

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC. MISC. CIVIL APPLICATION NO. E004 OF 2021

DANIEL MWATHE MWILU.....1ST APPLICANT

FLORENCE MULE MWATHE.....2ND APPLICANT

VERSUS

MICHAEL NDUNDA KILONZO.....RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated 29th January 2021 filed by M/s Simiyu Opondo Kiranga advocates on behalf of the applicants Daniel Mwathe Mwilu and Florence Mule Mwathe.
2. It is an application filed under section 1A, 1B, 3A, 63(c) and (e) of the Civil Procedure Act (cap 21) and Order 42 Rule 6, and Order 50 Rule 6 of the Civil Procedure Rules, seeking stay of execution of judgment or decree pending hearing and determination of appeal, as well as leave to appeal out of time.
3. The application has grounds on the face of the Notice of Motion and is supported by the affidavit sworn on 24th January 2021 by Sospeter Opondo Aming'a advocate, in which it was deponed that a judgment awarding the respondent damages of Kshs.858,910/= had already been entered, and that the time allowed by law to file an appeal had already lapsed.
4. The application is opposed through an affidavit sworn by the respondent Michael Ndunda Kilonzo on 16th February 2020 in which it was deponed that before the application was filed, already the applicant's advocate had via email communication indicated a willingness to pay the decretal amount and that it was a surprise that they were now saying that they intend to appeal out of time.
5. The application proceeded through filing written submissions. Both the applicant's counsel and respondent's counsel filed written submissions to the application. I have perused and considered the submissions filed.
6. From the facts disclosed to me in the application, the response of the respondent and submissions filed, it is evident that the intended appeal is only on quantum of damages.
7. Thus, with regard to the request for stay, I am of the view that the applicant has satisfied the requirements under Order 42 Rule 6 of the Civil Procedure Rules. If stay is not granted, the appeal could as well be rendered as nugatory, if leave to appeal out of time is granted. With regard to the request for leave to appeal out of time, in view of the wide latitude given on access to justice in our 2010 Constitution, I will not deny the same as the delay is for less than six months.
8. I thus allow the application and order as follows –

a) Leave to appeal out of time is hereby granted. The appeal will be filed within 14 days from today, otherwise the extension of time herein granted will automatically lapse.

b) Stay of execution of judgment or decree is granted provided the applicants pay the respondent part of the decretal amount; that is Kshs.400,000/= within 20 days from today. In default the stay herein granted will automatically lapse.

DELIVERED, SIGNED & DATED THIS 28TH DAY OF SEPTEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE