



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 55 OF 2020

MOMBASA MAIZE MILLERS LIMITED.....1ST APPLICANT

THOMAS AVULALA KIDIAVAI.....2ND APPLICANT

VERSUS

KIBUNEI KIPKOSGEI.....RESPONDENT

RULING

1. Before the Court for determination is the Notice of Motion dated **3 June 2020**. It was filed by the two applicants under **Sections 1A, 1B, 3, and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and Order 50 Rule 5, Order 51 Rule 1 and Order 42 Rule 6(6)** of the **Civil Procedure Rules, 2010**. The prayers sought thereby are:

[a] Spent

[b] That the Court be pleased to grant leave to the applicants to file their appeal out of time;

[c] Spent

[d] That costs of the application be in the cause.

2. The application was premised on the grounds that Judgment was delivered in **Eldoret CMCC No. 148 of 2018** on **30 April 2020** against the applicants for **Kshs. 2,460,529/=** together with interest and costs; and that the said Judgment was delivered without any notification by the court to the applicants' advocates, either physically or electronically. It was the averment of the applicants that, being aggrieved by the said decision they are desirous of filing an appeal; which cannot be done without leave of the Court.

3. In support of their application, the applicants relied on the affidavit annexed thereto, sworn on **3 June 2020** by their counsel, **Mr. Jonathan Omangi**, in which it was deposed that, at the conclusion of the hearing, the matter was fixed for mention on **30 January 2020** for the purpose of confirming the filing of written submissions and taking a judgment date; and that whereas they were appointed for **16 April 2020** as the judgment date, Judgment was not delivered as scheduled on account of the Corona Virus pandemic. It was the contention of **Mr. Omangi** that he only got to learn from the respondent's advocate that Judgment had been delivered on **30 April 2020**; and that since the applicants are desirous of appealing the decision, it is only fair and just that leave be granted to them to lodge their appeal out of time.

4. The respondent was opposed to the application, contending that notice of delivery of Judgment was duly given and posted on various Judiciary social media platforms, including the Kenya Law Reports website. He further asserted that a copy was forwarded to the Judgment was transmitted to the applicants via email on **26 May 2020**; and therefore that the applicants have not given sufficient cause as to why no appeal was filed in time. The respondent further averred that he is sickly and elderly; and requires the decretal sum to pay for medication. He consequently prayed that, should stay be granted, then it ought to be on terms that the admitted portion of the decretal sum be paid to him forthwith, while the amount represented by the value of the lost consignment which forms the subject of the intended appeal be deposited in a joint interest earning account in the names of the parties.

5. When the application came up for *inter partes* hearing on **23 June 2020**, **Ms. Tirop** for the respondent informed the Court that she had no objection to the applicants being granted leave to appeal out of time as well as stay of execution. She however prayed that an order be made for the immediate payment of the undisputed amount; and for the balance of the decretal sum to be deposited in an interest earning account in the joint names of counsel on record herein. Thus, only that aspect of the application is in contest as **Mr. Babu** for the applicants had no instructions to consent to the proposal by **Ms. Tirop**. He instead proposed that an order be made for the furnishing of a Bank Guarantee instead.

6. In the ordinary course of events, a successful litigant is entitled to the fruits of his litigation. Thus, it was aptly stated in **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2)** [2002] KLR 63 that:

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

7. That right can only be delayed by an order of stay of execution, in the event of an appeal, if it is demonstrated that the applicant stands to suffer substantial loss. Thus, **Order 42 Rule 6(1)** of the **Civil Procedure Rules, Chapter 21** of the **Laws of Kenya**, provides that:

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order, but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside..."

(2) No order for stay of execution shall be made under subrule (1) unless--

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

8. A look at the proposed Memorandum of Appeal shows that the only ground raised therein is in respect of an award by the lower court of **Kshs. 1,800,000/=** on account of lost goods. The respondent had claimed that amount vide paragraph 11 of his Amended Plaintiff contending that it represented the value of some 625 bags of seed maize that he was transporting on behalf of Kenya Seed Company Ltd from Kitale to Kisii in Motor Vehicle Registration No. KAG 129 Isuzu Lorry; and that the same was lost as a result of the subject road traffic accident. Since at paragraph 9 of the Supporting Affidavit it was conceded that the award was for **Kshs. 2,460,529/=**, there is no justification as to why the balance thereof should not be paid forthwith to the respondent. Accordingly, the orders that commend themselves to the Court, and which I hereby grant are as hereunder:

[a] That leave be and is hereby granted to the applicants to file their appeal out of time; and that the same be filed within 30 days from the date hereof.

[b] That there be stay of execution of the Judgment and Decree passed in **Eldoret CMCC No. 148 of 2018** pending the hearing and determination of the proposed appeal on condition that the disputed sum of **Kshs. 1,800,000/=** forming the subject of the proposed appeal be deposited in a joint interest earning account in the names of counsel for the parties within 30 days from the date hereof; and that the balance of the decretal sum be paid forthwith to the respondents;

[c] That costs of the application shall abide the appeal.

It is so ordered.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 13TH DAY OF AUGUST 2020

OLGA SEWE

JUDGE