



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT MERU

MISC CIVIL APPL. NO.E031 OF 2021

ALIBABA MOTOR LIMITED1ST APPLICANT

JOHN MUREITHI.....2ND APPLICANT

VERSUS

DAVID KAGWIRIA KIOGORA (Suing as the administrator of
the estate of David Mwirigi-deceased)RESPONDENT

RULING

1. The court is called upon to determine a Notice of Motion under certificate of urgency dated 19th May 2021 by the applicants, brought under Section 3A, 79G and 95 of the Civil Procedure Act, Order 22 Rule 22, Order 42 Rules 6, Order 50 Rule 6 and Order 51 Rule 1 and 3 of the civil procedure Rules, and all other enabling provisions of the law, and seeking, they be granted leave to appeal out of time against the judgement of Hon. J. Irura PM in Nkubu PMCC No. 21 of 2018 delivered on 7/4/2021 and that the execution of the said judgment be stayed pending the hearing and determination of the intended appeal.

2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Kelvin Ngure, the applicants' legal counsel sworn on 19/5/2021 and are to the effect that the delay was occasioned by the travel restrictions imposed due to Covid 19 pandemic, that the appeal is merited, arguable and has overwhelming chances of success and that the applicants are willing to furnish such reasonable security like a bank guarantee, because they are apprehensive that the respondent will be unable to refund the decretal sum, if given access thereto and later the appeal succeeds. It is the applicants' position that the respondent will not suffer any prejudice if the orders sought herein are granted.

3. The respondent, David Kagwiria Kiogora, opposed the application by the replying affidavit sworn on 16/6/2021. He avers that the application is made in bad faith to derail him from enjoying the fruits of his judgement then asserts being amenable to stay being granted on condition that $\frac{2}{3}$ of the decretal sum is paid to him, with the balance being deposited in a joint account of both advocates.

4. The parties agreed to canvass the application by way of written submissions which were respectively filed on 28/7/2021 and 13/7/2021.

5. For the applicants, submissions were made to the effect that they have demonstrated good and sufficient cause for not filing the appeal on time. They implored the court to exercise its wide discretion in their favour and grant them leave to appeal out of time. They asserted that the respondent, whose financial status was unknown, would be unable to refund the decretal sum in the event their appeal succeeded. It is contended that the applicants have demonstrated that the annexed memorandum appeal is arguable and raises serious points of law and fact with high chances of success. They relied on Wachira Karani v Bildad Wachira (2016) eKLR, Patel v E.A Cargo Handling Services Ltd (1974) E.A 75, Bake 'N' Bite (Nrb) Limited v Daniel Mutisya Mwalonzi (2015) eKLR, Esther Wamaita Njihia & 2 others v Safaricom Limited (2014) eKLR, Tabro Transporters Ltd v Absalom Dova Lumbasi (2012) eKLR, Mukuma v Abuoga (1988) KLR 645, Edward Kamau & anor v Hannah Mukui Gichuki & anor (2015)eKLR and National Industrial Credit Bank Ltd v Aquinas Francis Wasike & anor (2006) eKLR in support of their position on what principles guide grant of extension of time and stay pending appeal.

For the respondent it was submitted that the supporting affidavit sworn by Kelvin Ngure ought to be expunged from the record, for having been sworn by a person not a party to these proceedings.

According to him, the delay in filing the appeal in time has not been satisfactorily explained. The court was invited to balance the right of appellant against the right of a successful litigant as was held in Edward Kamau & anor v Hannah Mukui Gichuki (2015) eKLR. He contended that the applicants had failed to prove what substantial loss they would suffer if stay was denied. The respondent relied on Paul

Ngila & anor v Musili Malonza & anor (2020) eKLR, Kenya Power & Lighting Company Limited v Julius Wambale & anor (2019) eKLR, Monica Malel & anor v R & 2 Others (2009) eKLR and Kenya Red Cross Society v Mbono Katheke Mwanja (2019) eKLR to support his position that orders of enlargement of time to appeal out of time and stay should not be granted.

7. The principles for consideration on an application for extension of time to appeal out of time are established that, the power is discretionary, and unfettered but the applicant must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay must be plausible, the appeal must be demonstrated to be arguable and not flippant or frivolous and that the respondent is not unduly prejudiced by the order being made. See *Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others (2014) eKLR*.

8. I have given due regard to the length of delay and the explanation afforded for it. I have equally noted that the decision sought to be challenged was delivered on 7/4/2021 while the application now before court was filed on 21/5/2021. I compute the delay to amount to no more than 14 days and thus not convinced that it amounts to inordinate delay or indolence. When not inordinate, there is no reason to refuse extension of time. I find that the delay is excusable and I do excuse it.

9. On the arguability or otherwise of the intended appeal, the grounds raised in the draft memorandum seek answers on the manner in which the trial was conducted. The contention is that the evidence and submissions were never considered ad that there was an error in the conclusion as to the exact cause of the accident culminating in erroneous conclusions on liability and assessment of damages. Those are indeed concrete grounds of appeal, on the face of it. However, for this court to establish that there indeed exists an arguable appeal, materials need to be availed by the applicant. A decision to be judicious must be ground on fact beyond allegations. Here it would have been possible to avail to court even the judgment sought to be challenged to enable the court understand what the decision was and what reasons if any led to it. I have only been given the draft memorandum of appeal which I consider utterly bare and insufficient to enable me conclude that the intended appeal is arguable. For that reason alone, I find that there has not been met the threshold to grant leave and I decline the request to enlarge time and order that the prayer for extension of time be dismissed.

10. The next issue for consideration is whether the prayer for stay of execution pending appeal should issue. That prayer also invokes the discretionary powers of the court, which of course must be exercised judiciously. However, as the phrase suggests, stay can only be granted where there is a pending appeal.

11. Having declined leave to appeal out of time, there is no pending or anticipated appeal to ground stay and it thus follows that none should be granted at all. The consequence is that the entire application fails and it is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU VIRTUALLY BY MS TEAMS THIS 24TH DAY OF SEPTEMBER 2021

PATRICK J.O OTIENO

JUDGE

In presence of

No appearance for parties.

PATRICK J.O OTIENO

JUDGE