of the advocates for the parties within 30 days.

19. On the second issue, counsel relied on the case of **Jennifer Njuguna & Another v Robert Kamiti Gichuhi (2017) eKLR** where the court stated as follows:

*“Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR**. They include the following:*

*a. The period of delay;*

- b. The reason for the delay;*
- c. The arguability of the appeal;*
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;*
- e. The importance of compliance with time limits to the particular litigation or issue; and*
- f. The effect if any on the administration of justice or public interest if any is involved.”*

20. On the period of delay, he submitted that the said judgment was entered on the 7<sup>th</sup> May 2021 and the instant application was filed on 10<sup>th</sup> June 2021 making it thirty eight days after the date of the judgment which according to the respondent is indeed inordinate delay bearing in mind the applicants advocate was present in court where Judgment was delivered.

21. On the reason for the delay, he submitted that according to the 2<sup>nd</sup> applicant he had given his advocate instructions to file a memorandum of appeal which he inadvertently failed to do. That this is not a satisfactory reason as the applicants’ advocate was aware of the decision of the trial court but still did not file the appeal as instructed.

22. On the arguability of the appeal, counsel submitted that the annexed memorandum of appeal has 9 grounds which they concede are arguable but they ought to be argued fully to enable them respond to the issues raised. He referred to the case of **Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Limited now Civil Application No. 345 of 2004** to support this.

23. He submitted that the respondent is being curtailed from enjoying his fruits of the judgment and that the court should give specific timelines to ensure the suit is prosecuted in the shortest time possible. It is therefore counsel’s submission that the applicant’s application dated 8<sup>th</sup> of June 2021 is an afterthought, a non-starter, speculative, vexatious, premature and an abuse of the court process and the same should be dismissed.

#### **Analysis and Determination**

24. Having keenly considered the application, grounds of opposition, affidavits, submissions and authorities I find the main issue for determination to be whether the applicants have met the required principles for grant of (a) *leave to file appeal out of time* and (b) *stay of execution pending the hearing and determination of an intended appeal*.

25. It is not disputed that the applicants have a right to appeal against the Magistrate Court’s decision.

*Section 65(1) of the Civil Procedure Act provides:*

*(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—*

*(b) from any original decree or part of a decree of a subordinate court, other than a magistrate’s court of the third class, on a question of law or fact;*

*(c) from a decree or part of a decree of a Kadhi’s Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.*

26. The statutory provision dealing with the requisite period for filing of appeals from the subordinate courts to the high court is **Section 79G Civil Procedure Act** which provides:

*“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.”*

27. The trial court’s judgment was pronounced on 7<sup>th</sup> May 2021. Any appeal in respect to the said judgment ought to have been filed on or before 7<sup>th</sup> June 2021 which was not done. The application before this court was filed on 10<sup>th</sup> June 2021 and not 25<sup>th</sup> June 2021 as submitted by the applicants’ counsel. The applicant therefore made the application three (3) days outside the stipulated period and not thirty eight (38) days as submitted by the respondent’s counsel. According to the respondent the applicant should have filed the appeal immediately and that this application is an afterthought aimed at denying him the fruits of his judgment.

28. The reason for the delay has been said to be the late receipt of the judgment leading to the late taking of instructions from the applicants. On the other hand the respondent has argued that since the judgment was pronounced in the presence of the applicant’s counsel the applicant did not have to wait for the hard copy of the judgment before filing an appeal. I find that to be misleading as what is pronounced in court may just be the final orders especially where the judgment is pronounced virtually. It is important for one to have the full details of the judgment before considering whether or not to appeal. These details can only be found in the full judgment.

29. Considering that the application is dated 8<sup>th</sup> June 2021 is a clear indication that the applicants had it in their mind to appeal on time but as they had indicated earlier they had not gotten hold of the judgment. The delay of 3 days can't be said to inordinate. I have come to the conclusion that this is a mistake that is excusable. In order to allow the applicants exercise their right of appeal I will grant the leave sought without any hesitation.

30. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides for stay of execution pending appeal on conditions. It provides as follows:

**Rule 6 (1)** *No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have*

*such order set aside.*

*(2) 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.”*

1. In the application dated 8<sup>th</sup> June 2021 the applicants annexed a copy of the draft memorandum of appeal (MS-1). It is clear that they are only contesting the award of damages and not liability. According to the applicants the decretal sum including interest and costs is Kshs 1,544,356/= which is inordinately high. It is also not denied that the respondent suffered injuries for which he is entitled to some damages, which the applicants will have to pay, once the appeal is heard and determined. The only issue is the amount of damages to be paid.

31. In the case of **Gemstar Importers & Anor vs Edward Nthiwa Mutiso** (sued as the legal representative of the estate of Charles Nzioka Nthiwa (deceased) [2018] eKLR it was held thus:

*“Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 it was held that:*

*“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”*

32. In the case of **Boniface Nzioka Malundu vs Jeremiah Kariuki Mwaniki** [2018] eKLR it was held:

*“The judgment on liability was by consent and I agree with the applicant that in the event of a review of quantum on appeal, the applicant will still have some amount payable to him that will be sufficient to cover the funds he needs for medical treatment.... Having considered all the issues involved in this application, I hereby find merit in the application and allow it as follows.... That out of the amount of Kshs. 1,500,000/= deposited in court, Kshs.985,096.87 be paid to the applicant/respondent pending the determination of the appeal.*

33. Upon considering all these facts, I will allow the prayer for stay of execution. The upshot is that the application dated 8<sup>th</sup> June 2021 is allowed on the following conditions:

a) Leave to appeal out of time is granted. The annexed memorandum of appeal is hereby admitted and deemed to have been filed within time.

b) There shall be stay of execution of the judgment dated 27<sup>th</sup> October 2020 on the following conditions:

(i) *The applicants to pay to the respondent (through his advocates) Kshs 500,000/= within 30 days.*

(ii) *The balance of the decretal sum amounting to Kshs 1,044,356/= to be secured by way of a bank guarantee from a*

*reputable bank within 30 days.*

c) Failure to comply with any of the above conditions will automatically vacate the order of stay of execution.

d) Costs of this application will be in the cause.

**DELIVERED ONLINE, SIGNED AND DATED THIS 30TH DAY OF SEPTEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.**

**H. I. ONG'UDI**

**JUDGE**