



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

MISCELLANEOUS CIVIL APPLICATION NO. 36 OF 2020

SUSAN LEYATORO

DENNIS KIPKORIR.....APPELLANTS

VERSUS

GLADYS JEPKOSGEI (SUING THROUGH THE LEGAL

REPRESENTATIVE OF THE ESTATE OF CHEROP KOECH (DECEASED).....RESPONDENT

RULING

Application

1. By Notice of Motion application dated 20th May 2020 and filed on 27th May 2020, the appellant sought leave of court to file appeal out of time and stay of execution of the judgment of the trial court on the grounds set out in the application as follows:

“1. THAT this matter be certified urgent and be dispensed with in the first instance

2. THAT service of this Application be dispensed with in the first instance

3. THAT this Honourable Court be pleased to grant temporary stay orders pending the hearing and determination of this Application inter-parties.

4. THAT the Court be pleased to order Stay of execution of the judgment in Eldama Ravine Civil Suit No. 67 of 2018_delivered on 19/02/2020_pending the hearing and determination of the Appellants' intended Appeal.

5. THAT this Honourable Court be pleased to grant the Applicant/intended Appellant leave to file a Memorandum of Appeal as per the attached draft against the decision and judgment delivered on 19/02/2020 in Eldama Ravine.

6. THAT the Insurer of the Appellant/ Applicants be allowed to deposit half of the judgment sum in court as security for due performance of the judgment/decreed herein pending the hearing and determination of the appeal.

7. THAT such other additional suitable and or alternative orders be made as are just and expedient all circumstances of the case and this Application considered.

8. THAT the costs of this Application be provided for.

WHICH APPLICATION is based on the following grounds:

a) THAT Judgment was delivered against the Applicants and 30 days stay of execution granted on 19/02/2020.

b) THAT the Applicants being dissatisfied with the Judgment delivered against them on 19/02/2020 and who craved and still crave to lodge an Appeal challenging the award under general damages were unable to file a Memorandum of Appeal on time due to destabilizing of the court process as a result of the Corona Virus Pandemic that has affected the entire world. c) THAT the Appellant/Applicants were unable to file a Memorandum of Appeal or seek stay of execution on time since

directions on e-filing had not been issued by the time 30 days stay of execution lapsed.

d) THAT the Appellant/Applicants will be highly prejudiced as this intended Appeal which is on quantum of damages will be rendered nugatory if stay of execution is not granted and the said appeal succeeds thereafter.

e) THAT the stay of execution that was granted to the Applicants on 19/02/2020 has since lapsed and the Applicants are apprehensive that the Respondent may proceed to execute the Applicants' property, rendering the intended Appeal nugatory.

f) THAT the award on general damages is inordinately high in the circumstances and that the trial court failed to take into account the pleadings and submissions of the Applicant/Appellants in making the award.

g) THAT the trial court erred in law and in fact by awarding Kshs. 200,000/= as General damages which is highly excessive under the circumstances in comparison to the evidence adduced in court. Similar awards by courts and submission by the Appellants' counsel on record.

h) THAT the learned trial magistrate erred in law in failing to uphold the doctrine of precedent when considering the judgment.

i) THAT this Application has been brought to this court expeditiously and without any delay whatsoever and has overwhelming chances of success.

j) THAT the Respondent will suffer no prejudice if this Application was to be allowed while the Applicants will suffer substantial loss if this Application was to be denied.

k) THAT it is within the wider interest of Justice to enlarge time within which the Applicant may seek leave to appeal

l) THAT the Appellants are willing to abide by such reasonable stay terms as the court may order and in particular to deposit half of the decretal sum in court. AND TAKE FURTHER NOTICE that this Application is supported by the annexed affidavit of ISABELLA NYAMBURA and other or further grounds or reasons as may be adduced at the hearing hereof.

DATED at NAIROBI this 20 day of May 2020.

KAIRU & McCourt

ADVOCATES FOR THE APPLICANTS”

From the application and response, it became clear that the correct case file subject of the appeal was Kabarnet and not Eldama Ravine Civil Suit No. 67 of 2018 and that the correct general damages was not 200,000/- as shown in paragraph (g) of the grounds of the application but Ksh.1,160,000/-.

Memorandum of Appeal

2. The Memorandum of Appeal dated 9th March 2020 is in the following terms:

“MEMORANDUM OF APPEAL

The appellants herein SUSAN LEYATORO and DENNIS KIPKORIR being aggrieved and dissatisfied by the decision and judgement of the Honourable M. Idagwa Senior Principal Magistrate delivered on 19 .2.2020 in Kabarnet CMCC No. 67 of 2018 now wish to appeal to this Honourable Court against the judgement on quantum/award awarded on the following grounds:

1. The trial Magistrate erred in fact and in law in awarding the plaintiff /respondent a sum in damages which is manifestly excessive and/or inordinately high as to be unjust.

