



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. E300 OF 2021

PETER MWAURA GATHUKU.....1ST APPELLANT/APPLICANT

BENSON MUCHIRI.....2ND APPELLANT/APPLICANT

VERSUS

JOHN KINGELE MUE.....RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 25th June, 2021 taken out by the 1st and 2nd appellants/applicants and supported by the grounds set out on its body and the facts stated in the affidavit of the 1st applicant. The orders being sought are for leave to appeal out of time against the judgment and decree in Milimani CMCC NO. 711 OF 2020 delivered on 10th May, 2021 and a further order for a stay of execution of the aforesaid judgment pending the hearing and determination of the appeal.
2. The respondent responded to the Motion by way of the replying affidavit sworn on 12th July, 2021.
3. The instant Motion was canvassed through the filing of written submissions.
4. I have considered the grounds laid out on the body of the Motion; the facts deponed in the supporting and replying affidavits; and the respective submissions together with the authorities cited.
5. From a reading of the Motion it is evident that the orders sought therein are two-fold. The first is the order seeking for leave to appeal out of time against the impugned judgment and decree, which going by the record is unopposed by the respondent.
6. The provisions of Section 79G of the Civil Procedure Act are clear that the timelines for lodging an appeal against the decision of a subordinate court are within 30 days from the date of the decree or the order being appealed against. Furthermore, under the provisions of Section 95 of the Civil Procedure Act and Order 50, Rule 5 of the Civil Procedure Rules, the courts have discretionary power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
7. In the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** cited in the applicants' submissions, the Court of Appeal developed various conditions to offer guidance in deciding whether to extend the period for filing an appeal out of time and which I will address hereunder.
8. The first condition concerns the length of delay. In his supporting affidavit, the 1st applicant states that the Motion has been brought without undue delay.
9. Upon my perusal of the record, I note that none of the parties availed a copy of the impugned judgment for this court's reference. Nevertheless, it is apparent that the judgment was delivered on 10th May, 2021 while the Motion was brought sometime on or about the 25th day of June, 2021. I therefore do not find the delay to be unreasonable.
10. Concerning the reason(s) for the delay, the applicants state and submit that the delay was occasioned by the time taken by their advocate in obtaining a copy of the judgment and in receiving instructions to lodge an appeal against the same.
11. Upon taking into account the aforementioned averments, I find the explanation offered by the applicants for the delay to be reasonable in the circumstances.
12. On the principle touching on whether an arguable appeal exists, the applicants submits that they have an arguable appeal with high chances of success.

13. It is apparent from the grounds to the draft memorandum of appeal annexed to the instant Motion that the intended appeal is primarily challenging the assessment on damages made by the trial court. In the premises, I am satisfied that the applicants have raised arguable grounds in their appeal.

14. On the final condition touching on prejudice, the applicants state and submit that the respondent will not be prejudiced in any manner if the orders sought are granted.

15. In the absence of any indication of prejudice to be suffered by the respondent, I am convinced that it would not be in the interest of justice to deny the applicants an opportunity to challenge the trial court's decision on appeal. I therefore find it reasonable in the circumstances to extend the time required for the applicants to lodge their appeal.

16. The second order sought is that of a stay of execution of the decree pending appeal.

17. The guiding provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the following conditions in determining an application for stay.

18. The first condition stating that the application must have been made without unreasonable delay has already been addressed above.

19. The second condition touches on substantial loss to be suffered by an applicant. In both the supporting affidavit and submissions, the applicants indicate their apprehension that the respondent may be unable to refund the decretal sum once the same is paid to him and the appeal succeeds.

20. In reply, the respondent states and submits that substantial loss has not been demonstrated and that the applicants have not tendered any evidence to support their assertions that the decretal amount may be unrecoverable upon payment. The respondent cites the case of **Antoine Ndiaye v African Virtual University [2015] eKLR** in which the High Court held that the onus of proving inability to refund the decretal sum lies with an applicant, by way of evidence.

21. The question on who has the burden of proof on the issue of refund of the decretal sum was aptly discussed by the Court of Appeal in the case of **National Industrial Credit Bank Ltd v 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...”

22. In the absence of anything to indicate or ascertain the respondent's financial capacity here and upon considering the interest of justice, I am satisfied that the applicants have reasonably shown the likelihood of substantial loss occurring should the order for a stay of execution be denied.

23. Under the final condition which is the provision of security for the due performance of such decree or order, the applicants has indicated their readiness and willingness to furnish a bank guarantee as security, whereas the respondent urges that at least three quarters of the decretal sum be paid to him while the remainder be deposited in a joint interest earning account.

24. In making an order on the provision of security, this court must balance the interest of the parties. In the present instance, it is noteworthy that the respondent has not shown any pressing need that would require payment of part of the decretal amount to him at this stage. It is also noteworthy that the respondent is not amenable to the provision of a bank guarantee.

25. Consequently, the Motion dated 25th June, 2021 is allowed thus giving rise to the following orders:

i. The applicants granted leave to file an appeal out of time within 30 days.

ii. An order for stay of execution of the judgment delivered on 10th May, 2021 is granted on the condition that the applicants deposit the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within 30 days from today's date failing which the order for stay shall automatically lapse.

iii. Costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

.....

J. K. SERGON

JUDGE

IN THE PRESENCE OF:

..... **FOR THE 1ST AND 2ND APPELLANTS/APPLICANTS**

..... **FOR THE RESPONDENT**