

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANESOUS APPLICATION NO. 403 OF 2018

JAMES MUNGAI NGUMBA.....1ST APPLICANT

SARIS HARDWARD LIMITED.....2ND APPLICANT

VERSUS

SARAH WARINGA GATHAGE

GRACE MWONGELI MUTUKU (Suing as the Legal Representatives of the

Estate of SIMON MUTUKU MUTINDA (DECEASED)..... RESPONDENT

RULING

This is an application dated 24th July, 2018 for leave to lodge, file and serve appeal out of time and that the Memorandum of Appeal be filed upon payment of requisite fees; lastly that there be a stay of execution of the lower court decree made on 17th May, 2018. The application is supported by an affidavit sworn by Lydia Mwangi the legal officer with CIC General Insurance Limited, alongside the grounds set out on the face of the application.

The insurance company was not a party to the original suit but is said to be exercising its powers under the doctrine of subrogation. The application is opposed and there is a replying affidavit together with grounds of opposition filed on behalf of the respondents. Both parties have also filed authorities to assist the court in the determination of the application, in which both counsel agreed should be addressed based on the affidavit evidence and authorities cited.

I have read the authorities cited and considered the rival arguments by the parties in their respective affidavits. The applicants have the right of appeal while on the other hand, the respondents have a judgment in their favour which they wish to execute. There is always the balancing act in considering the positions of the parties in such applications, and in view of the provisions of order 42 rules 6 of the Civil Procedure Rules.

The delay in lodging the application and also the Memorandum of Appeal has been sufficiently explained to the satisfaction of the court. There should be no fear on the part of the respondents that the insurance company is incapable of meeting the decree that may be found against the applicants in view of the fact that security is a requirement under Order 47 Rule 6 aforesaid. The orders sought are discretionary and I am persuaded to exercise that discretion in favour of the applicants by allowing the application. There shall be a stay of execution provided that the decretal sum shall be deposited in an interest earning account in the names of both advocates on record for the parties within 30 days from the date of this ruling.

The Memorandum of Appeal shall be filed on payment of the requisite court fees within seven days from the date of the ruling. The costs shall be on appeal.

Dated, signed and delivered at Nairobi this 30th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE