



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. E402 OF 2020

JOHN KINYANJUI KIENDE.....1ST APPLICANT

EVANS NJOGU KARANJA.....2ND APPLICANT

VERSUS

MOSES LUGAYE MUGALA

(Suing as the legal representative of the estate

of PHILIP OMEGA LUGALE-Deceased.....RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 1st October, 2020 taken out by the 1st and 2nd applicants herein and supported by the grounds set out on its body and the facts deponed in the affidavit of **Kelvin Ngure**. The applicants sought for an order for leave to appeal out of time against the judgment and decree in Milimani CMCC NO. 8683 OF 2017 delivered on 26th June, 2020 and a further order for a stay of execution of the aforesaid judgment pending the hearing and determination of the appeal.
2. In opposing the said Motion, the respondent put in Grounds of Opposition dated 12th November, 2020 and further filed the replying affidavit of advocate **Anyango Bwire** sworn on 20th November, 2020.
3. At the interparties hearing of the Motion, the respective advocates for the parties opted to rely on the averments made in the respective documents mentioned hereinabove.
4. I have therefore considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing the Motion; and the Grounds of Opposition.
5. It is evident that the orders being sought in the Motion are two- fold: the first is the order seeking for leave to appeal out of time against the impugned judgment and decree.
6. **Section 79G** of the **Civil Procedure Act** provides for 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.
7. Moreover, under the provisions of **Section 95** of the **Civil Procedure Act** and **Order 50, Rule 5** of the **Civil Procedure Rules**, the courts have power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
8. In the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** the Court of Appeal developed various conditions to offer guidance in deciding whether to extend the period for filing an appeal out of time and which I will address hereunder.
9. On the first condition on length of delay, the respondent both in his Grounds of Opposition and through the replying affidavit of his advocate, is of the view that the applicant is guilty of inordinate delay in bringing the Motion, whereas the applicants are of the view that the instant Motion has been brought without inordinate or unreasonable delay.
10. While it is apparent from the record that no copy of the impugned judgment was availed to this court, it is not controverted that the aforementioned judgment was delivered on 26th June, 2020 which is less than four (4) months prior to the filing of the Motion. In my mind, while there has clearly been a delay in bringing the Motion, I do not think that such delay is unreasonable.

11. As concerns the reason for the delay, Kelvin Ngunjiri who is the Deputy Claims Manager of Directline Assurance Company, the insurer of motor vehicle registration number KBH 676Q which it seems is the subject motor vehicle in the suit, states in his supporting affidavit that the impugned judgment was delivered without notice to the parties and in the midst of the Covid-19 pandemic crisis, at a time when movement was restricted.

12. The deponent further states that upon realizing that the impugned judgment had been delivered, the applicants' advocate sought to obtain a copy of the same and by the time he obtained it, the timelines for lodging an appeal had long lapsed.

13. In response, advocate Anyango Bwire in reaffirming the Grounds of Opposition, states that the impugned judgment was sent to the respective email addresses of the parties' advocates and that her office immediately thereafter wrote to the applicants' advocate to demand payment of the decretal amount.

14. The advocate also states that at the time of delivery of the judgment, the Judiciary had already rolled out the Online Filing system to enable litigants file their documents, in the midst of the global pandemic crisis. Consequently, the respondent is of the view that no reasonable explanation has been given by the applicants for the delay.

15. I have looked at the letter dated 2nd July, 2020 and marked as annexure "KN 1" annexed to the supporting affidavit in respect to the suit. From the contents of the letter, which was received by the firm of advocates for the applicants on 9th July, 2020 it is clear that they were at all material times aware of the existence of the judgment since the said letter was essentially seeking payment of the decretal sum.

16. Further to the foregoing, the applicants did not bring any credible material to show that their advocates experienced challenges in obtaining a copy of the impugned judgment or to show that they even applied for the same to begin with.

17. That notwithstanding, upon considering the sentiments of the applicants, upon appreciating the overarching impact of the Covid-19 pandemic on both the public and private sectors; including the courts; and upon further appreciating the legal position that the inadvertence of an advocate should not be visited upon the client, I find the explanation offered by the applicants to be reasonable in the circumstances.

18. On the principle to do with whether an arguable appeal exists, it is the applicants' assertion that they have an arguable appeal. In contrast, the respondent through his Grounds of Opposition has taken the position that the intended appeal has minimal chances of success.

19. From my perusal of the grounds of appeal raised in the draft memorandum of appeal annexed as "KN 2" to the Motion, I note that the appeal is primarily challenging the finding of the trial court on both liability and quantum, including the argument that liability was not proved and that the award of damages was manifestly excessive. Upon considering the said grounds of appeal, I am satisfied that the applicants have raised arguable points of law and fact in their appeal.

20. In addressing the final condition on prejudice, it is clear that the judgment was in favour of the respondent herein. It therefore follows that the respondent would in ordinary circumstances be lawfully entitled to enjoy the fruits of his judgment.

21. Suffice it to say that it would not be in the interest of justice to lock out the applicants who are clearly aggrieved by the judgment of the trial court. I therefore find it reasonable to grant the applicants the opportunity of challenging the subordinate court's decision on appeal.

22. The second prayer is for a stay of execution of the decree pending appeal.

23. 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.

24. Under the first condition that the application must have been made without unreasonable delay, I am satisfied that this condition was sufficiently addressed hereinabove.

25. The second condition touches on substantial loss to be suffered by an applicant. On his part, Kelvin Ngunjiri states in his supporting affidavit that the applicants stand to suffer grave loss since there is a likelihood that the respondent will not be in a position to repay the decretal sum if the same is paid to him and the appeal succeeds. On his part, the respondent contends that the applicants have not demonstrated the substantial loss they stand to suffer.

26. The legal position is that upon the apprehension of an applicant that the decretal sum may not be recoverable, the evidentiary burden shifts to the respondent to show that he or she is financially capable of repaying the same upon a successful appeal. In this respect, I make reference to the following reasoning by the Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR**:

"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..."

27. In the absence of anything to indicate or 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.

28. The final condition is the provision of security for the due performance of such decree or order. On their part, the applicants have indicated their readiness and willingness to comply with the conditions to be set by this court on the provision of security. The respondent

did not address this particular subject.

29. In the end, the instant Motion dated is allowed on merit and the following orders are made consequently:

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

b) There shall be an order for stay of execution of the judgment and decree of 26th June, 2020 on the condition that the applicants deposit the entire decretal sum in an interest earning account in the joint names of the advocates and or firms of advocates within 30 days from the date of this ruling. In default the order for stay shall automatically lapse.

c) Costs of the Motion shall abide the outcome of the appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 17th day of December, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the 1st and 2nd Applicants

..... for the Respondent