



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS APPLICATION NO. 56 OF 2020

SAINA MUSA.....1ST APPLICANT/INTENDED APPELLANT

REHEMA MUSA.....2ND APPLICANT/INTENDED APPELLANT

VERSUS

IBRAHIM MUSA.....RESPONDENT

RULING

1. This is a ruling on a notice of motion brought under section 79G and 95 of the Civil procedure Act, Order 42 Rule 6 and order 50 Rule 6 of the Civil Procedure Rules seeking a stay of execution of the judgment delivered on 12th March 2020 by Hon. M.A Odhiambo (RM) in Meru CMCC No. 37 of 2018 pending the hearing and determination of the intended appeal and leave to appeal out of time.

2. The application was based on the ground on the face of it and on the supporting affidavit of Saina Musa who deponed that the trial court delivered it judgement on 12/3/2020 in which the appellant were condemned to pay the respondent Kshs. 150,000 plus costs on a claim for defamation. Having been aggrieved by the said judgment they instructed their advocate to prefer an appeal however soon thereafter the chief justice suspended all court processed to avert the Covid 19 pandemic. Therefore by the time the courts started to scale up the period for applying for appeal had long lapsed.

3. They are also apprehensive that the respondent may move to execute the judgement which would prejudice their right to appeal. It was additionally their argument that they have credible grounds for appeal and it is on those ground that they seek the orders herein.

4. The application was opposed by the replying affidavit of Ibrahim Musa Mohammed who averred that the applicant has been indolent as the judgement was delivered on 12/3/2020 and the application was filed on 10/7/2020. Hence the application is an afterthought meant to deny the respondent the fruits of the judgement. That the applicants should be ordered to pay the decretal sum as the respondent is a person of mean capable of refunding the amount in case the appeal succeeds.

5. I have considered the application, affidavits and submissions and the issue to be determined are;

a) Whether to grant a stay of execution pending the hearing and determination of the intended appeal?

b) Whether to grant leave to apply out if time?

6. Sections 79G and 95 of the Civil Procedure Act stipulates as follows:

79G. 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 orders 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.

Section 95 provides thus

95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

7. On the application for stay pending appeal, is set out in the provisions of Order 46 Rule 6 (2) Civil Procedure Rules. Under the said provisions, the court is supposed to be guided by the Principles set therein in determining whether to grant or not the Orders for stay of execution of the decree pending appeal.

8. The principles guiding the grant of stay of execution pending appeal are well settled. Under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the Court that:-

- a. Substantial loss may result to him unless the order is made;
- b. That the Application has been made without unreasonable delay; and
- c. The Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.

9. It is not in dispute that judgement was delivered in 12/3/2020 and the application was filed on 10/7/2020 which was beyond the 30 days stipulated in section 79G of the Civil Procedure Act. The Applicant gave an explanation that the reason for delay was due to the Chief Justice's order that suspended all court processes to avert the Covid 19 pandemic. There was delay that was admitted, however this court does not find that the delay is inordinate as to deny the applicant an opportunity to ventilate his grievances by way of an appeal as it a matter of public knowledge that courts scaled down operations due to Covid-19 pandemic.

10. In light of the above I find that the application has merit and make the following orders;

I. Appeal shall be filed and served within 14 days from the dates of the Ruling herein.

II. The Applicant is granted 14 days stay pending the filing of the intended Appeal in which substantive application and orders shall be issued pending the hearing and the determination of the intended Appeal.

III. Costs of application shall be paid to the Respondent.

HON.ANNE ADWERA ONG'INJO

JUDGE

RULING DATED AND DELIVERED AT MERU ON THIS 26th DAY OF AUGUST 2020.

HON.ANNE ADWERA ONG'INJO

JUDGE

In The presence:-

No appearance for Applicants

No appearance for Respondent.

Notice of ruling to issue.

HON.ANNE ADWERA ONG'INJO

JUDGE