

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 414 OF 2014

MUTALII SYMON ITHIRIRI.....1ST APPLICANT

KIMATHI DERRICK.....2ND APPLICANT

VERSUS

KALEB JAOKO.....RESPONDENT

RULING

This is an application by way of Notice of Motion under Sections 1A 3A 63 (e) and 79 G of the Civil Procedure Act and Order 42 rule 6 and 51 Rule 1 of the Civil Procedure rules for stay of execution of the lower court judgment. There is also a prayer for extension of time to file the Memorandum of Appeal. The reasons for seeking those orders are set out on the face of the application alongside an affidavit sworn by counsel for the applicants. The draft memorandum of appeal is also annexed to the application.

The application is opposed and grounds of opposition have been filed on behalf of the respondent. Parties have filed submissions which I have noted alongside the cited authorities. The orders sought are discretionary which discretion should be exercised judicially. The applicants have the right of appeal but on the other hand the respondent has the judgment in his favour out of which he desires to enjoy the fruits thereof.

Going by the draft Memorandum of Appeal, the thrust of the intended appeal relates to liability and what is said to be excessive award of damages both in terms of general and special damages. I know the principles applicable under order 42 Rule 6 of the civil Procedure Rules. The judgment of the lower court was delivered on 8th May, 2018 and this application was filed on 31st July, 2018. Soon after the delivery of the judgment, on 18th May, 2018, counsel for the applicants addressed a letter to the Executive Officer of the lower court asking for proceedings.

That was a clear demonstration that the applicants intended to challenge the judgment of the lower court. As at the time of arguing this application the said proceedings had not been delivered. The delay in lodging the Memorandum of Appeal in time has been sufficiently explained. The court is supposed to balance the interest of both parties. No party can be penalised for systemic shortcoming of the institution of judiciary. Neither can any party take advantage of such shortcomings.

Doing the best that I can, I hereby allow the application to extend the time to file the Memorandum of Appeal which should be done within 14 days from the date of this ruling. I further allow the prayer for stay of execution of the lower court judgement provided that the applicants pay to the respondent a sum of Kshs. 1,000,000/= within 30 days from the date of this ruling and deposit the balance of the decretal sum in an interest earning account in the joint names of both advocates for the parties on record within the same period of 30 days. In default execution shall proceed. The costs shall be on appeal.

Dated, signed and delivered at Nairobi this 15th Day of March , 2019.

A. MBOGHOLI MSAGHA

JUDGE