



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 761 OF 2019

GEORGE MAINA.....1ST APPLICANT

JANE NYAMBURA GATHITU.....2ND APPLICANT

-VERSUS-

PETER KASIU MUTIE alias BRIAN KASIU MUTIE....RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 5th December, 2019 lodged by the 1st and 2nd applicants and supported by the grounds set out on its face and the facts stated in the affidavit of advocate *Ascar Kwamboka Ooga*. The applicants sought for the substantive orders of extension of time and leave to file a memorandum of appeal out of time against the judgment of Honourable L.T. Lewa (Senior Resident Magistrate) delivered on 24th October, 2019 in MILIMANI CMCC NO. 3494 OF 2017, and for a stay of execution pending hearing and determination of an intended appeal.
2. The abovementioned deponent stated in her affidavit that judgment was entered in the suit in favour of the respondent and against the applicants in the aggregate sum of Kshs.413,805/ together with costs of the suit and interest thereon, which award the applicants are aggrieved by and wish to challenge by way of an appeal.
3. The deponent further stated that by the time she received instructions from the applicants to lodge an appeal, the stipulated timelines had lapsed, with the delay being attributed to the time taken by the applicants to revert to their advocate on an opinion given earlier on.
4. The deponent went on to assert that the respondent does not stand to suffer prejudice should the applicants be permitted to file their appeal out of time.
5. It was equally the deponent's assertion that there lies an imminent threat of execution by the respondent and there is also a likelihood that the applicants will not be able to recover the decretal amount from the respondent once the same is paid and the intended appeal is successful, thus rendering the intended appeal nugatory.
6. The deponent contended that the applicants are entirely ready and willing to comply with any orders relating to the provision of security to ensure due performance of the decree.
7. *Dr. Njoroge O. Kimani* advocate for the respondent put in a replying affidavit to resist the Motion, averring that the applicants' advocates being at all material times aware of the judgment ought to have appealed against the same before the time lapsed hence the explanation now given to this court is both misleading and insufficient.
8. The deponent maintained that there is no reason as to why the respondent should be prevented from enjoying the fruits of his judgment, adding that the application is solely intended to delay such process.
9. During oral arguments, *Miss Ooga* advocate for the applicants reiterated the averments made in the application but added that the applicants are of the view that the award of damages was excessive hence the intended appeal. She also submitted that the applicants are willing to deposit the decretal sum in court or alternatively pay a portion of it to the respondent and deposit the remaining balance in court.
10. In reply, *Mr. Gitonga* counsel acting for the respondent contended that there has been a delay in bringing the application and further contended that the award of damages was not too high. He included the submission that should this court be persuaded to grant the prayers being sought, then it would be a fair order that the entire decretal sum be deposited in court.
11. I have duly considered the grounds as presented in the Motion, the facts deponed in the supporting and replying affidavits respectively, and the competing oral arguments.

12. It is noted that the Motion sought for twin prayers. I will first address the prayer on leave to appeal out of time/extension of time to file an appeal. In this regard, reference is made to **Section 79G** of the **Civil Procedure Act** which provides 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.”

13. The above provision elaborates that a court can only grant a party leave to file an appeal out of time where sufficient cause is given.

14. In the present instance, there is no question that the timelines for filing an appeal have since lapsed. That said, in contemplating whether to extend the time or otherwise allow the applicants to lodge their appeal out of time, I am guided by the court’s analysis in the case of **Apa Insurance Limited v Michael Kinyanjui Muturi [2016] eKLR** where reference was made to the case of **Thuita Mwangi v Kenya Airways Limited [2010] eKLR** in which the Court of Appeal succinctly stated the conditions/principles to be met in an application for leave to appeal out of time.

15. I will consider the first and second principles on the length and reason for the delay contemporaneously. It is apparent that the judgment in question was delivered on 24th October, 2019. The applicants brought the present Motion within a span of not more than (2) months thereafter. Having considered the 30 days stipulated under the provisions of **Section 79G** (*supra*), I am satisfied that there has been no unreasonable delay in bringing the Motion. In respect to the reasons behind the delay, I took note of the explanation stated in the supporting affidavit concerning the time taken by the advocate to study the judgment, give an opinion on the same and obtain further instructions from the applicants; in my view, this constitutes a fairly reasonable explanation and in any case, *Mr. Gitonga* in his oral submissions acknowledged that on the date of delivery of the judgment, the applicants were not in attendance, which would further explain the delay.

16. On the element on prejudice that will befall the respondent should the relevant prayer be granted, upon my study of the record, I observed that the respondent did not address me on this principle, thereby leading me to conclude that the respondent has not demonstrated any particular prejudice that he stands to suffer.

17. From the foregoing, I see no cause to deny the applicants an opportunity to file their appeal out of time.

18. Having determined so, I will now proceed to address the second limb of the Motion to do with the granting of an order for stay of execution, the guiding principles of which are encapsulated under **Order 42, Rule 6 (2)** of the **Civil Procedure Rules**.

19. I am satisfied that the first principle on whether the application has been brought without unreasonable delay has adequately been addressed hereinabove and there is no need for me to belabor my analysis and finding on the matter.

20. The second principle touches on substantial loss. As I may recall, the applicants’ major apprehension in this regard was that there is no guarantee that the respondent will be in a financial position to repay the decretal sum if the appeal is found to have merit. From my study of previous decisions where this point has been raised, I found that while it is true that a judgment-creditor should not be kept out of the fruits of his or her judgment, it is also true that once an applicant expresses a reasonable fear that the decretal sum will be non-recoverable from the judgment-creditor or respondent, the evidential burden automatically shifts to the respondent to demonstrate that he or she has the financial means to refund the decretal amount where the circumstances call for it.

21. In the present instance, the respondent did not address this court on his financial standing, neither did he avail an affidavit of means to show his income and/or assets. In the absence of such evidence, I am convinced that the applicants have demonstrated that they stand to suffer substantial loss.

22. On the third and final condition on the provision of security, as earlier noted the applicants expressed their willingness to comply with whatever orders this court will deem fit to issue and the respondent similarly offered a preferred mode of provision of security, both of which I have considered.

23. In the end, the Motion is allowed in respect to prayers (ii) and (iv) and the following orders are made consequently:

a) The applicants shall file and serve the intended appeal within 60 days from today.

b) There shall be a stay of execution of the judgment delivered on 24th October, 2019 on the condition that the applicants deposit the decretal sum of Kshs.413,805/ in court within 30 days from this date, failing which the order for stay shall automatically lapse.

c) Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 27th day of February, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the 1st and 2nd Applicants

..... for the Respondent