



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**MISC. APPLICATION NO.E028 OF 2021**

**JAMES KAGUGA T/S OPERATOR SACCO.....APPELLANT**

**- V E R S U S -**

**EVERLINE OTIENO OKETCH (Suing as legal representatives of the estate of**

**GEORGE OMOLLO OGOLA - DCD.....RESPONDENT**

**R U L I N G**

1. The Application coming for consideration in this ruling is the Chamber Summons dated 13/9/2021 seeking leave to appeal out of time and stay of execution pending appeal.
2. The Application is supported by the Affidavit of the Applicant dated 13/9/2021 in which it is deposed that the judgment was delivered in the absence of the Applicant and without notice.
3. Further, that the Applicant's Advocate upon perusing the court file found that judgment had been delivered and he was instructed to file the appeal and the same was forwarded to the court registry on 4/8/2021 before the expiry of the stay period but the same could not be assessed as the court Registry was closed.
4. The Respondent opposed the Application and filed a Replying Affidavit dated 21/9/2021 sworn by **EVERLINE ATIENO OKETCH**.
5. The parties filed written submissions in the Application which I have duly considered.
6. The applicant submitted that the judgment was delivered on 7/7/2021 in the absence of the Applicant and without notice and further upon receiving a copy of the judgment, due to factors beyond the control of the applicant the appeal could not be assessed by the court registry due to court closure.
7. The applicant further submitted that the respondent had not demonstrated that she would be adversely affected or prejudiced if the leave to appeal out of time and stay pending appeal was granted. The applicant was willing to furnish security namely a bank guarantee of Kshs. 3,000,000 pending hearing and determination of the intended appeal.
8. The applicant submitted that the intended appeal has a high likelihood of success. The applicant is contending both liability and quantum in the intended appeal.
9. The respondent submitted that the court has the discretion to grant or refuse leave to appeal out of time.
10. The respondent submitted that the court could allow the application for stay of execution pending appeal on condition that half the decretal sum be paid to the respondent and the remaining half be deposited in an interest earning account in the name of both counsels.
11. The respondent further submitted that the applicant had not disclosed how many times the said bank guarantee had been used and whether or not it was exhausted, furthermore, that the said bank guarantee was dated 6th November, 2020 and was valid for a period of one (1) year and as such the bank guarantee would lapse on 6th November, 2021 and would not adequately cover the instant suit.
12. The respondent further submitted that she was prejudiced in that she needs the fruits of the judgment to educate the children who were left by the deceased.

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

**(i) Whether the Applicant should be granted leave to appeal out of time**

**(ii) Whether the Applicant is entitled to stay pending appeal**

**(iii) Who pays the costs for the application.**

14. On the issue as to whether the Applicant should be granted leave to appeal out of time, the governing provisions are section 79 (G) and section 95 of the Civil Procedure Act which state as follows;

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. In the current case, I find that there is good and sufficient cause to warrant the Applicant to be granted time to appeal out of time, furthermore, the length of delay involved will not prejudice the respondent. I grant leave to appeal out of time.

16. On the issue of stay pending appeal, the governing provision 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."*

17. In **SAMVIR TRUSTEE LIMITED VS. GUARDIAN BANK LIMITED NAIROBI MILIMANI HCCC 795 OF 1997** Warsame, J. (as he then was) expressed himself as hereunder:

*"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant... The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion."*

18. In **ARUN C. SHARMA VS. ASHANA RAIKUNDALIA T/A RAIRUNDALIA & CO. ADVOCATES & 2 ORS. [2014] eKLR**, the court stated:

*"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor..."*

19. In **FOCIN MOTORCYCLE CO. LIMITED VS. ANN WAMBUI WANGUI & ANOR [2018] eKLR**, it was stated that:

***“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”***

20. I hereby allow the Application dated 13/9/2021 on the following conditions;

**(i) THAT the intended appeal is filed and served within thirty (30) days of this date.**

**(ii) THAT the Applicant deposits half the decretal sum in an interest earning account jointly held by counsels for both parties within sixty (60) days of this date.**

**(iii) THAT the costs of this Application be paid by the Applicant.**

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 19<sup>TH</sup> DAY OF NOVEMBER 2021.**

**A.N. ONGERI**

**JUDGE**