



**KTL.NO.503/2019**

**REPUBLIC OF KENYA**

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

**CIVIL MISC. APPLICATION NO. 80 OF 2018**

**JOSHUA KALOLA MUNYAKA.....APPLICANT**

**VERSUS**

**JOYCE KALAU KITUNDU (Suing as the Administrator**

**of the Estate of MATIVO KITUNDU (Deceased).....RESPONDENT**

**R U L I N G**

1. The Applicant has approached this Court by way of Notice of Motion seeking leave to appeal out of time against the whole Judgment of the **Kitui Chief Magistrate's Court Kitui CMCC No. 496 of 2015** delivered on **29<sup>th</sup> August, 2018**. In the same vein he seeks orders that the Memorandum of Appeal annexed to the Application be deemed as duly filed and served upon payment of the requisite fees and stay of execution of the Judgment and the Decree subsequent thereto pending the hearing and determination of the Appeal.
2. The Application is premised on grounds that the trial Court did not issue interim orders of stay pending Appeal, therefore the Respondent is at liberty to commence execution proceedings against the Applicant; the delay in filing the Appeal was inadvertent on the Applicants' part and was occasioned by an inadvertent omission on the part of the Applicant to instruct his Advocate to file an Appeal. That the delay is not inordinate; the Appeal has good chances of success such that it would be rendered nugatory if stay of execution is not granted. That the Appellant will suffer substantial loss if the Judgment given on **29<sup>th</sup> August, 2018** is executed as the Respondent is a peasant farmer and may be unable to repay the Judgment sum if the Appeal succeeds, and the Applicant is willing to furnish such security as the Court may order for the due performance of the Decree and the Application has been brought without unreasonable delay.
3. The Application is supported by an affidavit deponed by **Joshua Kalola Munyaka**, the Applicant, who deposes *inter alia* that he is dissatisfied with the whole of the Judgment and intends to lodge the Appeal against the Judgment. That the delay in filing of the Appeal was occasioned by an inadvertent omission on his part to instruct his Advocate to file the Appeal, that it will be in the interest of justice to have the orders sought granted.
4. The Respondent filed an affidavit in reply where she deponed that the Application is not made in good faith as it is aimed at delaying payments in the matter and to derail her from enjoying fruits of the Judgment. That the Deceased left behind a mother and siblings and they do not have anyone to support them or anything to survive on as they were waiting for the outcome of the Judgment. That they borrowed money to cater for funeral expenses that they are expected to refund upon finalization of the claim herein. And on without prejudice basis sought an order directing the Applicant to pay half the decretal amount of **Kshs. 807,612/=** and deposit the balance in a joint account.
5. Following directions given in the matter, the Application was to be canvassed by way of written submissions but only the Applicant filed submissions that I have duly taken into consideration.
6. The discretion to enlarge time within which an Appeal can be filed is derived from the provisions of **Section 79G** of the **Civil Procedure Act** that provides thus:

***“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 been 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.”***

7. The Judgment in the Lower Court was delivered on the **29<sup>th</sup> August, 2018** and the instant Application was filed on **1<sup>st</sup> October, 2018**.

The delay in filing of the Application was not inordinate. It will be in the interest of justice to accord the Applicant an opportunity of being heard on Appeal which is his right. In the circumstances no prejudice will be suffered by the Respondent since it is a money Decree.

8. Regarding stay of execution, the principles of granting the order is provided for in **Order 42 Rule (6)** of the **Civil Procedure Rules** that 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 subrule (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.*

*(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*

*(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.*

*(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”*

9. As pointed out, the Application was made without unreasonable delay. The nature of loss the Applicant alleges will suffer if the sum paid is not repaid in case the Appeal succeeds is in monetary terms. It is further argued that no evidence was adduced to establish the claim.

10. The claim is a monetary one where the Court should hesitate granting the order sought for the reason that it can be repaid. This was well put in the case of **Ujagar Singh vs. Runda Coffee Estates Limited (1966) EA 263** as follows:

*“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”*

11. It has been stated that the Respondent is a peasant farmer and may be unable to pay the decretal sum if the appeal succeeds. According to the response filed it is apparent that the Respondent is a person of straw because it is averred that the family had to borrow some cash to cater for funeral expenses, money that has not been refunded to date which means that they are not capable of refunding any sum of money if paid in case the Appeal succeeds. However, I do note that in the intended Appeal, the Appellant is aggrieved with the award of quantum of damages which is termed to be manifestly excessive.

12. In the premises I order as follows:

(i) The Applicant is granted leave to appeal out of time within **30 days**.

(ii) There be a stay of execution on condition that the Applicant pays the Respondent **Kshs. 300,000/=** and to deposit balance of the decretal amount in a joint account held by both parties' Counsels in a reputable financial institute within **30 days** and in default execution to issue.

(iii) Since the Respondent did not file any submissions there will be no order as to costs.

13. It is so ordered.

**Dated, Signed and Delivered at Kitui this 21<sup>st</sup> day of February, 2019.**

**L. N. MUTENDE**

**JUDGE**