REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANOUS APPLICATION NO. 209 OF 2019

BOAZ KIPCHIRCHIR SEREM...............................APPLICANT

VERSUS

GEOFFREY NGANGA GITHUKA....................RESPONDENT

RULING

1. **BOAZ KIPCHIRCHIR SEREM** (the applicant) has by a notice of motion application dated 5.12.2019 sought to be granted:

a) leave to file an appeal out of time from the judgment and decree issued on 10.7.2019 pending filing, hearing and determination of the appeal to be filed in the High court at Eldoret

b) Stay of execution of the decree issued on 10.7.2019

c) The costs of this application.

2. The grounds in support of the application is that judgment was delivered on 10.7.2019 and stay of execution was granted, and the insurer **Directline Assurance** by email instructed its advocate to file an appeal. This email was never received due to a technological hitch and it led to a delay which is not inordinate. That the intended appeal has high chances of success, and the respondent/decree holder is a man of straw, so in the event the appeal succeeds they may not be able to recover the decretal sum.

The applicant is willing to furnish such security as the court may deem fit for the due performance of the decree.

3. In support of the application are two affidavits sworn by **Everlyne Okwoyo**, the advocate who had conduct of this case and **Isabella Nyambura** the **Legal Counsel at Directline Assurance Company Limited** who are the insurers of motor-vehicle registration number KCH 987F (who further deposes that the applicant is willing and ready to deposit 50% of the decretal sum in court pending hearing and determination of the appeal).

4. The respondent opposes the said application on grounds that the applicant is guilty of latches, and has filed the application after a long and inordinate delay, the allegations in the supporting affidavits are unsubstantiated and unsupported. Further the mistake of the applicant should not be visited on him.

5. The applicant through the written submissions urges this court to be guided by **Order 42 rule 4 & 6 of the Civil Procedure Rules**, and exercise its unfettered discretion in deciding whether or not it shall grant stay of execution as was held in **Elena Doudoladova Korir v. Kenyatta University [2014] eklr.**

6. On substantial loss, it is argued that the decretal amount is substantial and they are likely to suffer loss if the appeal succeeds as the same may not be easily recovered. From the lower court proceedings, in examination-in-chief, the respondent had stated that he was a boda boda rider and he never tendered any evidence in court to prove his financial worth. In support of this position. The applicant cites **Kenya Orient Insurance Co. Ltd v. Paul Mathenge Gichuki & anor [2014] eklr.**

7. It is also contended that the delay was not too inordinate, and expresses a willingness to deposit the full decretal sum in court as security pending the outcome of the appeal.

8. In addition, it is submitted that the appeal raises triable issues of law with high chances of success as shown in the draft memorandum of appeal, and the same may be rendered nugatory if the application is not allowed.

9. The respondent submits that judgment was delivered on 10.7.2019 and the applicant was aware of the outcome, and has not given any evidence on the technological hitch, and the delay of 5 months is described as quite inordinate and no concrete explanation has been given.

10. Further that the affidavits were sworn by parties who are strangers to the proceedings who cannot defend the allegations on delay, and this court ought to find that the application has been brought in bad faith, having been prompted by the lapse of the stay of execution.

11. **Analysis and determination**

The issue for determination is whether the applicant ought to be be granted leave to appeal out of time and whether the application is merited to warrant stay of execution.

12. **Order 42 rule 6(1&2)** provides for the conditions to warrant stay of execution. It states as follows:

> **(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 sub-rule (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.**

The power to grant or refuse stay of execution is discretionary and the case of **Butt v. Rent Restriction Tribunal [1982] KLR 417 stated**:

> ***"1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.***
>
> ***2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.***
>
> ***3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.***
>
> ***4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.***
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> ***5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."***

13. **Substantial Loss:** The applicant submits that the decretal amount is huge and that if stay of execution is not granted, and, the appeal succeeds, then the same cannot be recovered from the respondent who had testified that he was a boda boda rider.

14. In the quintessential decision of the Court of Appeal in **Shell Ltd v Benjamin Karuga and Another [1986] KLR,** Platt JA set out two different circumstances when substantial loss could arise as follows:

> ***"The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages…It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts…***
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> ***If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money."***

15. Certainly in considering an application for stay, the court must consider also whether refusal to issue the orders would render the appeal nugatory, as was discussed in **Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458** that:

> ***"… that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory…***

if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."

16. In the case of **National Civil Appl. No. 238 of 2005, National Industrial Credit Bank Limited –Vs- Acquinas Francis Wasike & Anor (UR)** the court stated: -

> ***"This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by a Respondent or lack of them. Once an Applicant expresses a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to matter which is peculiarly, within his knowledge."***

As regards the likelihood of the Applicant suffering substantial loss in event the appeal succeeds after payment of the decretal amount, it has been adequately demonstrated that the 1st Respondent's testimony at the trial Court was that he was a *boda boda* rider, and there was nothing to suggest that he had a reliable source of income. The Respondent has not demonstrated that from his engagements as a *boda boda* rider, he would be able to refund the decretal amount in the event that the appeal succeeds. This means that were execution to proceed and the judgment sum of Ksh1.500.000/= paid, the respondent may not be able to refund the decretal amount in the event that the appeal eventually succeeds.

17. **Delay:** The application was filed on 6.12.2019 after a judgment which had been delivered on 10.7.2019. The applicant concedes that they were aware of the judgment and even got instructed to file an appeal out of the judgment. **Section 79G** provides for the filing of appeals to this court as follows:

> **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 order appealed against, excluding from such period any time which the lower court may certify as having 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.**

18. There is no failed mail delivery message presented to this court to support the applicant's argument about a failed technology. I however take cognizance of the fact that every party has a right to be heard, and echo the sentiments expressed in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR, citing the decision of Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** that:

> "***We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff…… It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal……"***

19. This court shall thus exercise its inherent jurisdiction and power to allow the applicant file appeal out of time, as the delay of 5 months, is in my view not inordinately.

20. **Security**: The applicant is willing to deposit the decretal sum with the court. The interest of both parties has to be balanced, that of the judgment debtor and the decree holder who needs to enjoy the judgment. In this regard the interest of justice 1/3 of the decretal sum should be paid to the respondent and 2/3 deposited in a fixed joint earning account in the names of the advocates on record for respective parties within 14 days of this ruling.)

21. On whether the intended appeal is arguable, the applicant is appealing against quantum of damages, and it is in the interest of justice that the respondent's right to appeal should not be locked out. The decretal sum is ksh1.500.000/= which the applicant averred that it was in excess compared to the kind of injuries sustained, and the evidence tendered in court by the respondent. This is a question to be determined on merit at the appeal stage.

22. **Final Orders**

> **a) Stay of execution be and is hereby granted on condition that 1/3 of the decretal sum be paid to the respondent and 2/3 be deposited in a fixed joint interest earning account in the names of the advocates on record for respective parties within 14 days of this ruling.**
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> **b) Leave to appeal be and is hereby granted**
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> **c) The appellant is directed to file and serve appeal within 15 days hereof**
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> **d) In default of a) above then the Stay order shall stand vacated and the respondent shall be at liberty to proceed with the execution of the decree**

Delivered and dated this 25th day of November 2020 at Eldoret

H. A. OMONDI

<u>JUDGE</u>

Mr Matekwa h/b for Mwinamo for respondent

Mr Amikhanda for applicant

C/A Komen