



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCC. MISC APPL NO. 124 OF 2019

MALIKA MUTUNE & CYNTHIA WANZA KISILU

(suing for and on behalf of the Estate of

FRANCIS MUTUNE MALIKA(Deceased)APPLICANT

-VERSUS-

MUTISO MUTUA.....RESPONDENT

RULING

1. The applicant who was the defendant before the lower court filed the Notice of Motion dated 11th September, 2019 seeking the following orders:

1) **That**, this Honourable court be pleased to extend time and grant leave to the applicant to lodge a memorandum of appeal out of time against the judgment delivered by Honourable J.O Magori (SPM), in Makindu PMCC No. 542 of 2016; Malika Mutune & Cynthia Wanza Kilisiu (*suing for and on behalf of the Estate of Francis Mutune Malika – deceased*) –vs- Mutua Mutiso on 14th May, 2019.

2) **That**, this Honourable court be pleased to order stay of execution of the judgment made and issued in Makindu PMCC No. 542 of 2016; Malika Mutune & Cynthia Wanza Kilisiu (*suing for and on behalf of the Estate of Francis Mutune Malika – Deceased*) –vs- Mutua Mutiso on 14th May, 2019 and all consequential orders and proceedings thereto pending the hearing and determination of the intended appeal.

3) **That**, the costs of this application be provided for.

2. An interim order of stay of execution was granted on 11th September, 2019 when both parties appeared before this court.

3. The application is supported by the grounds on its face and the supporting affidavit of Mutiso Mutua the applicant. The salient issues raised by the applicant are that judgment was delivered against him on 14th May, 2019. He was held 80% liable and ordered to pay KShs.1,648,000/= plus costs and interest at court rates.

4. Though aggrieved by the judgment, he has not yet filed an appeal to challenge it. He cites the reason for the delay in filing appeal as the non-service of notice of delivery of judgment on his advocates. That his advocates only learnt of the delivery of judgment when they were served with notice of party and party costs by the respondent's advocates.

5. He also cites the delay in obtaining a copy of the judgment from the lower court as one of the reasons for the delay in filing appeal. He says he is ready and willing to furnish the court with reasonable security as shall be directed by the court.

6. It is his belief that he has an arguable appeal which he should be allowed to present, since the delay is not inordinate. He has also averred that the orders sought if granted will not cause any prejudice or damage to the respondents. On the other hand, he reckons that if the orders sought are not granted he will suffer prejudice and irreparable substantial loss as there is a likelihood of him not recovering the decretal sum if paid to the respondents and the appeal is successful.

7. The respondent filed a replying affidavit through Cynthia Wanza Kilisiu one of the legal administrators and representative of the estate of the deceased. She has opposed the application saying a notice for delivery of judgment (**cwk1**) was sent to the parties by the court. That her

advocates did a letter to the applicant's advocates dated 29th August, 2019 (cwk2).

8. She depones that the intended appeal has no chances of success since the judgment being contested is fair, sound and reasonable. She adds that if the court is inclined to grant leave to appeal out of time and a stay of execution, then there must be conditions for such grant. She prayed for two conditions namely:

i. Half of the decretal sum to be released to the decree holder's advocates.

ii. The balance to be deposited in an interest earning account of both counsel appearing till the appeal is determined.

9. The reasons she requests for these conditions is that the deceased left behind two (2) minors who are school going and are in need of basic necessities (cwk3). She deponed that she is employed and earns a salary and should be able to refund any money paid in case the intended appeal is successful. Cwk4 is a letter from her employer.

10. I have carefully considered the application, affidavits annexures and the draft memo of appeal. It is not disputed that the judgment the applicant wishes to challenge was delivered on 14th May, 2019. The document (cwk1) confirms that the court indeed issued a notice for delivery of the judgment to the advocates for both parties. The said notice is dated 8th May, 2019. It is not clear why the appellant's advocates never received the notice.

11. The thirty (30) days period within which any aggrieved party is supposed to file an appeal expired on 8th June 2019. The application seeking leave to file appeal out of time was filed on 12th September, 2019 which is exactly three (3) months delay.

12. Would three (3) months delay in the circumstances of this case be said to be inordinate? Considering that the respondent's counsel did notify the applicant's counsel of the delivery of the judgment vide its letter dated 29th August, 2019 (cwk2), this court expected an explanation from the applicant on his inaction. Even upon receipt of the letter the applicant did not act until 12th September, 2019 yet he knew judgment had been delivered on 14th May, 2019.

13. In spite of all these shortfalls the court takes note of the fact that in spite of the delay the applicant has made effort and filed an application seeking leave. I want to believe it would be in the very worst of scenarios that the court would bar a party from challenging a decision where the law allows for such a challenge. Considering the decretal sum, I find that stopping the applicant from appealing by denying him the leave sought would amount to over relying on a technicality to deny him justice in seeking an opinion from a higher court. The leave sought is therefore granted.

14. Order 42 Rule 6 Civil procedure Rules provides that:

Stay in case of appeal

6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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 as been given by the Applicant.

15. In an application of this nature the court looks out for three things namely: -

i. Whether there was delay in filing the application.

ii. Whether there is evidence of substantial loss if the order is not made.

iii. Security for due performance of the decree is provided.

16. I have already dealt above with the issue of delay in filing the application. On substantial loss, the amount involved in the judgment is shown as Kshs.1,648,000/= plus costs and interest. This is not little money. The applicant's concern is that he is not sure that the sum would be refunded if paid and the appeal is successful. On the other hand the respondent in her replying affidavit avers that she is employed and earns Kshs.20,000/= per month and so is capable of refunding the money in the event of a successful appeal. A letter from her employer (cwk4) was annexed

17. There is no dispute that an accident occurred. One of the two motor vehicles involved KCF 082Q (probox) belongs to the Applicant. The

deceased was a passenger in that vehicle. The vehicles driver perished as a result of the accident. These are the undisputed facts. Liability was apportioned at 80:20 in favour of the respondent. The applicant argues that he should not have been found liable at all. That is an issue for consideration when the appeal comes for hearing.

18. The respondent has a decree in her favour for now and she should not be denied its fruits unless for very good reasons. At paragraph 7 of her replying affidavit the respondent states that:-

“However if the court is inclined to grant leave to appeal out of time and a stay, may the same be granted on condition that the defendant/applicant do release half of the decretal sum to the decree holder’s advocates while the balance of the decretal sum be deposited in a joint interest earning account of both advocates on record till the said appeal is determined as the deceased left behind two (2) minors who are schooling and are in dire need of basic needs like food, shelter, clothing, medication and education. (Annexed and marked “cwk 3” is a copy of a letter from the chief – Nguumo location showing the beneficiaries).”

19. Balancing the interests of both parties, I will grant stay of execution pending the filing and hearing of the intended appeal on the following conditions: -

- 1) Leave to file appeal out of time granted.***
- 2) Appeal to be filed and served within 14 days.***
- 3) The applicant to release to the respondent’s advocate Kshs.500,000/= as part of the decretal sum within 30 days.***
- 4) The balance of the decretal sum to be secured by a bank guarantee within 30 days.***
- 5) If conditions 2 and 3 are not complied with, the stay of execution will automatically be vacated.***

Orders accordingly.

Delivered, Signed and Dated This 31st Day of October, 2019 in Open Court at Makueni.

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H. I Ong’udi

Judge