



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

MISC. APPLICATION NO. E007 OF 2021

ALICE CHEPKEMOI TONUUI & GEOFFREY KIPNGENO KIGEN (Suing as

legal representatives of the estate of **DAVID KIBET TONUUI**.....**RESPONDENT**

VERSUS

BENARD WANJALA KHAEMBA.....**APPLICANT**

R U L I N G

1. The Application coming for consideration in this ruling is dated 18/1/2021 seeking the following orders;

i. SPENT

ii. SPENT

iii. THAT the Applicant be granted leave to file and serve an appeal out of time against the judgment delivered on 9/9/2020 in terms of the annexed draft Memorandum of Appeal.

iv. THAT pending the hearing and determination of the intended appeal, that there be stay of execution of the judgment and/or decree of HON. B. R. KIPYEGON delivered on 9/9/2020 in Kericho CMCC No. 225 of 2015.

v. THAT upon grant of prayers 3 & 4 (above), this court be pleased to order that the Applicant do provide sufficient security in the form of a suitable bank guarantee from a reputable financial institution to secure the judgment herein.

vi. THAT the court do make any other orders it may deem just to grant.

vii. THAT costs be in the cause.

2. The Application is based on the grounds on the face of it and supported by the Affidavit of the Applicant BERNARD WANJALA KHAEMBA in which it is deposed that upon delivery of the judgment on 9/9/2020, his Advocate wrote an email to the Claims Director of Direct line Assurance Company Limited who are the Applicant's insurance advising an appeal on quantum and the Claims Director issued them with instructions to file an appeal by way of email which inadvertently was not received by the Applicant's Advocates.

3. Further, that the response was inadvertently not received until the thirty (30) days required to file the appeal lapsed.

4. The Supporting Affidavit states that the intended appeal has good chances of success and unless the intended stay is granted the same will be rendered nugatory.

5. The Supporting Affidavit further states that the Respondent's means of income are unknown/insufficient/undisclosed and the Respondent herein may not be able to refund the decretal sum in the likely event the intended appeal succeeds.

6. The Respondents filed a Replying Affidavit sworn on 25/1/2021 by ALICE CHEPKEMOI TONUUI opposing the Application on the grounds that there has been inordinate delay (more than 90 days) and further that the same is an abuse of the court process and is meant to delay the plaintiff from enjoying the fruits of the judgment.

7. The parties were directed to file written submissions in the Application which I have duly considered.

8. The applicants submitted that the application for leave to file the appeal out of time dated 26/1/2021 was filed three (3) months late and that this delay was occasioned by the fact that the judgment delivered on 9/9/2020 was read in the absence of the applicant and/or his counsels who learnt of the judgment after period required to file the appeal had lapsed.

9. The applicants submitted that by the time they received a copy of the judgment and sought instructions for leave to appeal, the time had already lapsed.

10. The applicants further submitted that the respondent had not demonstrated how she would be adversely affected or prejudiced if the appeal out of time was allowed by the court, the applicant who also sought stay of execution pending appeal was willing to offer a bank guarantee to act as a security for the entire amount pending hearing and determination of the intended appeal.

11. The applicants submitted that the intended appeal had a high likelihood of success. The applicants are contesting both liability and quantum in the intended appeal.

12. The respondents opposing the application submitted that there had been inordinate delay (more than ninety (90) days) and further that the same is an abuse of the court process and is meant to delay the respondent from enjoying the fruits of the judgment.

13. The issues for determination in this Application are as follows;

i. Whether the time for lodging the intended appeal should be extended.

ii. Whether stay of execution should be granted.

iii. Who pays the costs for the Application.

14. On the issues of expansion of time to lodge the appeal, the governing provisions of law are section 79 (G) and section 95 of the Civil Procedure Act. Section 79 (G) of the Civil Procedure Act states as follows:-

" 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."

Section 95 of the Civil Procedure Act states as follows:-

"Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.
"

15. The Court of Appeal in **UNION INSURANCE CO. OF KENYA LTD VS. RAMZAN ABDUL DHANJI CIVIL APPLICATION NO 179 OF 1998** proceeded to hold:

"The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it".

16. This was reiterated further in the case of **MURINGA COMPANY LIMITED VS. ARCHDIOCESE OF NAIROBI REGISTERED TRUSTEES CIVIL APPLICATION NO.190 OF 2019** where it was explained that:

"Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity."

17. There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible.

18. In **ANDREW KIPLAGAT CHEMARINGO VS. PAUL KIPKORIR KIBET [2018] eKLR** the Court of Appeal stated:

"The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily

explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

19. In the current case, I find that the judgment was delivered on 9/9/2020 and the Application was filed on 18/1/2021 and amended 26/1/2021. I find that the period is inordinately long and the reason given is not plausible.

20. The prayer for leave to appeal out of time is not merited and the same is accordingly declined.

21. On the issue as to whether stay of execution should be granted, the governing section is Order 42 Rule 6 of the Civil Procedure Rules which states as follows;

"(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for 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.

(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

22. In the case of **BUTT VS. RENT RESTRICTION TRIBUNAL [1982] KLR 417** the Court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:

"1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

23. I find that it is not necessary to grant stay since the prayer for leave to appeal out of time has been declined.

24. The Application dated 18/1/2021 and amended on 26/1/2021 be and is hereby dismissed with costs to the Respondents.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 19TH DAY OF NOVEMBER, 2021

A. N. ONGERI

JUDGE