



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. 301 OF 2017**

**SIMON KIKO MUNYILU.....1<sup>st</sup> APPLICANT**

**NGUGI MICHAEL.....2<sup>nd</sup> APPLICANT**

**VERSUS**

**JOHN PHILIP NZIOKA KILONZO**

(Suing as representative of the estate of

**JONES KIMEU KILONZO (deceased).... RESPONDENT**

**RULING**

1. This is an application by the Applicant dated 4.10.2017 seeking two main prayers, firstly leave to enlarge time within which to file an appeal from a judgement and decree entered against them and given on 26.7.2017 in **Kangundo SPMCC No. 13 of 2016** and secondly stay of execution of judgement and decree in **Kangundo SPMCC No. 13 of 2016** pending the hearing and determination of the intended appeal.

2. The Applicant seeks orders for enlargement of time to file Memorandum of Appeal out of time. The intended appeal is from a judgement given on 26.7.2017. The Application is supported by Affidavits by Kelvin Nguere, the claims manager of the insurers of the suit vehicle and by Robert Ogode, from the firm of advocates on record in this matter. The judgement was given on 26.7.2017. The Applicant did not lodge this Application until 4.10.2017. This was more than thirty-one days after the lapse of the time allowed to lodge appeals.

3. The Applicant deposes that the delay was occasioned in the process of obtaining the judgement delivered on 26.1.2017 but however they are apprehensive that the respondent may carry out execution of the decree. The Applicants annexed a Draft Memorandum of Appeal exhibiting their grounds of dissatisfaction with the Learned Trial Magistrates judgement. The applicants aver in the supporting affidavit that execution is imminent and the deponent has included a notice of execution to support this averment.

4. The Application is opposed vide grounds of opposition. The Respondent finds that the application is frivolous, vexatious, incompetent, bad in law, incurably defective, abuse of the court process, an afterthought and brought after inordinate delay.

5. The Application was canvassed by way of written submissions.

6. The issue for determination is whether the Applicant is entitled to an extension of time to lodge his appeal and orders for stay of execution.

7. Section 79G of the Civil Procedure Act is the law applicable in deciding whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

***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.***

8. The points taken up by the Respondent is that the Application is frivolous, vexatious, incompetent, bad in law, incurably defective, abuse of the court process, an afterthought and brought after inordinate delay. This being an application that is brought under Section 79G of the Civil Procedure Act. I am unable to find it bad in law. In light of the remedies sought in the application *vis-a-vis* the provisions of the law I disagree with the respondent that the application is vexatious and frivolous and incompetent; the application also does not appear to be an afterthought; with regard to the aspect of delay, this is a matter of fact and the respondent having opted to file grounds of opposition has not

expounded how the application is brought after inordinate delay.

9. The power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis and while not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour. This was stated in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC and 7 Others (2015) eKLR**

10. The Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR**, listed the factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. They include the following:

*a. The period of delay;*

*b. The reason for the delay;*

*c. The arguability of the appeal;*

*d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;*

*e. The importance of compliance with time limits to the particular litigation or issue; and*

*f. The effect if any on the administration of justice or public interest if any is involved.*

I will now consider the Applicants' application for extension of time against these factors.

11. The Application was brought almost 3 months after time had run out and the Applicants have not explained satisfactorily the reason for the delay. Further I see a thin line between whether this delay is inordinate or not. Under the circumstances, and because the Applicants appears to have reached the end of the tether, I hold the delay not to be inordinate.

12. Looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is unarguable for all one is required to demonstrate is the arguability of the appeal. The Applicants have easily met that standard. I believe that the Applicants have discharged this burden.

13. The applicants are not averse to the furnishing of requisite security for performance of the decree. I am alive to the apprehensions that the applicants have that execution may commence any time. However in light of the fact that they have indicated willingness to furnish security to satisfy the decretal sum and that they are not satisfied with the judgement of the trial court, there is some semblance of adverse effects that refusing the order have on them.

14. Consequently, I will grant prayer 2 in the Applicants Notice of Motion.

15. The next issue relates to stay of execution and Order 42 Rule 6 of the Civil Procedure Rules is the law applicable in deciding whether the prayer is merited.

16. The case of **Antoine Ndiaye v African Virtual University [2015] eKLR** gave the guiding principles for stay orders, in semblance with Order 42 Rule 6 of the Civil Procedure Rules; to wit,

*a. The Application was brought without undue delay,*

*b. Substantial loss occasionable to the applicant if the order is not granted,*

*c. Security for performance.*

17. I have looked at the application herein, and with regard to the condition of undue delay, as analyzed above, the delay is not inordinate. With regard to the issue of substantial loss, I am unable to find the substantial loss that the applicants shall suffer save that their right to be heard on appeal will be extinguished if the order is not granted. I am also unable to see the loss that the respondent shall suffer if the order is granted. On the issue of security for performance, the applicants have indicated willingness to deposit security as court directs; on the other hand the respondent has not shown their willingness or ability to refund the decretal sum if the appeal is decided against him. In these circumstances I am satisfied that the applicant has met the basic requirements for grant of this order. It would be unfair and unjust to deny the Applicants an opportunity to ventilate their appeal now that they are willing to furnish security.

18. In the result the Applicant's application dated 4/10/2017 has merit. The same is allowed in the following terms:-

*(a) The Applicants are granted leave to file and serve their memorandum of Appeal within the next ten (10) days from the date hereof.*

*(b) An order of stay of execution of the judgement and decree in Kangundo SPMCC No. 13 of 2016 do issue upon the Applicants depositing the entire decretal sums into an interest earning account in the joint names of both Advocates within thirty (30) days from the date of this ruling and in default the order of stay shall lapse.*

*(c) The costs of the application shall abide in the appeal.*

It is so ordered.

**Dated and delivered at Machakos this 30<sup>th</sup> day of May, 2019.**

**D.K. KEMEI**

**JUDGE**