



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL MISC APPL. NO. 9 OF 2019**

**RISIPA OKWISA OMBULA**

**ESTHER AYUMA OMBULA** (suing as legal administrators

of the estate of the late **GEOFFREY OMBULA**).....**PLAINTIFFS/RESPONDENTS**

**VERSUS**

**NJUGUNA SIMON**.....**1<sup>ST</sup> DEFENDANT/APPLICANT**

**FREDRICK MBUGUA NJENGA**.....**2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. The Application dated 18<sup>th</sup> January, 2019 seeks orders that this honourable court be pleased to extend time and grant leave to the Applicants to lodge a memorandum of appeal out of time against the judgment and decree entered against the Applicants by Hon. P Muholi Senior Resident Magistrate in Milimani CMCC No. 6699 of 2016 on 21<sup>st</sup> November, 2018.
2. Secondly, that this honourable court be pleased to stay execution of the judgment and decree in Milimani Civil Suit No. 6699 of 2016 pending hearing and determination of the intended appeal.
3. It is stated in the grounds and the affidavit in support of the application that judgment was delivered in the lower court on 21<sup>st</sup> November, 2018 against the Applicant for the sum of Ksh.2,851,098/= plus costs and interest. That the Applicant is aggrieved by the said judgment and wishes to appeal. The delay in filing the appeal is blamed on inadvertent delay in obtaining a copy of the judgment.
4. It is further stated that the appeal has overwhelming chances of success in respect of the excessive awards on quantum of damages and future earnings. That the Applicant stands to suffer substantial loss as the decretal sum if paid to the Respondent may not be recovered. The Applicant has offered security for the due performance of the decree
5. The application is opposed. It is stated in the replying affidavit that the application is meant to delay the Respondents from enjoying the fruits of the judgment. That the deceased who was the sole breadwinner left behind three minor children and a mother. That if the application is allowed half the decretal sum of Ksh.1,533,485/= be paid to the Respondent's and the other half deposited in a joint account.
6. I have considered the application and the response to the same.
7. Section 79G of the Civil Procedure Act provides that:

**“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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.”**

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

8. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

**“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.”**

9. In the case at hand, the delay is blamed on inadvertence by the Applicant’s counsel. The judgment of the lower court was delivered on 22<sup>nd</sup> November, 2018. The application at hand was filed on 18<sup>th</sup> January, 2019. Taking into account that under Order 50 rule 4 Civil Procedure Rules time does not run during the period between 21<sup>st</sup> December, 2018 to 13<sup>th</sup> January, 2019, the delay was not inordinate and is excusable.

10. The Applicants’ main grievance is that the quantum of damages is excessive and that if the same is paid it may not be recoverable from the Respondents. The Respondents have not said anything to allay their fears. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another:**

**“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the 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 the lack of them. 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 – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”**

11. To balance the competing interests of both parties, I allow the application on condition that half of the decretal sum be paid to the Respondents and the balance deposited in an interest earning joint bank account of the counsels for both parties or in court within 30 days from the date hereof. Costs to the application to the Respondents.

**Dated, signed and delivered at Nairobi this 27<sup>th</sup> day of March, 2019**

**B THURANIRA JADEN**

**JUDGE**