



**REPUBLIC OF KENYA**

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

**MISCELENEOUS APPLICATION NO.31 OF 2020**

**CARISTO ODHIAMBO.....APPLICANT**

**-VERSUS-**

**THOMAS MUTHAM MUIGAI.....RESPONDENT**

**RULING**

1. This is a ruling on application dated **13<sup>th</sup> February 2020**. The applicant seeks stay of execution of judgment in Molo CMCC No. 169B of 2018 pending hearing and determination of intended appeal, leave to file the intended appeal delivered on 14<sup>th</sup> December 2019; and the insurer be allowed to deposit full judgment sum in a joint interest earning account as security for due performance.
2. Grounds on the face of the application are that the applicant is aggrieved by the judgment delivered on 14<sup>th</sup> December 2019 and seeks leave of this Court to lodge an appeal; that the 30 days stay of execution granted by Court have lapsed and the applicants intended appeal which is on quantum will be rendered nugatory if stay of execution is not granted.
3. The applicant's argument is that the award of damages is inordinately high in the circumstances and the trial failed to take into consideration pleadings and submissions; that the trial court in failing to uphold the doctrine of precedent; that the application has been filed expeditiously and the respondent will suffer no prejudice if the application is allowed.
4. The application is supported by the applicant's affidavit sworn on 13<sup>th</sup> February 2020. He restated grounds on the face of the application.
5. The applicant averred that this matter was part of series at Molo being Molo CMCC No.169B of 2018 and Molo CMCC No.155 of 2018 where the claimants were awarded kshs 150,000 and 180,000 respectively; that the injuries herein being soft tissue the award was too high.
6. In response the respondent filed replying affidavit sworn on 22nd February 2020. The respondent averred that that no sufficient reason has been tendered for failing to file appeal within the stipulated time; that there is inordinate delay of two months.
7. Respondent averred that he sustained more severe injuries than plaintiff Molo CMCC No.170 of 2018; that he sustained dislocation of left hip joint, dislocation of right shoulder, multiple bruises on the face and side of the mouth and bruises on the right upper arm whereas plaintiff in CMCC No. 170 of 2018 sustained cut on the head, soft tissue injuries of the shoulder joint, left knee joint and left hip joint. He annexed amended plaint and discharge summary in CMCC No.167 and 170 of 2017.
8. He averred that the application is brought in bad faith and a tactic to deny him fruits of his judgment.
9. In response to averments in the replying affidavit, the applicant filed supplementary affidavit. He averred that the application has been brought expeditiously as period does not run during Christmas recess and further that cheques in the other two files have been dispatched to the respective Advocates and it is only in this matter where the Advocate has been instructed to file appeal as the award is excessive.
10. Counsels herein agreed to proceed by way of written submissions.

**APPLICANTS SUBMISSIONS**

11. The applicant restated averments in the two affidavits filed. On delay in filing the application, the applicant submitted that stay of execution was granted for 30 days from 4<sup>th</sup> December 2019 and time stopped running from 21<sup>st</sup> December to 13<sup>th</sup> January. And therefore 30 days of stay lapsed on 28<sup>th</sup> January 2020; counsel submitted that during this period parties were still negotiating and they were of the believe that all the 3 matters would be settled; that the application was filed on 14<sup>th</sup> February 2020.
12. Counsel submitted that there was some delay but it was not due to indolence but circumstances beyond the control of the applicant;

counsel further submitted that the respondents will not suffer any prejudice if extension is granted; that it will be in the interest of justice that the applicants appeal is heard and determined as it has high chances of success.

#### RESPONDENT'S SUBMISSIONS

13. On whether the application is merited, the respondent submitted that for orders to appeal out of time, the respondent submitted that section 79(G) of the civil procedure Act provide time within which an applicant is required to file appeal; that appeal should be filed within 30 days from the time of the decree excluding time which the court certify as having been requisite for preparation and delivery of the decree or order; that the court may allow filing appeal out of time if a party satisfies the court that there was sufficient reason for not filing appeal within the provided time.

14. The respondent submitted that the applicant failed to demonstrate sufficient reason for delay in filing appeal within prescribed time; that judgment in the primary suit was delivered on 4<sup>th</sup> December 2019. And the application herein was filed on 1<sup>st</sup> February 2020 which is 70 days after delivery of judgment. Further the defendants entered appearance and filed defence about 2 years since they were in possession of the file. Respondent submitted that delay of even one day ought to be explained.

15. The respondent further submitted that contrary to allegations that the respondent sustained soft tissue injuries, the respondent submitted that injuries suffered in this case are more serious. Further that the respondent herein was not a party in the other two suits and the pleadings have not been attached in this application to enable the court appreciate the injuries he sustained. Respondent submitted that the respondent sustained more severe injuries and the award of kshs 300,000 was not excessive. Respondent urged this court to dismiss this application.

#### ANALYSIS AND DETERMINATION

16. I have considered arguments by both parties herein. The applicant intends to appeal on quantum argument being that the award of kshs 300,000 is inordinately high for injuries sustained by the respondent. The applicant compared the injuries herein with injuries sustained in two files in the same series with this one where awards of kshs 150,000 and kshs 170,000 were awarded.

17. **Stanley Karanja Wainaina & Another v Ridon Anyangu Mutubwa [2016] eKLR** where the Court set out the following conditions for grant of stay pending appeal: -

**i. The application must be made without delay**

**ii. That the applicant must demonstrate that they will suffer substantial loss unless the order sought is granted**

**iii. Such security as the court orders for due performance of such decree as may ultimately be binding on him has been given by the applicant.**

18. From averments in two affidavits filed by the applicant, I note that the judgment was delivered shortly before the December recess and application was filed about a month after recess. The applicant has explained that they believed this matter would be settled with the other two files in the series which the respondent confirmed having dispatched cheques for settlement at the time of filing replying affidavit. In my view the explanation delay is not inordinate and explanation given is sufficient.

19. In respect to deposit of security, I note that the applicant is reluctant to release the decretal amount on ground that the respondent may not be able to refund if appeal succeeds. Further that they did not settle this matter on ground that the award of kshs 300,000 is inordinately high compared to award of kshs 150,000 and kshs 170,000 award in the other 2 files in the same series. The applicant is challenging quantum in the appeal. In my view it will be fair and just to direct release half of the decretal amount to the respondent and the other half be deposited in a joint interest earning account in the names of both Advocates.

#### 20. FINAL ORDERS

1. Applicant granted leave to file appeal out of time. The same to be filed 14 days from the date of this ruling.

2. Stay of execution pending appeal on condition that half the decretal amount is paid to the respondent and the remaining half to be deposited in a joint interest earning account in the names of both Advocates herein.

3. Applicant to comply with order 2 above within 30 days from the date of this ruling failure which execution to commence.

**Ruling dated, signed and delivered via zoom at Nakuru this 26<sup>th</sup> day of November, 2020**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jenifer - Court Assistant

Ms. Githae H/B for Kirimi Muriuki counsel for the applicants

Ms. Obura counsel for respondent