



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO E029 OF 2021**

**JOHN CALVIN OKUTU OWINO.....1<sup>ST</sup> APPLICANT**

**SHIDDA IDA ONYANGO.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**EDWARD OKWEMBA AMELE (Suing as the legal**

**representative of the Estate of FRONICAH NGAIRA**

**OKWEMBA (Deceased) .....RESPONDENT**

**JUDGMENT**

1. In their Notice of Motion dated 8<sup>th</sup> February 2021 and filed on 12<sup>th</sup> February 2021, the Applicants sought an order for leave to lodge an appeal and file a memorandum of appeal out of time against the Judgment and decree of Honourable C Oruo (SRM) that was delivered against them in **Maseno Civil Suit No 22 of 2019** and an order of stay the execution of the said Judgement and decree pending the hearing and determination of the intended appeal. The Application was supported by an Affidavit that was sworn by Pauline Waruhiu, Legal Counsel, Directline Assurance Company Limited on 8<sup>th</sup> February 2021.
2. The Applicants contended that the delay in filing the Appeal was occasioned by the internal process of transmission of communication of judgment from their advocates and transmission of instructions from the client to the advocates.
3. They averred that their application had been filed without any delay and added that the delay in lodging the Appeal was excusable. They stated that they had an arguable appeal which had overwhelming chances of success. They further contended that the Respondent would not suffer any prejudice.
4. They were apprehensive that stay of execution had lapsed and their Motor vehicle Registration number KCK 773 M would be proclaimed and attached and risked to be sold. They were categorical that they would not be able to recover the decretal sum in the event that the same was executed by the Respondent and they were successful on their Appeal.
5. It was their contention that their insurer, M/S Directline Assurance Company Limited was willing to provide a bank guarantee as a security for stay of execution pending appeal. They therefore urged this court to allow their application as prayed.
6. In opposition to the said application, on 2<sup>nd</sup> March 2021, the Respondent filed Grounds of Opposition. He contended that the Applicants had not satisfied the conditions precedent to grant of the orders sought. He stated that the decree herein was a modest money decree and the Applicants had not deposited the decretal amount in court and/or had shown no such intention to warrant the grant of the orders sought upon payment of security for costs.
7. It was his averment that the Applicants had not filed any appeal and/or shown how the intended appeal would be rendered nugatory if payment was made to him. He added that the intended appeal had no chances of success as the liability applied by the Trial Court was as a result of a consent recorded by parties.
8. He was emphatic that he had the capacity to institute the suit. He pointed out that the right of appeal ought to be balanced with the right of the decree holder to enjoy the fruits of judgment.
9. The Applicants relied on the case of **Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another [2018] eKLR** where the court therein allowed an application to appeal out of time on the ground that while statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in some sense.

10. They were emphatic that the delay in filing the appeal was not as a result of indolence but occasioned by the internal process of communication of Judgment and transmission of instructions between the Advocate and the client.
11. They contended that their draft memorandum of appeal annexed thereto their application set out grounds that are highly arguable giving the intended appeal a good chance of success if they were allowed to ventilate the same.
12. The Applicants further submitted that they had satisfied the conditions that were set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010.
13. They argued that the Respondent did not demonstrate his means of income and they were therefore uncertain if they would be able to recover the decretal sum if the same was executed and/ or paid to him in whole pending the intended appeal. They argued that they would suffer irreparable loss and damage in that the Respondent was a man of straw and was incapable of refunding the decretal amount of Kshs 404,000/=, which amount they contended was substantial.
14. In support of their averment that their insurer was willing, ready and able to furnish a bank guarantee, they placed reliance on the case of **Justin Mutunga David vs China Road & Bridge Corporation (K) Limited [2019] eKLR** where the court therein noted that the bank guarantee was an acceptable mode of furnishing security.
15. On his part, the Respondent was categorical that the Applicants had not met the conditions that had been set in Order 42 6(2) of the Civil Procedure Rules. He asserted that the Applicants had not proven to court that if the decree herein was executed, they would suffer substantial loss. He added that they did not also demonstrate that they had an arguable appeal.
16. He further argued that the Applicants had not offered or paid any security to this court for due performance of the decree. He added that the reason for delay that they gave was a mere excuse as there was no record availed to court to prove that contention.
17. In support of his case, he relied on the cases of **Butt vs Rent Restriction Tribunal [1979]** (eKLR citation not provided) where the court held that the power of a court to grant or refuse an order for stay of execution was discretionary, **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR**, where the court held that an applicant must establish other factors which show that the very essential core of the applicant as the successful party in the appeal amongst several other cases where it was held that the condition of payment of security for due performance of the decree had to be met by an applicant applying for an order for stay pending appeal.
18. That being said the guiding principles to be met in an application seeking leave of the court to file an appeal out of time/extension of time were then laid out in the case of **Thuita Mwangi vs Kenya Airways Limited [2003] eKLR** and were reaffirmed in the case of **Growth Africa (K) Limited & Another vs Charles Muange Milu [2019] eKLR**.
19. In exercising its discretion to allow an application seeking extension to file an appeal out of time, a court has to be satisfied that the omission or commission was excusable. In other words, there must be a plausible explanation for the delay in doing an act.
20. Although this court found that the Applicants' advocates and their insurer did not conduct themselves diligently, such failure was not an entirely unexpected omission. It was normal occurrence. This was a plausible, excusable and satisfactory explanation for the delay in filing the appeal on time.
21. From the Record, it was apparent that the decision the Applicants intended to appeal against was delivered on 10<sup>th</sup> November 2020. The present application was filed on 12<sup>th</sup> February 2021. Two (2) months and a week had since passed. As this court had found the reason for the delay that was advanced by the Applicants to have been excusable, this court came to the firm conclusion that the length of the delay was not inordinate and/or unreasonable.
22. An applicant also has to demonstrate that it has an arguable ground of appeal. The court perused the draft memorandum of appeal that was annexed to the said Notice of Motion application and noted that the appeal essentially sought to challenge both award on liability and quantum. At this point in time, it was not the duty of this court to consider the merits of the appeal.
23. Nonetheless, the court found and held the question as to whether or not the award of loss of dependency was pleaded and proved in the circumstances of the case warranting interference by the appellate court was an arguable ground of appeal, which the Applicants ought to be given an opportunity to canvass on merit.
24. In considering whether or not to grant an order for extension to do any act, the court also has to consider if the opposing side would suffer any prejudice if extension of time was granted. This court was not satisfied that the Respondent would suffer any prejudice if the Applicants exercised their constitutional right of appeal. If there was any prejudice, he did not demonstrate the same.
25. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice. Notably, while Section 75 A of the Civil Procedure Code provides for the period of thirty (30) days for an aggrieved party to lodge an appeal, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act.
26. Order 50 Rule 6 of Civil Procedure Rules stipulates as follows:-

