



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. E434 OF 2020

OBADIAH MUSYIMI MULWA.....1ST APPLICANT

BENSON HINGA KINYANJUI.....2ND APPLICANT

ELIUD KINYANJUI HINGA.....3RD APPLICANT

-VERSUS-

FRANCIS KIMEGHO NGALA.....RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 16th October, 2020 taken out by the 1st, 2nd and 3rd applicants in which they sought for an order for a stay of execution of the judgment delivered on 6th February, 2020 in Milimani CMCC NO. 10843 of 2018 and consequent decree, pending the hearing and determination of the appeal; and a further order for leave to lodge the main appeal out of time against the aforesaid judgment.
2. The Motion is supported by the grounds set out on its body and the facts stated in the affidavit of advocate **Purity Wambui Waikwa**.
3. In opposing the said Motion, the respondent swore a replying affidavit on 23rd October, 2020.
4. When the Motion came up for interparties hearing before this court, the parties' advocates opted to rely on the respective documents filed.
5. I have therefore considered the grounds laid out on the body of the Motion; and the facts deponed in the affidavits supporting and opposing the Motion.
6. Before I proceed with the merits of the Motion, I deem it necessary to address a preliminary issue that was raised by the respondent, that the instant Motion is unfounded since the matter was compromised by the parties.
7. In his replying affidavit, the respondent states that following delivery of the impugned judgment, the applicants' advocates engaged with his advocates with the aim of negotiating the award made by the trial court downwards and that it was agreed by consent of the parties that the total sum to be paid to the respondent is Kshs.800,000/.
8. The respondent further states that a consent to that effect was filed before the trial court on 4th September, 2020 and that execution proceeded on the basis of that consent.
9. It is the assertion of the respondent that the applicants undertook to settle the consent amount by 23rd October, 2020 and executed fees payment with the Auctioneers to that effect.

10. I note that the applicants did not respond to this specific issue. Nonetheless, I have looked at the correspondences annexed to the replying affidavit to support the averment that the applicants' advocate had been engaged in negotiations with the advocate for the respondent with a view to settle the award at an all-inclusive sum of Kshs.800,000/.
11. I have also looked at the consent letter dated 2nd July, 2020 addressed to the Executive Officer of the Chief Magistrate's Court at Milimani Commercial Courts, the contents of which are to have the judgment varied to the sum of Kshs.800,000/ and that there be a stay of execution for 15 days from the date of filing of the consent.
12. However, the aforementioned letter does not bear the official court stamp to indicate when, if ever, it was received by the Chief Magistrate's Court. Moreover, there is nothing to indicate whether the consent was ever adopted as an order of the court by the trial court for it to have legal effect. In the same manner, the respondent has not brought any credible evidence to confirm the position on whether the applicants have satisfied the decretal sum.
13. In the circumstances, I have no basis on which to conclude that the matter was ever compromised. I will now look at the merits of the Motion.
14. It is evident that the Motion is seeking twin orders, the first being leave to appeal out of time against the impugned judgment delivered on 6th February, 2020.
15. **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 further stipulates that an appeal may be admitted out of time where sufficient cause has been shown.
16. 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.
17. The guiding principles to be satisfied in an application seeking leave of the court to file an appeal out of time/for the extension of time were the laid out in the case of **Thuita Mwangi v Kenya Airways Limited [2003] eKLR** and were reaffirmed in the case of **Growth Africa (K) Limited & another v Charles Muange Milu [2019] eKLR**. The principles are: the length and reason for the delay; whether the appeal is arguable or not and the prejudice which will befall the respondent should the applicant be granted leave to appeal.
18. On the first principle on length of delay, the applicant is of the view that the Motion has been brought without unreasonable delay. The respondent did not address me on this principle
19. Upon my perusal of the record, I note that none of the parties availed a copy of the impugned judgment for my reference. Nevertheless, it is not in dispute that the judgment was delivered on 6th February, 2020 which is about eight (8) months prior to the filing of the instant Motion. In my mind, while there has clearly been a delay in bringing the Motion, I do not find such delay is inordinate.
20. Concerning the reason(s) for the delay, Purity Wambui Waikwa in her supporting affidavit states that the delay in filing the appeal was occasioned by the time taken in receiving instructions from the applicants to lodge an appeal against the decision of the trial court and was further occasioned by the fact that the advocate who was handling the matter had left the employment of the firm without a proper hand over of matters.
21. The deponent also states that the Covid-19 pandemic played a role in the delay since it was not possible for the applicants to visit their advocate for some time owing to the travel restrictions put in place by the government.
22. Upon considering the above explanation, I am alive to the fact that the global Covid-19 pandemic greatly 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 temporary closure of the courts and offices soon thereafter, as well as restricted movement put in place by the Kenyan Government. Consequently, I find the explanation for the delay to be reasonable in the circumstances.

23. On whether or not an arguable appeal exists, Purity Wambui Waikwa states that the intended appeal raises arguable points of law and fact. This subject was not touched on by the respondent

24. From my study of the grounds of appeal raised in the draft memorandum of appeal annexed to the Motion, I note that the appeal is primarily challenging the award of general damages by the trial court, which the applicants argue to be manifestly excessive and a departure from conventional awards previously made. Upon considering the above, I am satisfied that the applicants have established arguable points of law and fact in their draft memorandum of appeal.

25. Under the final principle on prejudice, the applicants are of the view that the respondent does not stand to be prejudiced should leave be granted for them to file their appeal out of time. In the absence of any contrary averment, I am satisfied that there is no indication of prejudice on the part of the respondent that cannot be compensated through costs.

26. For all the foregoing reasons, I am convinced that it would be fair and proper for me to exercise my discretion in favour of the applicants.

27. The second order sought is for stay of execution of the impugned judgment pending the hearing and determination of the appeal.

28. The guiding provision is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the following three (3) conditions in determining an application for stay.

29. The first condition is that the application must have been made without unreasonable delay, which condition has already been addressed.

30. Under the second condition, the applicants must show to this court's satisfaction the substantial loss they would likely suffer if the order for stay is denied.

31. From the Motion and supporting affidavit, it is apparent that the applicants are apprehensive that the execution process has commenced and there is a likelihood that they will be unable to recover the decretal amount from the respondent once the same is paid to him and the appeal succeeds. There was no retort from the respondent on this subject.

32. The legal position is that execution is a lawful process and hence a party cannot simply argue that a stay of execution is necessary in order to halt or prevent execution. It is on this basis that the court in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** rendered itself thus:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

33. The question on who has the burden of proof on the issue of refund of the decretal sum was addressed by the Court of Appeal's analysis in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** when it held that:

“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...”

34. In the absence of any indication on whether the respondent is in a financial position to refund the decretal sum should the circumstances require it, I am satisfied that the applicants have reasonably shown that they will suffer substantial loss.

35. In respect to the final condition which is the provision of security for the due performance of such decree or order, the applicants indicated their readiness and willingness to deposit the decretal sum in a joint interest earning account, which I find reasonable.

36. In the end, the Motion succeeds on merit and the following orders are made consequently:

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

b) There be a stay of execution of the judgment delivered on 2nd February, 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 order for stay shall automatically lapse.

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

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

.....

J. K. SERGON

JUDGE

In the presence of:

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

..... for the Respondent