



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC. MISC. CIVIL. APPLICATION NO. E043 OF 2021

BERNARD M, KISIMU.....1ST DEFENDANT/APPLICANT

MANATWA SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LTD...2ND DEFENDANT/APPLICANT

-VERSUS-

MORRIS NZIOKA KYONGO.....1ST PLAINTIFF/RESPONDENT

AGNES K. MUTHINI.....2ND PLAINTIFF/RESPONDENT

JAMES KYALO KYONGO.....3RD PLAINTIFF/RESPONDENT

(Suing as the legal and personal representatives of VERONICA MUENI MWANGANGI (Deceased))

RULING

1. Before me is an application by way of Notice of Motion filed under section 3A, 79G, and 95 of the Civil Procedure Act (cap.21) and Order 22 Rule 22, Order 42, Rule 6, Order 50, Rule 6, Order 51, Rules 1 and 2 of the Civil Procedure Rules, seeking seven prayers, some of which have been spent as follows –

1) (spent)

2) That the court be pleased to extend time and grant leave to the applicant to lodge a memorandum of appeal out of time against the judgment and decree entered against the applicants by Honourable Sagero, SRM in Makueni CMCC No. 210 of 2019.

3) (spent)

4) That this honourable court be pleased to stay execution of the judgment and decree in Makueni CMCC No. 210 of 2019 pending hearing and determination of the intended appeal.

5) (spent).

6) That this honourable court be pleased to issue any other orders that it may deem just and expedient in the interests of justice.

7) That the costs of this application be in the cause.

2. The application has grounds on the face of the Notice of Motion that the judgment herein is for a substantial amount and the intended appeal herein will be rendered nugatory if execution is levied, and that if the amount is paid the respondent may not be able to repay the amount thus rendering the appeal as nugatory. It is also a ground that the intended appeal has high chances of success.

3. The application was filed with a supporting affidavit sworn on 28/4/2021 by Elizabeth Wanjiru advocate for the applicants, which amplifies the grounds of the application.

4. The application has been opposed through a replying affidavit sworn by Faith Mutio Mutuku advocate for the respondents on 21/6/2021, in which it was deponed that in the trial court, the applicants were granted 45 days stay of execution, and that counsel for the appellants intimated that they were processing payment only to turn round later and file the present application which was not merited.

5. The application was canvassed through written submissions. I have perused and considered the submissions of Kimondo Gachoka & company for the applicants and Mutuku Wambua & associates for the respondents.

6. This is an application for extension of time to file appeal, as well as an application for stay of execution pending appeal. Section 79G of the Civil Procedure Act (cap.21) relates to extension of time to file appeal while Order 42 Rule 6 of the Civil Procedure Rules deals with the grant of stay of execution of judgment or decree pending appeal.

7. Section 79G of the Civil Procedure Act provides as follows –

79G: 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.

8. With regard to stay of execution of decree pending appeal, Order 42 Rule 6(2) provides as follows –

6(2) No order of stay of execution shall be made under sub-rule (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.

9. The powers of this court to extend time to appeal, and to grant stay of execution of decree or judgment are discretionary powers. Such exercise of this court's discretionary power is guided by judicial principles in order to do justice, and not based on whims or sympathy. In this regard, in **Paul Musili Wambua –vs- Attorney General & Others (2015) eKLR** the court had this to say on the exercise of Judicial discretion –

“However, in exercise of such discretion, the court must act upon reasons not based on whims or caprice. In general, the matters which a court takes into account in deciding whether to grant extension of time are; the length of delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted ...”.

10. The reason given herein for the delay in filing an appeal is that the appellant (client) gave instructions late to the advocate to file the appeal. Having perused the proposed grounds of appeal I note that the grounds are not frivolous. In short, it will be an arguable appeal. In my view therefore, in line with the constitutional principle under Article 159(2) of the Constitution 2010 on courts having to render substantive rather than technical justice, I will not deny the applicant the chance to file and argue his appeal so that it is determined on merits. I will thus grant leave to appeal out of time.

11. With regard to the request for stay of execution of decree or judgment, the reasons for the delay in filing the application have been explained sufficiently. They relate to the delay of the client in giving instructions. The delay is also not inordinately long.

12. On the issue whether the applicant is likely to suffer substantial loss if the stay order sought is not granted, I find so in this money decree as recovery of the whole amount from the respondent might be difficult. I will however, grant stay subject to the applicants paying part of the decretal amount to the respondents.

13. With regard to the provision of security by the applicants, in my view such security will be satisfied by the payment of part of the decretal amount.

14. Consequently and for the above reasons, I order as follows –

1) I grant extension of time to the applicants to file appeal. The appeal will be filed within 15 days from today.

2) Stay of execution of judgment or decree is hereby granted, provided the applicants pay the respondents through their advocate part of the decretal amount of Kshs.1,000,000/= within 30 days from today.

3) In default of (2) above, the stay of execution orders herein granted will automatically lapse.

4) The costs of the application will abide the results of the appeal.

Delivered, signed & dated this 25th day of November, 2021, in open court at Makeni.

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GEORGE DULU

JUDGE