2. The Learned Magistrate erred in law and in fact in failing to accord due regard to the Appellants' submissions on quantum on applicable principles for assessment of damages.

3. The learned magistrate erred in law and in fact by failing to consider authorities relied on by the Appellants in their submissions.

WHEREFORE the appellants herein pray that:

i) The appeal herein be allowed

ii) The judgement of the lower court delivered on 19.02.2020 on quantum be set aside and substituted with proper award

iii) The respondent to pay costs in this appeal.

DATED at NAIROBI this 9th day of March 2020

Kairu & McCourt

Advocates for the Appellants.”

Response

3. The Respondent filed a replying affidavit sworn by Counsel, George Kirumba Mbiyu on 4th June 2020 partly conceding the closure of courts upon COVID 19 outbreak but faulting the appellant for not filing the memorandum of appeal on line in accordance with directions issued therefor by the Judiciary, as follows:

“8. That my firm wrote to the Applicant’s counsel on the 27/2/2020 through courier informing them of the judgment and costs. (Annexed hereto and marked GKM 1 is a copy of the letter.)

9. That the Applicants, if they desired to appeal ought to have done so on or before 19/3/2020.

10. That the attached memorandum of Appeal marked IN1 bears a date of 9th March 2020 and it can be deduced that the decision of appeal was made then.

11. That no reason has been advanced why the Memorandum of Appeal was not filed on the 9/3/2020 or on 16th March 2020.

12. That I am aware that the court temporarily ceased to operate normally due to Covid-19 pandemic on 16th March 2020 following the government announcement.

13. That I verily believe that e-filing of documents did not start on the 27th May 2020 when this application was brought to court.

14. That I verily believe that the present application is only meant to deny the respondent enjoyment for the fruit of her judgment.

15. That I refer to ground 3 of the application dated 20/5/2020, and state that there was no award of Ksh.200,000 General damages in the lower court matter.

16. That I verily believe that the Appeal, if any, should have been on or before time lapsed.

17. That if the Honourable court was to allow the application, I pray that ½ of the decretal amount and full costs be released to the respondent and the other ½ (one half) be deposited into court.”

4. The appellant’s counsel filed a further affidavit sworn on 9th June 2020 pointing out principally “that the direction on e-filing were issued by the Chief Justice on 22nd April 2020 long after the 30 days stipulated in the law to file the Memorandum of Appeal had lapsed.”

Written Submissions

5. Counsel for the parties filed respective written submissions on the issues of extension of time to file appeal and for stay of execution pending appeal.

6. I have considered the submissions and the case-law authorities cited by the parties – *Mwangi v. Kenya Airways Ltd; National Industrial Credit Bank Ltd v. Aquinas Francis Wasike & Anor* (2006) eKLR; *Kenya Shell Ltd. v. Benjamin Karuga Kinuri & Anor.* (1986) eKLR; *Machira t/a Machira & Co. Advocates v. East African Standard (No.2)* (2002) KLR 63; *Tabro Transporters Ltd. v. Francis Njenga* (2018) eKLR; *Mega Pack (K) Limited v. United Aryan (EPZ)* (2019) eKLR, among others.

Principles for the grant of leave to appeal out of time and for stay of execution

7. The power to grant an application for extension of time to do anything required to be done under the rules of court is reserved under Order 51 rule 6 of the Civil Procedure Rules. I have also considered the well known principles for the grant of leave to appeal out of time and stay execution, namely, the delay and reason therefor; the prejudice to the respondent and, the need to ensure that where the appellant is exercising his undoubted right of appeal, that the appeal if successful, and I must accept the possibility of success of the appeal as it has not been shown that the appeal is frivolous, is not rendered nugatory; and the provision of security as required by Order of 42 rule 6 (2) of the Civil Procedure Rules.

The delay

8. The delay in presenting the Memorandum of Appeal was shown at least partly to have been occasioned by the closure of the courts in Covid-19 management programme but it cannot be said that the same was filed at the earliest opportunity of the resumption of court operations. As observed by the Appellants, the court reopened and upscaled its operations on see Chief Justice’s Circular for e-filing of 21st April 2020.

