



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**MISCELLANEOUS CIVIL APPLICATION NO 687 OF 2019**

**ZILLION FARM LIMITED.....1<sup>ST</sup> APPLICANT**

**CRISPIN BOKEA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**JOSEPHINE MUKAI & PETER MAINA WAHOME**

**suing for and on behalf of the dependants and**

**estate of JOHNSON WACHIRA WAHOME (deceased).....RESPONDENT**

**RULING**

1. In their Notice of Motion application dated and filed on 30<sup>th</sup> October 2019, the Applicants herein sought leave to file an appeal out of time and an order of stay of execution pending the hearing and determination of the Appeal herein. On the same date, the 2<sup>nd</sup> Applicant swore an Affidavit on his own behalf and on behalf of the 1<sup>st</sup> Applicant herein.
2. The Applicants contended that they recorded a consent on liability at 75%:25% in favour of the Respondents but that they were aggrieved by the award of Kshs 1,630,820/= that was made by the Learned Trial Magistrate on the ground that the same was manifestly high and contrary to the established precedence by the court.
3. They were apprehensive that the Respondents would execute against them which would occasion them irreparable loss and also render their Appeal nugatory. They pointed out that their application was timely and that they were ready and willing to furnish such reasonable security as the court would deem fit to grant.
4. They added that their intended appeal was merited and arguable and that it had raised pertinent points of law with overwhelming chances of success. It was their further averment that this court had power to enlarge time for them to file the said intended appeal as the statutory time within which to file an appeal had lapsed.
5. They averred that the Respondents would not suffer any prejudice if their application was allowed and thus urged this court to allow the same.
6. In opposition to the said application, on 9<sup>th</sup> December 2019, Josephine Mukai swore a Replying Affidavit on her own behalf and on behalf of Peter Maina Wahome. The Respondents averred that the judgment that was delivered in their favour was reasonable and had been arrived at judiciously and that the present application was intended to deny them from enjoying the fruits of their judgment. They added that the Applicants' chances of success were minimal.
7. It was also their contention that the Applicants had not proffered explanation for the delay of more than two (2) months and that in any event, Section 79G was clear that every appeal to the High Court had to be filed within thirty (30) days from the date of the decree or order to be appealed from.
8. They also stated that the said Josephine Mukai was widowed and that the decretal sum would have assisted her to fend for her two (2) children. They further said that allowing the said application would cause her great prejudice and thus urged this court to dismiss the said application with costs.
9. Both parties were agreed on the conditions that must be met before an order for stay of execution pending appeal can be granted. In this

regard, the Applicants relied on the case of Kapa Oil Refineries Limited vs Festus Mutuku & Another [2018] eKLR to support their case that they ought to be granted an order for stay of execution pending appeal. In respect to the prayer seeking leave to file their appeal out of time, they placed reliance on the case of Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & Another [2014] eKLR.

10. On their part, the Respondents referred this court to the cases of G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR, Masisi Mwita vs Damaris Wanjiku Njeri [2016] eKLR, and Sammy Musyoki vs Fatma A Abdalla [2006] eKLR to argue that the Applicants had not met the conditions for being granted an order of stay of execution pending appeal.

11. They further placed reliance on the case of Maree Ahmed & Another vs Leli Chaka Ndoro [2017] eKLR where the court dismissed an application to extend time to file an appeal out of time on the ground that the reason for not filing the appeal within the stipulated time was not adduced in the affidavit evidence.

12. This court deemed it prudent to address its mind to the question of leave to file an appeal out of time in the first instance as the second order for stay of execution would be dependent on the said leave being granted. Indeed, it would add no value to grant the Applicants an order for stay of execution and deny them leave to file an appeal out of time.

13. As the Respondents correctly argued, Section 79G of the Civil Procedure Act Cap 21 (Laws of Kenya) provides that an appeal has to be lodged within thirty (30) days from the date of delivery of the decision to be appealed.

14. This court took cognisance of the fact that every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.

15. It is for that reason that Section 79 G of the Civil Procedure Act provides that an appeal can be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not having filed his appeal within the prescribed time. A similar conclusion was arrived at by Odunga J in Dilpack Kenya Limited vs William Muthama Kitonyi [2018] eKLR.

