



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

MISC. CIVIL APPLICATION CASE NO. 61 OF 2019

BRYAN KIKUNGA KINYAMASYO.....APPLICANT

-VERSUS -

FESTUS MBOYA KIKUNGA & KENNETH MBOYA (suing as the representatives

of the estate of the late) FRANCIS KIKUNGA MBOYA.....RESPONDENT

RULING

1. **Bryan Kikunga Kinyamasyo** the Applicant, approached the court by way of Notice of Motion seeking orders thus:-

i. Spent

ii. Spent

iii. **That** this Honourable Court be pleased to extend time and grant leave to the applicant to lodge an appeal against the judgment of **Honorable Z. J. Nyakundi**, Senior Principal Magistrate in Motomo **PMCC No.107 of 2016** delivered on 22/1/2019 and the Memorandum of Appeal annexed hereto be deemed as duly filed with leave of the court.

iv. **That** upon granting prayer number 2 above, this Honourable Court be pleased to stay the execution of Judgment/Decree obtained in Mutomo PMCC No.107 of 2016 pending the full hearing and final determination of the appeal subject to the application.

v. **That** the costs of this application abide the outcome of the appeal.

2. The application is premised on grounds that; judgment in Mutomo PMCC No. 107 of 2016 was allegedly delivered on 22/1/2019 for a decretal amount of **Kshs.3,246,475**; on the stated date representatives of both parties attended court when the judgment was not delivered and if it was delivered, the same was done in their absence and without notification; the applicant became aware of the delivery of the judgement upon receiving a letter on the same from the respondent's advocate on 11/2/2019.

3. That since then the applicant failed to access the judgment until the respondents advocate forwarded a copy to them and upon perusal they noted errors and irregularities including failure to date the judgment that invalidated it.

4. That the delay in lodging the appeal was caused by the pursuit to obtain the court file for perusal; the amount awarded is substantial and incase the appeal is successful and execution is complete the applicant will suffer irreparable harm as the value of the respondent is undisclosed. That the applicant is willing to abide with conditions of the court on security including depositing an insurance bond or bank guarantee as security for the due realization of the judgement from the order sought and the stay sought will not be prejudicial to the respondent.

5. The legal officer of Madison Insurance Company, insurers of motor vehicle registration number KCE 740T that was involved in the accident swore an affidavit in support of the application where he basically reiterated what was stated on the grounds of the application.

6. **Festu Mboya Kikunga** and **Kenneth Mboya** the respondents and representatives of the estate of the deceased swore an affidavit in reply. They deposed that the deceased was survived by his father and siblings who do not have anyone to support them as he was the sole bread winner of the family. That they borrowed money to offset funeral expenses that has not been repaid and if the court is inclined to grant orders sought it would be just to order the applicant to pay half the decretal sum amounting to **Kshs.1,739,620.50cts**.

7. The application was canvassed by way of written submissions that I have taken into consideration

8. To grant leave to a party to lodge an appeal out of time the court is guided by **Section 79G of the Civil 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.”

9. In exercising the discretion, the court must consider if the applicant has a good cause that made him fail to file the appeal within the stipulated time. Courts have considered some factors which may be considered to be good and reasonable factors which may include; the period of delay, the reason for the delay, if the respondent will be prejudiced and whether the intended appeal is arguable (also see the decision of **Samuel Mwaura Muthumbi -vs- Josephine Wanjiru Ngugi & another (2019) eKLR**)

10. The reason given is that the judgment in question was delivered in the absence of both counsels after they waited for the same in vain but it was not delivered in their presence on the scheduled date. And, after they learnt of the same having been delivered they made a relentless effort to acquire a copy which was not forthcoming.

11. The respondent on their part argue that the applicant has not given any substantive reason that is supported by evidence as to the delay in filing of the appeal.

12. The copy of the judgement annexed to the application is not dated. However there is a notice that was sent to the Applicant’s advocates which stipulate that the judgment was delivered on the 22/1/2019. It was received on the 11th February 2019 but the applicant waited until 17/4/2019 to file the instant application. This was some (2) months later. The applicant cannot be seen to have been diligent. However, a perusal of the appeal shows that some aspects of it may be arguable. In the premises, it may be in the interest of justice to have the appeal heard. Therefore I grant the applicant **14 days** within which to file the appeal out of time.

13. On stay of execution the principles to guide the court in exercise of the discretion are stipulated in order **42 Rule (6) of the Civil Procedure Rules** that can be summed up thus:

(i) The application should be brought without undue delay

(ii) The court should be satisfied that substantial loss may result to the applicant unless stay of execution is ordered, and

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

14. As pointed out, the applicant moved the court slightly more than 30 days after they were made aware of the judgement. The question to be grappled with is whether this was inordinate delay. Looking at the circumstances that transpired the delay may not be dismissed as unconscionable.

15. On event of substantial loss occurring, it is urged that incase the appeal succeeds the applicant may not be able to recover the decretal sum from the respondents. This is a case where the respondents have averred that they are men of straw. They have clearly stated that even the sum expended on funeral expenses was borrowed and todate it has not been paid. It is obvious that incase the appeal succeeds such individuals cannot refund the sum, this will be prejudicial to the applicant.

16. The applicant is willing and ready to provide security for due performance of the decree.

17. I therefore grant a stay of execution pending filing, hearing and determination of the appeal on condition that security by the applicant is provided by depositing **Kshs.1,600,000/= in court within 14 days.**

18. Cost of the application shall abide the appeal.

Dated, Signed and delivered at Kitui this 24th day of September, 2019

L.N. MUTENDE

JUDGE