9. The deadline for the filing of the memorandum of appeal from the judgment of the trial court delivered on 19th February 2020 in accordance with section 79G of the Civil Procedure Act and Order 42 Rule 1 of the Civil Procedure Rules was the **19th March 2020** by which time the court had already closed its operations on **16th March 2020**. The appellant explained the reason for failure to file the memorandum of appeal before the expiry on the 19th March 2020 as being the logistics of travel to the court and the intervening closure of the court on the 16th March 2020 following Covid-19. Before **19th March 2020**, the appellant was in any event within the time prescribed under the Rules. In my view, the appellant may only be faulted if it is shown that **she did not file the memorandum of appeal within reasonable time after re-opening the courts and the registries after the Covid closure.**

10. It is indubitable that the situation in the courts, and social life in general, has been greatly disrupted since covid-19 as to afford a reasonable excuse for lack of efficiency in the filing of court documents or taking steps in the process of the court. It was in recognition thereof that the Chief Justice had by the circular of 15th March 2020 closing the courts also declared a moratorium on applications for execution of judgment and orders, which was only lifted recently on 2nd June 2020 by a Circular as follows:

“DATE: June 2, 2020

RE: EXECUTION OF JUDGMENTS AND DECREES

In its meeting held on March 15,2020, the National Council on the Administration of Justice (NCAJ) resolved to suspend the execution of civil decrees and orders in order to avoid unwarranted distress following the scaling down of court activities in the wake of COVID-19 discovery in the country. This position was reiterated during the Council’s subsequent meetings of April 16, 2020, and April 21, 2020.

Following the considerable number of judgments that have been delivered and consequent decrees and orders that have since been issued, and upon review, all courts are now directed to facilitate parties seeking the extraction, issuance, and execution of all decrees and orders.

Any urgent issues regarding the execution of decrees and orders, or appeals therefrom, should be taken to the respective courts for appropriate remedy.

HON. DAVID K. MARAGA, EGH

CHIEF JUSTICE AND PRESIDENT OF

THE SUPREME COURT OF KENYA”

11. The appellant was protected from execution by the said order, and exposed upon its lifting on the reopening of the courts circular, making this application for stay of execution necessary.

12. The memorandum was filed on 27th May 2020. The delay of two months from the date of expiry of the 30-day period limited for filing of an appeal is, in the social context of covid-2019 disruption, not inordinate.

Substantial loss

13. I do not agree with the respondent that the appellant does not show substantial loss. The amount of the judgment is a large sum shown as Ksh.1,160,000/- and its full payment or execution therefor, would render the appeal nugatory, or at least occasion the appellant a substantial loss for which he is entitled under the rules of court to protection. The appellant has proposed an order for the deposit of the decretal sum into court, and as I understand the appellant’s case, the appeal is on quantum for which submission is made that –

“The deceased was a minor aged 7 years and the trial court awarded damages totalling to Ksh.1,160,000/- which damages is highly excessive under the circumstances in comparison to the evidence adduced in court, similar awards by the courts and submission by the applicant’s court on record.”

Conclusion

14. As the appellant’s appeal only challenges the quantum and not liability the appeal cannot be rendered nugatory by payment in the meantime of a reasonable portion not being the full amount of the quantum awarded. In balancing the interests of the parties, on the one hand, to the effective right of appeal for the appellant who is exercising his undoubted right of appeal and who therefore is entitled to an order preserving the status quo or what amount to the same thing to protection from substantial loss by execution of the judgment in the meantime, and, on the other hand, the enjoyment of the fruits of judgement for the respondent, and it not having been shown that the respondent though unemployed is of such impecuniosity as to be unable to refund a portion of the judgment amount if so ordered as requested by the respondent, the court considers that an order for the payment of one third (1/3) of the judgment sum to the respondent and the deposit into court, or, as may be agreed by the parties, into a joint interest earning account in the names of counsel for the parties, of the balance of the sum awarded by the judgment shall wholly meet the justice of the case.

15. As Costs will follow the event - in this case the result of the appeal and depends on the Quantum finally adjudged, the court cannot, therefore, order as requested by the respondent the payment of the costs before the appeal is heard and determined.

Orders

16. Accordingly, for the reasons set out above, the appellant's application for leave to file appeal out of time is granted upon terms that the appellant's Memorandum of Appeal dated 9th March 2020 shall be filed within the next seven (7) days.

17. An order for stay of the execution of the judgment of the court pending the hearing and determination of the appeal is granted on condition that the appellant pays to the respondent **the sum of Ksh.400,000/-**, being approximately $\frac{1}{3}$ of the judgment sum, and **deposits as security the balance thereof in the sum of Ksh.716,000/-** into court, or, as may be agreed by the parties, into a joint interest earning account in the names of counsel for the parties, **within the fourteen (14) days.**

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF JULY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kairu & McCourt & Co. Advocates for the Appellant.

M/S Mutonyi Mbiyu & Co Advocates for the Respondent.