



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. E455 OF 2021

SIMON WAGACHA NGANGA.....1ST APPELLANT/APPLICANT

JOSEPH MUNIU GITAU.....2ND APPELLANT/APPLICANT

-VERSUS-

JOHN NJUGUNA GITHINJI.....RESPONDENT

RULING

1. This ruling is predicated on the Notice of Motion dated 16th September, 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 2nd applicant. The applicants sought for an order for leave to appeal out of time against the judgment and decree delivered on 30th July, 2021 in Milimani CMCC No. 7609 of 2019 and a further order for a stay of execution of the aforementioned judgment pending the hearing and determination of this appeal. The applicants also sought for an order to the effect that they be allowed to provide a bank guarantee from Diamond Trust Bank as security for the decretal sum.
2. In response to the said Motion, the respondent put in Grounds of Opposition dated 27th September, 2021 in which he raised a total of 12 grounds.
3. The instant Motion was canvassed through oral arguments whereby the parties' respective advocates chose to rely on the relevant documents filed.
4. I have considered the grounds laid out on the body of the Motion; the facts deponed in the supporting affidavit; the Grounds of Opposition and the oral submissions.
5. The orders being sought in the Motion are two-fold: first is the order seeking for enlargement of time to appeal and for leave to appeal out of time against the impugned judgment and decree.
6. Section 79G of the Civil Procedure Act stipulates that an appeal against the decision of a subordinate court shall be lodged within 30 days from the date of the decree or the order being appealed against. The provision further stipulates that an appeal can be admitted out of time where sufficient cause has been shown.
7. Moreover, under the provisions of Section 95 of the Civil Procedure Act and Order 50, Rule 5 of the Civil Procedure Rules, the courts have power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
8. In the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** the Court of Appeal illustrated the conditions to be met in deciding whether to extend the period for filing an appeal out of time and which I shall address hereunder.
9. Under the first condition touching on length of delay, while it is apparent from the record that no copy of the impugned judgment was availed to this court, the parties are in agreement that the impugned judgment was delivered on 30th July, 2021 which is close to two (2) months prior to the filing of the Motion. In my view, while there has clearly been a delay in filing the Motion, I do not find the delay to be inordinate.
10. Concerning the reasons for the delay, the 2nd applicant explained that the delay was occasioned by the difficulty experienced by their advocates in tracing them upon delivery of the impugned judgment. The respondent argued in his grounds that the applicants have not given any reasonable explanation for the delay.
11. Upon considering the explanation given by the applicants, I find the same to be reasonable in the circumstances.

12. As relates to the condition on whether or not an arguable appeal exists, it is the applicants' assertion on the one hand that they have an arguable appeal which raises valid points of law and fact. The respondent on the other hand contends that the appeal has no chances of success.

13. Upon my perusal of the grounds of appeal raised in the draft memorandum of appeal annexed to the Motion, I note that the appeal is challenging the finding of the trial court on quantum. I am therefore satisfied that the applicants have demonstrated arguable points of law and fact in their appeal.

14. In addressing the final condition on prejudice, the applicants assert that the respondent does not stand to be prejudiced in a matter that cannot be adequately compensated by way of costs.

15. Upon my perusal of the record, it is apparent that the judgment was in favour of the respondent herein and against the applicants. It therefore follows that the respondent is lawfully entitled to enjoy the fruits of his judgment. Suffice it to say that it would not be in the interest of justice to lock out the applicants who are aggrieved by the judgment of the trial court on damages. I therefore find it reasonable for the applicants to be given the opportunity of challenging the subordinate court's assessment on damages on appeal.

16. The second prayer is for stay of execution of the decree pending appeal, for which the guiding provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the conditions to be satisfied for issuance of such an order.

17. The first condition being that the application must have been brought without unreasonable delay has already been addressed hereinabove.

18. The second condition touches on substantial loss to be suffered by an applicants.

19. The applicants on their part are apprehensive that if the decretal amount is paid to the respondent, the likelihood of recovering the amount from the respondent should the appeal succeed is slim. The respondent is of the view that the applicants have not demonstrated by way of evidence the substantial loss they stand to suffer in the circumstances.

20. The question as to who has the burden of proof on the issue of refund of the decretal sum was discussed by the Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** in which it held inter alia as follows:

“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...”

21. In the absence of anything to ascertain the respondent's financial capacity to refund the decretal sum, I am satisfied that the applicants have reasonably demonstrated that they stand to suffer substantial loss if the order for a stay of execution is not granted.

22. Under the final condition which is the provision of security for the due performance of the decree or order, the applicants state that they are ready and willing to provide security by way of a bank guarantee. In retort, the respondent proposes that half the decretal sum be paid to him while the remaining half be deposited in a joint interest earning account.

23. In making an order for 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.

24. In the end therefore, the Motion dated 16th September, 2021 is found to be meritorious and hence it is allowed thus giving rise to the following orders:

i. The applicants shall file and serve the memorandum of appeal within 21 days from this day.

ii. There shall be an order for stay of execution of the judgment and decree issued on 30th July, 2021 pending the hearing and determination of the intended appeal on the condition that the applicants deposit the entire decretal sum in an interest earning account in the joint names of the advocates or firms of advocates within 45 days from the date of this ruling in default of which the stay order shall lapse.

iii. Costs of the Motion shall 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