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case**

may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

**Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.**

27. Taking all the factors hereinabove into account, it was the considered view of this court that the Applicants ought to be given an opportunity to have their Appeal heard on merit as they would suffer great prejudice if they were denied an opportunity to fully present their Appeal to be heard on merit.

28. Turning to the order for stay pending appeal under Order 42, Rule 6(2) of the Civil Procedure Rules, before such an order can be granted, an applicant has to demonstrate the following:-

**a. That substantial loss may result unless the order is made.**

**b. That the application has been made without unreasonable delay.**

**c. Such security as the court orders for the due performance of the decree has been given by the applicant.**

29. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.

30. The decretal sum herein was Kshs 404,000. It was not a colossal amount of money. However, the Respondent did not file an Affidavit of Means to demonstrate that he would refund the Applicants the said sum in the event they were successful in the intended appeal.

31. In the case of **G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another** (supra), this very court held as follows:-

**“It was the considered view of the 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.”**

32. This court was further guided by the holding of the Court of Appeal in the case of **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another [2006] eKLR** where it held thus:

**“Once an applicant expresses a reasonable fear that 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...”**

33. In the absence of proof that the Respondent would be able to refund the Applicants’ insurer the entire decretal sum without any hardship, this court was satisfied that they would suffer substantial loss. The Applicants had thus satisfied the first condition of being granted an order for stay of execution pending appeal.

34. Having found that the present application had been filed without unreasonable delay, this court was satisfied that the Applicants had met the second condition of being granted an order for stay of execution pending appeal.

35. The Applicants’ insurer had indicated that they were willing to provide security and consequently, it was therefore the considered opinion of this court that they had demonstrated that they had complied with the third condition of being granted an order for stay of execution pending appeal.

36. However, this court took the view that security in form of a bank guarantee was not suitable considering that there was a possibility of the bank not honouring the bank guarantee as the bank that would issue the same would not be a party to the suit herein making it difficult for the Respondent to enforce any orders it would get regarding the said bank guarantee, if at all without difficulties. This court therefore determined that the security to be furnished would be in form of money.

37. As the question of the capacity to institute the proceedings against the Applicants herein was a ground of the intended appeal, this court was not persuaded that it should order partial release of the decretal sum to the Respondent pending the hearing and determination of the intended appeal herein.

38. Weighing the Applicants’ right to have their dispute determined fairly in a court of law as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent’s fundamental right that justice delayed is justice denied as stipulated in Article 159(2)(b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicants if they were denied an opportunity to ventilate their Appeal on merit without an order for stay of execution pending appeal being granted herein.

## **DISPOSITION**

39. For the foregoing reasons, the upshot of this court's decision was that the Applicants' Notice of Motion application dated 8<sup>th</sup> February 2021 and filed on 12<sup>th</sup> February 2021 was merited and the same be and is hereby allowed in terms of Prayer No (3) and (4) therein in the following terms:-

**1. The Applicants be and are hereby directed to file and serve their Memorandum of Appeal within fourteen (14) days from the date of this Ruling.**

**2. The Applicants be and are hereby directed to file and serve their Record of Appeal within one hundred and twenty (120) days from the date of this Ruling.**

**3. The Deputy Registrar High Court of Kenya Kisumu is hereby directed to facilitate the expeditious typing of the proceedings in the lower court to enable the Applicants comply with the timelines within which to file their Record of Appeal as aforesaid.**

**4. There shall be a stay of execution of the decree in Maseno Civil Suit No 22 of 2019 (Edward Okwemba Amele (suing as the Legal representative of the Estate of Fronicah Ngaira Okwemba (deceased) vs John Calvin Okutu Owino & Another) on condition that the Applicants shall deposit into an interest earning account in the joint names of their counsel and counsel for the Respondent herein, the sum of Kshs 404,000/- within thirty (30) days from the date of this Ruling.**

**5. For the avoidance of doubt, in the event, the Applicants shall default on paragraph 39(4), the conditional stay of execution shall automatically lapse. The Respondent shall be at liberty to take such appropriate action in the event the Applicants shall default on Paragraph 39(1) and (2) hereinabove.**

**6. Either party is at liberty to apply.**

**7. Costs of the application will be in the cause**

40. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF SEPTEMBER 2021**

**J. KAMAU**

**JUDGE**