



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**MISC. APPLICATION NO. 56 OF 2020**

**NICHOLAS NZIOKA.....APPLICANT**

**VERSUS**

**BONIFACE MUIA MBATHA**

**NDUKU KATUA (suing as next of Kin and personal representatives of the**

**Estate of Silvester Muia Mathina-Deceased).....RESPONDENTS**

**RULING**

1. By a Motion on Notice dated 27<sup>th</sup> May, 2020, the applicant herein seek the following orders:

**1) Spent.**

**2) That this honourable court be pleased to extend time and grant leave to the applicant to lodge an appeal and file a memorandum of appeal out of time against the judgement and decree of the honourable Keago E delivered against the defendant/Applicant on 11<sup>th</sup> March 2020 in Machakos Civil Suit No.735 of 2014.**

**3) Spent.**

**4) That this honourable court be pleased to stay the execution of the said judgement and decree pending the hearing and determination of the intended appeal.**

**5) That this court be pleased to give any other and or further orders that it may deem fit, just and expedient in the circumstances and in the interest of justice.**

**6) That the costs of the application be in the cause.**

2. The application was based on the following grounds:

**a) Judgment herein was delivered on 11<sup>th</sup> March 2020 and the 30 days within which an appeal is to be filed have since lapsed.**

**b) The defendant/applicant is aggrieved by the Judgment on Quantum delivered on 11<sup>th</sup> March 2020 in Machakos civil suit no 735 of 2014 by the Honorable Kiago C.A and seeks leave to appeal out of time.**

**c) The defendant /applicant is desirous of filing an appeal against the said judgement.**

**d) That upon obtaining a copy of the said judgment the applicant's advocates received instructions to appeal against the said judgment after the period of filing an appeal had lapsed hence the delay.**

e) That the delay was inadvertent and not deliberate and this application is brought timeously without unreasonable and undue delay.

f) The defendant /Applicant stands to suffer substantial and irreparable loss and damage as there is a real likelihood that the Respondents will proceed and execute the said judgment and decree.

g) Unless this application is allowed, the Applicants' intended appeal will be rendered nugatory.

h) The Applicant has a strong arguable appeal with high chances of success.

i) The application is made in good faith and the respondent/plaintiff will not suffer any prejudice or any damage should the prayers sought herein be granted.

j) The defendant/Applicant is apprehensive that the Respondent may levy execution against it.

k) The applicant is ready and willing to comply with such reasonable conditions as this court may grant to enable the applicant pursue its intended appeal.

3. The application was supported by an affidavit sworn by **Isabella Nyambura**, the Senior Claims Manager at Directline Assurance Company Limited, the insurers of the vehicle the subject of the suit in the lower court. In the said suit on 11<sup>th</sup> March, 2020, judgement was entered against the applicant by which the applicant was adjudged 50% liable and was directed to pay the Respondents Kshs 1,548,250/=. Aggrieved by the said decision the Applicant instructed its advocates to lodge an appeal against the said judgement and based on the annexed draft memorandum of appeal, the deponent believed that the same is merited, arguable and raises pertinent points of law hence has overwhelming chances of success.

4. It was disclosed that the applicant was ready, able and willing to furnish such reasonable security and the court deems fit. However, the Applicant was apprehensive that the Respondents would proceed and execute against the applicant thereby occasioning great injustice, prejudice and loss to the Applicant. On the other hand, it was the Applicant's belief that the Respondents would not suffer any prejudice or any damage not capable of being compensated by way of costs.

5. According to the Applicant there was a likelihood that the Applicant would not recover the decretal amount if the same was paid over to the Respondents before the intended appeal was determined.

6. The Applicant averred that the inadvertent delay was highly regretted and since the Applicant had nothing to do with the same, the Applicant should not be penalised. In any case the said delay was no so inordinate as to be inexcusable.

7. The application was not opposed by the Respondents save that the Respondents contended that since the intended appeal was restricted only to quantum the court ought to grant a conditional stay, the condition being that the applicant ought to pay the Respondent 50% of the decretal sum and to deposit the other half in an interest earning bank account in the joint names of the parties' respective firms of advocates within a specified time.

#### **Determination**

8. I have considered the application, the affidavits filed and the submissions filed as well as the authorities relied upon.

9. As stated hereinabove the limb seeking extension of time is unopposed. Accordingly, time is hereby extended to the applicants within which to file their memorandum of appeal with a period of 14 days from the date of this ruling.

10. Having considered the instant application, it is my view that this a case where a stay ought to be granted but on conditions since it would seem that the fulcrum of the applicant's case will be on quantum. Accordingly, the order which commends itself to me and which I hereby grant is that there will be stay of execution pending the hearing of the intended appeal on condition that the Applicant pays 50% of the decretal amount to the Respondent and deposits the other half in a joint interest earning account in the names of the advocates for the respective parties in Kenya Commercial Bank, Machakos within 30 days of this decision. Failure to adhere to the above conditions, the stay will automatically lapse.

11. The costs of this application will be borne by the applicant in any event.

12. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 30<sup>th</sup> day of June, 2020.**

**G V ODUNGA**

**JUDGE**

**Delivered in the absence of the parties.**

