



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 221 OF 2020

GILBERT CHOMBA.....1ST APPELLANT/APPLICANT

ROBERT WALLACE MURIITHI.....2ND APPELLANT/APPLICANT

JOHN MWANGI MBOCHE.....3RD APPELLANT/APPLICANT

-VERSUS-

SEIF MUTIE ZACHARIAH.....RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 5th June, 2020 taken out by the appellants/applicants herein, in which they sought for an order for stay of execution of both the judgment delivered on 13th March, 2020 in CMCC NO. 8167 of 2017 and the consequent decree, pending the hearing and determination of the appeal; and a further order for leave to file the main appeal out of time against the aforesaid judgment, and that the memorandum of appeal on record be deemed as duly filed with leave.
2. The Motion is supported by the grounds set out on the body of the application and the facts deponed in the affidavit of Linda Njenga, learned advocate for the applicant.
3. In opposing the said Motion, the respondent filed the replying affidavit he swore on 26th June, 2020, to which **Linda Njenga** rejoined with her supplementary affidavit sworn on 15th July, 2020.
4. When the Motion came up for interparties hearing before this court, the respective advocates for the parties made brief oral submissions in which they essentially reiterated the averments made in their respective documents.
5. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing the Motion and the rival oral arguments made by learned counsels.
6. It is evident that the orders being sought in the Motion are two- fold: **first** is the order seeking for enlargement of time to appeal and **secondly** for leave to appeal out of time against the impugned judgment and decree.
7. **Section 79G** of the **Civil Procedure Act** sets the timelines for lodging an appeal against the decision of a subordinate court as 30 days from the date of the decree or the order being appealed against. The provision goes on to express that an appeal can be admitted out of time where sufficient cause has been shown.
8. Furthermore, under the provisions of **Section 95** of the **Civil Procedure Act** and **Order 50, Rule 5** of the **Civil Procedure Rules**, the court has power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
9. The guiding principles to be met in an application seeking leave of the court to file an appeal out of time/extension of time were the laid out in the case of **Thuita Mwangi v Kenya Airways Limited [2003] eKLR** and where the court reaffirmed in the case of **Growth Africa (K) Limited & another v Charles Muange Milu [2019] eKLR**.
10. On the first condition on length of delay, the respondent was of the view that there has been an unreasonable delay in bringing the application. The applicants on their part are of the view that the application has been brought without unreasonable delay.

11. While it is apparent from the record that no copy of the impugned judgment was availed to this court, it is not in dispute that the aforesaid judgment was delivered on 13th March, 2020 which is about three (3) months prior to the filing of the instant Motion. In my mind, while there has clearly been a delay in bringing the application, I do not find the same to be inordinate.
12. Concerning the reason given for the delay, the deponent who swore the supporting affidavit to the Motion explained that the delay was occasioned by the time taken in obtaining instructions to appeal from the applicants and was further occasioned by the closure of the courts and the offices of the applicants' advocate owing to the global Covid-19 pandemic, for some time.
13. In response, the respondent stated that the aforesaid reasons are not sufficient in explaining the delay since there were other means of communication that could have been applied between the applicants and their advocates.
14. Upon considering the above, I am alive to the fact that the global Covid-19 pandemic disrupted the operations of the courts and the country at large since the month of March. I am also alive to the fact that there was closure of the courts and a number of other offices for some time thereafter. Consequently, I find the explanation behind the delay to be reasonable.
15. As relates to whether or not an arguable appeal exists, it is the applicants' assertion that there exists an arguable appeal as indicated in the memorandum of appeal annexed to the instant Motion and in the manner set out in the affidavits of Linda Njenga. The respondent did not touch on this subject.
16. Upon my perusal of the grounds of appeal raised in the draft memorandum of appeal, I find that the appeal is primarily against the award made by the trial court on general damages, which is said to be excessive according to the applicants. The applicants are also arguing that the trial court did not consider the evidence and submissions presented on their behalf. Taking these factors into account, I am satisfied that the applicants have demonstrated arguable points of law and fact in their appeal, regardless of whether or not the appeal succeeds.
17. Under the final principle on prejudice, Linda Njenga stated in her affidavits that the respondent does not stand to be prejudiced if leave is granted to the applicants to file their appeal out of time. On his part, the respondent stated that he stands to suffer loss in the sense of the injuries sustained as a result of the material accident which occurred several years ago.
18. It is apparent that the judgment was in favour of the respondent herein and that he was awarded damages. It is therefore only natural for the respondent to be lawfully entitled to enjoy the fruits of his judgment. Nevertheless, it would not be in the interest of justice to lock out the applicants who are aggrieved by the decision of the trial court. I therefore find it reasonable for the applicants to be given the opportunity of challenging the subordinate court's decision on appeal.
19. The second prayer is for stay of execution of the judgment and decree pending appeal.
20. The guiding provision is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the following conditions in determining an application for stay.
21. The first condition is that the application must have been made without unreasonable delay. I am satisfied that this condition was sufficiently addressed hereinabove.
22. Under the second condition, the applicants must show to this court's satisfaction the substantial loss they would suffer if the order for stay is denied.
23. From the Motion and affidavits to back it, it is apparent that the applicants are anxious that the respondent will not be able to refund the decretal sum if the same is paid to him and the appeal succeeds. On his part, the respondent stated that he is a man of means and therefore able to refund the decretal amount should the circumstances require it.
24. The question as to who has the burden of proof on the issue of refund of the decretal sum is on the part of the respondent. The Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** where it held inter alia as follows:
- “Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”***
25. Though the respondent indicated that he is financially capable of refunding the decretal sum, he did not bring any material or evidence to support his averment.
26. In the absence of anything to ascertain the respondent's financial capacity therefore, I am satisfied that the applicants have reasonably demonstrated the manner in which they stand to suffer substantial loss.
27. The final condition is the provision of security for the due performance of the decree or order, the applicants on the one hand indicated their readiness and willingness to deposit the decretal sum in court or in a joint interest earning account, which position was reiterated by their advocate during oral submissions. On the other hand, the respondent is of the view that should an order for a stay of execution be granted, then the applicants should be ordered to deposit half the decretal sum in court and to deposit the remaining half in a joint interest earning account.

28. In the end, the Motion dated 5th June, 2020 is found to be meritorious and it is allowed giving rise to issuance of the following orders:

a) The applicants are granted leave of 14 days to file an appeal out of time.

b) There be a stay of execution of the judgment/decree delivered on 13th March, 2020 on the condition that the applicants deposit the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates and or firms of advocates within 30 days from today, failing which the application for stay shall be deemed to have been dismissed.

c) Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 27th day of November, 2020.

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st, 2nd and 3rd Appellants

..... for the Respondent