



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL MISC. APPL. NO. 244 OF 2018**

**RICHARD GITHU MUTURI and TERESIA**

**NJERI KAGWA (Suing as the Administrator**

**to the Estate of FLORENCE SUSAN NYAMBURA.....RESPONDENT**

**VERSUS**

**JOHN BEAUTY MITAU.....APPLICANT**

**MY BEAUTY TRANSPORTERS LIMIED.....APPLICANT**

**RULING**

1. The application dated 11<sup>th</sup> April, 2018 principally seeks orders that this honourable court be pleased to grant leave to the Applicants to lodge a Memorandum of Appeal out of time against the judgment and/or decree of Honourable Mbeja, Senior Resident Magistrate delivered on the 23<sup>rd</sup> January, 2018 in Milimani CMCC No. 2135 of 2013.
2. Secondly, that there be a stay of execution of the judgment and decree in Milimani CMCC No. 2135 of 2013 pending hearing and determination of the intended appeal.
3. Thirdly, that the draft Memorandum of Appeal be deemed to have been duly filed upon payment of requisite fees.
4. The judgment was entered against the Applicants on 23<sup>rd</sup> January, 2018 on 100% liability basis for the sum of Ksh.1,200,000/= general damages, Ksh.186,802/= special damages, costs and interest. It is averred in the affidavit in support that the Appeal was not filed within time as the Advocate who was previously handling the matter resigned from the firm of Ms. Kairu & McCourt, the Advocates for the Applicants, without notice and without filing the Memorandum of Appeal. That the Advocate who took over the file was not aware of the said state of affairs. It is contended that the intended Appeal is arguable with high chances of success. That the Applicants are apprehensive that the Respondent is a person of unknown means and the appeal may be rendered an academic exercise. The Applicants are willing to deposit security for the due performance of the decree.
5. In a replying affidavit filed in opposition to the application, it is deponed that there were promises for payment of the decretal sum and that the application at hand is an attempt to frustrate the Respondent. It is further stated that there is no notice of the alleged resignation by Advocate exhibited herein and nor is the name of the said advocate disclosed.
6. The application was canvassed by way of written submissions. I have considered the application, the response to the same and the submissions filed.
7. Section 79G of the Civil Procedure Act provides that:

**“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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 court therefore has the discretion to extend time within which to file an appeal. As stated by the Court of Appeal in the case of **Aviation Cargo Limited v St. Mark Freight Services Limited [2014] eKLR**:

**“...whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.”**

9. In an execution for stay of execution, Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

**“No order for stay of execution shall be made under sub-rule (1) unless –**

**(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

10. The judgment of the lower court was delivered on 23<sup>rd</sup> January, 2018. The application at hand was filed on 16<sup>th</sup> April, 2018 about 3 months later. The delay has been explained albeit without any documents in support thereof.

11. The Applicants have stated that the Respondent may not be able to refund the decretal sum. The Respondent has not said anything about it. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another**:

**“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”**

12. To balance the competing interests of the parties herein, I allow the application on condition that the decretal sum is deposited in a joint interest earning bank account of the counsels for the parties or in court within 30 days from the date hereof. Costs to the Respondent.

**Date, signed and delivered at Nairobi this 20<sup>th</sup> day of June, 2019**

**B. THURANIRA JADEN**

**JUDGE**