16. Further, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It stipulates as follows:-

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed...”**

17. Having said so, the extension to file an appeal out of time is not a matter of course. The court has to consider certain factors before allowing an application for extension to file an appeal out of time. These are the period of delay, the reason for the delay, the chances of the appeal succeeding and/or the arguability of the appeal and the prejudice that would be suffered by a respondent if the said application for leave to file an appeal out of time was granted as was held in the case of Mwangi vs Kenya Airways Limited (2013) KLR.

18. Notably, the decision the Applicants intended to appeal against was delivered on 18<sup>th</sup> September 2019. The period of filing an appeal expired on 17<sup>th</sup> October 2019. The present application was filed on 30<sup>th</sup> October 2019. This was about two (2) weeks after the period of filing an appeal had expired.

19. It was evident from the Applicants' Supporting Affidavit that no reason was proffered to explain the delay in filing the appeal. Even in the absence of a plausible explanation, if it can be shown that no prejudice has been suffered by the opposing party, courts must always strive to do substantive justice to both parties.

20. It was also the considered opinion of this court that the period of about two (2) weeks between the time the appeal was to be filed and the time the present application was filed, was not inordinate.

21. The question of whether or not the Learned Trial Magistrate erred in having awarded the Respondents special damages which had not been strictly proved, whether or not the said Learned Trial Magistrate erred in not having subjected the award to the apportionment of liability that had been agreed upon by the parties and/or whether or not the damages awarded were excessive in the circumstances were not frivolous issues. The issues raised were arguable points of law and fact as was contemplated in the case of Mwangi vs Kenya Airways Limited (Supra).

22. This court was thus persuaded that it was in the interests of justice that the Applicants herein be granted leave to file an appeal out of time.

23. Turning to the question of a stay of execution pending appeal, the court noted that before an applicant could be granted an order for stay of execution pending appeal, he had to demonstrate that he had met the following conditions that have been set out on Order 42 Rule 6(2) of the Civil Procedure Rules, 2010:-

**a. That substantial loss may result unless the order is made.**

**b. That the application has been made without unreasonable delay.**



33. The Respondents had waited for a long time to realise the fruits of their judgment. It was only fair that part payment of the amount that was not contestable be released to them as the Applicants prosecuted their appeal.

34. For the avoidance of doubt, the adoption of the minimum wage herein is not binding on the court that will hear the appeal herein. The same has been adopted purely for purposes of assisting this court in coming up with a figure that could be safely released to the Respondents pending the hearing and determination of the appeal herein. In the event the court hearing the appeal was to determine that the Respondents ought to have been awarded a lesser sum than what has been released to them, nothing should stop the Applicants from pursuing them for the monies that will be found to be due and owing to Applicants herein.

#### **DISPOSITION**

35. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated and filed on 30<sup>th</sup> October 2019 was merited and the same is hereby allowed in the following terms:-

**1. The Applicants are hereby directed to file and serve their Memorandum of Appeal within fourteen (14) days from the date of this Ruling.**

**2. The Applicants are hereby directed to file and serve their Record of Appeal within one hundred and twenty (120) days from the date of this Ruling. In the event the proceedings of the lower court and the lower court file will have been placed in the file herein and the Appellant shall have failed to file his Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed.**

**3. Since the Applicants do not have control of the court diary, the Registrar of High Court Civil Division Milimani Law Courts is hereby directed to facilitate the typing of proceedings and placing of the lower court file within ninety (90) days from date of this Ruling.**

**4. THAT there shall be an order for stay of execution of the Ruling of Hon Orange K. I SRM, that was delivered on 18<sup>th</sup> September 2019 in Nairobi Milimani Civil Suit No 10497 of 2018 Josephine Mukai (Suing on behalf of the Estate of Johnson Wahome) vs Zillion Farm Limited & Another pending the hearing and determination of the Appeal on the following conditions:-**

**a. THAT the Applicants shall release to the Respondents the sum of Kshs 536,605.80 within thirty (30) days from the date of this Ruling.**

**b. THAT the Applicants shall deposit into an interest earning account in the joint names of their advocates and the advocates for the Respondents, the balance of the decretal sum of Kshs 1,094,214.20 within thirty (30) days from the date of this Ruling.**

**5. For the avoidance of doubt, in the event, the Applicants shall default on Paragraph 35(4)(a) and (b) hereinabove, the conditional stay of execution shall automatically lapse.**

**6. Either party is at liberty to apply.**

**7. Costs of the application will be in the cause.**

36. It is so ordered.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of September 2020**

**J. KAMAU**

**JUDGE**