



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**MISC. CIVIL APPLICATION NO.257 OF 2019**

**CHARLES KAMAU KIRAGU....1<sup>ST</sup> APPELLANT/APPLICANT**

**JOHN KAGAL.....2<sup>ND</sup> APPELLANT/APPLICANT**

**-VERSUS-**

**AW(Minor suing thro' her**

**father and next friend MMK.....1<sup>ST</sup> RESPONDENT**

**GABRIEL NDERITU NGATIA.....2<sup>ND</sup> RESPONDENT**

**RONALD MUNGAL.....3<sup>RD</sup> RESPONDENT**

***(Being an appeal against the judgment of Hon. J.B Kalo Cm***

***delivered on 18<sup>th</sup> December, 2018 in Nakuru CMCC No.327 of 2008)***

**RULING**

1. This is a ruling on application dated **16<sup>th</sup> April 2019**. It seeks stay of execution judgment delivered on 18<sup>th</sup> December 2019 in CMCC No.327 of 2008 and consequential orders.
2. It also seeks leave to file appeal out of time and draft memorandum of appeal be deemed as duly filed save for payment of filing fees. The application is supported by affidavit sworn by **Kibet Cheboswony** applicant's Advocate.
3. He averred that judgment was entered in favour of 1<sup>st</sup> respondent for kshs.650,000 as general damages and kshs.2000; that the insurer **UAP** was aggrieved with the judgment and intend to appeal.
4. That delay was as a result of communication breakdown between the applicants and Advocate resulting in instruction to file appeal not reaching the advocate's offices in time; further that the delay was not intentional but was due to unforeseen circumstances. He averred the applicant has meritorious and formidable appeal and urged court to allow the applicant prosecute the appeal.
5. The applicant further averred that the 1<sup>st</sup> respondent is in the process of executing and if allowed the applicant will be shut out from ventilating the appeal. He added that plaintiff will not suffer any prejudice if the application is allowed.
6. In response, the respondent filed replying affidavit sworn by **Geoffrey Kirumba Mbiyu** on 14<sup>th</sup> May 2019; he averred that judgment was delivered in the presence of the parties and judgment terms and costs were communicated to the applicant's Advocates on 7<sup>th</sup> January 2019; further that his firm issued two reminders dated 8<sup>th</sup> February 2019 and 29<sup>th</sup> March 2019. He attached the letters.
7. Counsel further averred that he personally called **Mr Kibet** and **Karanja** of the firm representing the applicants over settlement of the decree and the Advocate promised that they were in touch with their client and payment would be made soon.
8. Counsel stated that he was surprised to be served with this application on 6<sup>th</sup> May 2019; he averred that the applicant filed this application on 24<sup>th</sup> April 2019 and served on 6<sup>th</sup> May 2019 a month after filing the application and 12 days after getting stay order.
9. Counsel further stated that no reason has been advanced as to why the application should be allowed; that the applicant has not stated the

communication barriers alleged to be cause for delay and stated that the unforeseen events and communication barriers are vague and unknown in law.

10. He averred that the appeal is predicated on suit proceeding whilst the 3<sup>rd</sup> party is **Blue Shield Insurance Company Ltd** a matter that neither flowed from pleadings, or evidence or raised by 3<sup>rd</sup> party who chose to proceed with the matter and therefore appeal on that ground is unlikely to succeed.

11. Counsel further averred that the applicant never called any witnesses to tender evidence in court therefore appeal is unlikely to succeed. He added that the applicants were represented by counsel who knew appeals are lodged within 30 days after judgment is delivered, a fact well known by insurance companies who have legal officers. That the application was filed 5 months after delivery of judgment is devoid of merit and is meant to deny 1<sup>st</sup> respondent fruits of judgment. He prayed that application be dismissed.

### **ANALYSIS AND DETERMINATION**

12. I wish to consider whether the applicant has satisfied the court that it has met conditions to warrant exercise of discretion to stay execution and allow extension of time to file appeal.

13. In respect to extension of time to file appeal, the application has to demonstrate that application has been filed without delay, chances of appeal succeeding and whether prejudice will be occasioned to the respondent if application is allowed.

14. It is not disputed that the judgment was delivered in the presence of counsel of both parties in the lower court. Thereafter there was communication from counsel for the respondent to the applicant's Advocate on settlement of the decretal amount.

15. It is not also in dispute that this application was filed 5 months after delivery of judgment. Applicant talked of communication barrier with the Advocate. That has not been elaborated. Counsel for 1<sup>st</sup> respondent indicated that the Advocates who were on record for defendants in the lower court communicated to plaintiff's advocate indicating that they were in touch with their client. If they were in touch with client as indicated, it follows that the client knew the position of the case.

16. I note that in submissions filed, the applicant has attempted to explain the communication breakdown; explanations given are issues of fact which should have been deponed by party alleging. The allegations therefore remain unsubstantiated.

17. Respondent has also indicated that the defendant in the lower court never adduced evidence. In appeal the High Court will be required to evaluate evidence adduced in the lower court; in the absence of evidence by defendant's evidence in the lower court to rebut plaintiff's evidence, chances of appeal succeeding in my view are slim.

18. From the foregoing, I find that the delay has not been sufficiently explained. The delay for 5 months is prolonged. Counsel who was on record was aware that appeal was to be filed within 30 days but waited up to 5 months. In my view, this is an afterthought; it is not filed in good faith. I therefore disallow application to file appeal out of time.

19. Having made the above finding, I am inclined to allow stay of execution for a period of 30 days from the date of this ruling.

**Ruling dated, signed and delivered at Nakuru this 30<sup>th</sup> day of January 2020**

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**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Schola/Jenifer - Court Assistant

Mr. Kahiga Counsel for Applicant

Mr. Mutonyi Counsel for respondent