



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 24 OF 2018

ANTONY KONDE FONDO.....1ST APPLICANT

ENFORCER CAR ALARMS.....2ND APPLICANT

VERSUS

ROSELINE MWANATUMU

CHIMEGA (The representative of Florence Chimega-Deceased).....RESPONDENT

[An application for leave to appeal out of time against the judgement delivered on 25th June, 2018

by R. K. Ondieki in Kilifi SPMCC No. 595 of 2010, Roseline Mwanamutu Chimega

(the representative of Florence Chimega-Deceased) v Antony Konde Fondo & another]

RULING

[Applicants' Notice of Motion dated 18th September, 2018]

1. Antony Konde Fondo and Enforcer Car Alarms, the applicants herein, were the defendants in Kilifi SPM Court Civil Case No. 595 of 2010 in which the Respondent. Roselyne Mwanatumu Chimega (the representative of Florence Chimega-Deceased) had sued them for compensation on behalf of the estate of Florence Chimega who was killed in a road traffic accident by the applicants' car.
2. At the trial the Respondent was awarded Kshs. 2,268,185. The applicants intend to appeal against that judgment. The applicants have therefore, through the notice of motion dated 18th September, 2018, prayed for leave to file an appeal out of time and a stay of execution of the judgment pending the hearing and determination of the intended appeal.
3. When the applicants first appeared before me on 20th September, 2018 I granted them stay on condition that they deposited the decretal amount in court within 45 days. On 23rd January, 2019, the advocates for the parties confirmed that the decretal amount had been deposited in court.
4. From the grounds in support of the application and the supporting affidavit of Faiz Mohamed Noor, the applicants' counsel, the applicants' case is that they only learned of the delivery of the judgment on 1st August, 2018 when their advocate received a letter dated 31st July, 2018 from the Respondent's counsel indicating that the judgment was delivered on 27th June, 2018 and demanding payment of the decretal amount.
5. It is their case that they are aggrieved by the judgment and wish to appeal against the decision on the quantum of damages. Further, that they have an arguable appeal which will be rendered nugatory unless stay is granted.
6. It is the applicants' case that the delay in filing the appeal was occasioned by the delivery of judgment without notice. The applicants disclose that they are willing to provide appropriate security. A copy of the memorandum of appeal is annexed to the application.
7. The application is opposed though a replying affidavit shown by the Respondent on 31st October, 2018. Her first missile is directed at the affidavit in support of the application. She avers that the same is fatally defective as the applicants' advocate deposes on issues of fact not

within his knowledge.

8. The Respondent avers that the applicants' advocates ought to have followed up on the judgment with the court. Further, that the intended appeal does not raise arguable issues and the application is thus an afterthought being employed to curtail her enjoyment of the fruits of judgment.

9. Alternatively, the Respondent avers that the application can be allowed on condition that the Applicant deposits the entire decretal amount in a joint earning interest account.

10. The advocates, as directed by the court, filed and exchanged submissions on the application. Common sense demands that I first consider whether the applicants should be allowed to file an appeal out of time. Section 79G of the Civil Procedure Act, Cap. 21 allows this court to admit an appeal out of time **"if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time"**.

11. The Supreme Court distilled the principles applicable to the extension of time in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** as follows:-

"1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

12. The averment by the applicants' counsel that he had no notice of the delivery of the judgment until he received a letter from the Respondent's counsel demanding payment of the decretal amount has not been rebutted. It is also noted that the application has been brought without undue delay. No prejudice will be suffered by the Respondent which cannot be compensated by damages. The annexed draft memorandum of appeal discloses an arguable appeal. Taking all these factors into account, I find that the applicants merit an extension of time to enable them file their appeal.

13. The remaining question is whether the applicants deserve an order staying execution of judgment pending the hearing and determination of the appeal they intend to file.

14. Counsel for the Respondent has urged this court not to grant stay of execution asserting that the applicants have not demonstrated the irreparable loss they will suffer if the order is not granted. Reliance is placed on the decision in **HCCC No 422 of 2006, Antoine Ndiaye v African Virtual University** in support of the proposition that an applicant can only earn an injunction upon demonstrating the damage to be suffered.

15. On the other hand, counsel for the applicants urged the court to find that the applicants have made their application without delay and have shown that they will suffer substantial loss if the order is not granted. Further, that the applicants have offered security for due performance of the decree as required by the law.

16. In order for stay pending appeal to materialize, an applicant should demonstrate that the application has been made without undue delay and if the order is not issued then substantial loss will arise. The applicant should also provide security for due performance of the decree as the court may order.

17. As already stated, the instant application has been made without undue delay. The applicants will suffer loss if stay is not granted because the Respondent has not shown that she can refund the decretal amount if the appeal succeeds. The applicants have already provided the security by depositing the decretal amount in court. The applicants have met the conditions for grant of stay. Their application for stay pending appeal is allowed.

18. In summary, the applicants are granted leave to appeal out of time. The applicants to file their appeal within 14 days from the date of delivery of this ruling. There shall be stay of execution of the judgment of the trial court pending the hearing and determination of the applicants' intended appeal.

19. Although the applicants became aware of the trial court's judgment on 1st August, 2018, they filed this application on 18th September, 2018. This is a sign of lethargy which should be punished by an award of costs to the Respondent. The Respondent is therefore awarded the costs of this application.

Dated and Signed at Nairobi this 12th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 23rd day of May 2019

R. Nyakundi,

Judge of the High Court