



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CIVIL MISC. APPLICATION NO. 62 OF 2019**

**BETWEEN**

**BEATRICE MAKASI MUTHANGYA.....1<sup>ST</sup> APPLICANT**

**CHRISTINE KITONDO MAKASI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**ELIZABETH MWENDE MUTUA.....RESPONDENT**

**R U L I N G**

1. **Beatrice Makasi Muthangya** and **Christine Kitondo Makasi**, the Applicants approached this Court on the **16<sup>th</sup>** day of **April, 2019** by way of Notice of Motion seeking leave to appeal out of time and in addition, a stay of execution pending hearing of the Application and intended Appeal.
2. Prior to the Application being disposed off, on the **7<sup>th</sup>** day of **June, 2019**, they filed another Application seeking stay of execution pending hearing and determination of the Application. The stated Applications were heard simultaneously.
3. The Applications are premised on grounds that Judgment was delivered on the **6<sup>th</sup> December, 2018**; thereafter the Applicants' Advocate was served with a Decree; there was delay in obtaining the Judgment; they have reasonable chances of succeeding on Appeal; if stay of execution is not granted the intended Appeal will be rendered nugatory.
4. At the point of filing the 2<sup>nd</sup> Application it was based on grounds that the Applicant risk being committed to Civil Jail; as a warrant of arrest had been issued on the **6<sup>th</sup> June, 2019** in execution of the Lower Court Decree. That after the Respondent was served with the Application that came up on the **23<sup>rd</sup> May, 2019** when the Court was not sitting was adjourned to **9<sup>th</sup> July, 2019**.
5. The Respondent filed grounds of Appeal to both Applications where he stated that there is no Appeal in place upon which the Application is based and it is not supported by any security as a condition for stay of execution pending Appeal.
6. The Application was canvassed by way of written submissions. It was urged for the Applicant that the Application is brought without delay and a Memorandum of Appeal was attached.
7. In response it was stated that the Application was filed four (4) months after Judgment. That the same Advocates having been the ones who represented the Applicant in the Lower Court, they did not require proceedings to file a Memorandum of Appeal which makes the delay inordinate.
8. That the Applicants had not demonstrated how they will suffer substantial loss if the order sought is not granted and that if the Applications were to be allowed they should provide security.
9. In a rejoinder, it was urged that the proceedings had to be typed and the amount being executed is as a result of the Lower Court case costs, therefore requiring security will make the Applicants to suffer prejudice.
10. Principles of enlarging time to file an Appeal are stipulated in **Section 79G** of the **Criminal Procedure Act** that provides thus:

***“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.”*

11. In exercising the discretion, the Court may be guided by factors stated in the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Civil Application No. Nai 205 of 1997** (unreported) where the Court of Appeal held as follows:

*“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.”*

12. The Judgment in the Lower Court was delivered on the 6<sup>th</sup> day of **December, 2018** and the Application was filed on the 17<sup>th</sup> **April, 2019**. These were 129 days later. It is urged that the delay was caused by failure to obtain proceedings. But the Applicants failed to avail any evidence to that effect. However, looking at the intended Memorandum of Appeal as drafted, it may be in the interest of justice for an Appeal to be heard.

13. With regard to the 2<sup>nd</sup> limb of the Application, principles of granting an injunction were stated in the case of **Butt vs. Rent Restriction Tribunal (1982) KLR 217** thus:

*“... (a) the power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal;*

*(b) the general principle in granting or refusing a stay is if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the Judge’s discretion;*

*(c) a Judge should not refuse a stay if there are grounds for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings;*

*(d) the court in exercising its discretion whether to grant and refuse an application for stay of execution will consider the special circumstances of the case and unique requirements. The special circumstances in this were that there was a large amount of rent in dispute and the applicant had an undoubted right of appeal.*

*(e) the court in exercising its powers under Order XLI rule 4(2)(b) (now Order 42(6)(b) of the Civil Procedure Rules, can only order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”*

14. It will be in the interest of justice for an order of stay to be granted in order for the Appeal not to be rendered nugatory.

15. In the premises I grant orders thus:

(i) The Applicants are granted leave to appeal out of time within **7 days**.

(ii) There be stay of execution on condition that the Applicants deposits the entire decretal sum in Court within **7 days**.

(iii) In default execution to proceed.

16. It is so ordered.

**Dated, Signed and Delivered at Kitui this 27<sup>th</sup> day of June, 2019.**

**L. N. MUTENDE**

**JUDGE**