

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

MISC APPLICATION NO. 24 OF 2020

GEORGE MADEGWA.....1ST APPLICANT

JOHN NG'ANG'A WAWERU.....2ND APPLICANT

VERSUS

ANN NYARIBA GITAGIA (suing as the Administrators of the estate of

Peter Elizabeth Watiri – Deceased).....RESPONDENT

RULING

The Applicants were aggrieved by the judgment and decree of the Chief Magistrate's Court rendered on 23rd September 2020 (Hon. V. Karanja SRM) in Kitale CMCCC No. 137 of 2016. The Applicants wish to appeal against the said decision. According to the Applicants, they were not able to lodge the said appeal in time on account of the fact that there was a delay in giving the requisite instructions to the advocate due to the Covid-19 Pandemic protocols that made it economically difficult for the Applicants' to institute the appeal on time. The Applicants pleaded with the court to favourably consider their application and allow them a chance to ventilate their appeal before the appellate court. Pending the hearing and determination of the appeal (if the application is allowed), the Applicants crave for this court's orders of stay of execution. The Applicants are willing to provide security for the due performance of the order of stay of execution.

The Application is opposed. The respondent contends that the application is an abuse of the due process of the court. The Applicants have not established to the satisfaction of the court that substantial loss will ensue unless the order is granted. The respondent contends that the application has been brought to court after an inordinate delay and therefore should not be granted. Finally, the Respondent stated that the Applicants had not given security for the due performance of the order or decree that may ultimately be binding upon them. In the premises therefore, the Respondent urged the court to dismiss the application.

Parties were ordered to file their written submissions upon which the court will write the Ruling. Only the Applicants filed their written submissions. As regards the first prayer by the Applicants to be granted extension of time to file appeal out of time, this court formed the view that the same has merit. The Applicants delayed for a period of approximately 30 days from the date they were required to file the appeal. This period is not inordinate. The court is satisfied by the explanation given by the Applicants for their failure to lodge the appeal in time. This court takes judicial notice of the fact that the COVID-19 Pandemic has disrupted people's earning capacity. In the premises therefore, the Applicants' application to be granted leave to file appeal out of time shall be allowed.

As regard the second issue whether the court should grant stay of execution pending the hearing of the appeal intended to be filed, this court agrees with the Applicants that if stay of execution is not granted, the appeal may be rendered nugatory. The Respondent did not file an affidavit indicating that she would refund the decretal sum in the event the appeal were to succeed. Without such information, this court cannot make a finding that the Respondent will refund the decretal amount if the appeal were to succeed. The decision of the Court of Appeal in **National Industrial Credit ltd V. Aquinas Francis Wasike & Anor. [2006] eKLR** is apt;

“This court has said before and it would bear repeating that while the legal duty is on the applicant to prove the allegation that the appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. 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....”

In the present application, it is clear to the court that it is unable to ascertain the capacity of the Respondent to refund the decretal sum in the event that the appeal will be successful. The Applicants are however required by law to provide security for the due performance of the decree should the appeal not succeed. In the premises therefore, the application is allowed in the following terms:

1. The Applicants are hereby granted leave to appeal out of time. The Memorandum of Appeal shall be filed and served within fourteen (14) days of the delivery of the Ruling.
2. The Applicants shall deposit in a joint interest earning account in a reputable bank in the names of the Advocates of the parties herein the sum of Kshs 409,500/= pending the hearing and determination of the intended appeal.
3. There shall be stay of execution of the judgment and decree of the Chief Magistrate's Court pending the hearing and determination of the intended appeal.

4. Costs shall be in the cause.

DATED at KITALE this 23rd day of September 2021.

L. KIMARU

JUDGE