



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL CASE NO. 285 OF 2019

BEATRICE WAIGUMO THUO & TERESIA MUTHONI GATHIRA

(suing on their own behalf & Administrators of the estate of the late

PETER GACHUGI THUO).....PLAINTIFF/RESPONDENT

VERSUS

JIMNA MUTHUSI..... DEFENDANT/APPLICANT

RULING

1. The Applicant herein filed an application dated 18/06/2019 seeking for orders *inter alia*: - that this court do extend time and grant leave to the Applicant to lodge an appeal and file a Memorandum of Appeal out of time against the Judgement and decree in **Kithimani SRMCC No.78 of 2017**; that an order of stay of execution of the judgement and decree be granted pending the hearing and determination of the intended appeal; that the costs be in the cause.
2. The application is supported by an affidavit of **Isabella Nyambura** the General Claims Manager of the Applicant's Insurer sworn on even date as well as grounds on the face thereof. The same raised the following issues: that the applicant is desirous of lodging an appeal against the Judgement of the lower court; that efforts to get instructions from the directors of the Insurer could not be obtained in time as they were out of the country; that the intended appeal has high chances of success; that the delay to lodge the appeal is highly regretted as proceedings were not obtained in good time; that the Applicants stand to suffer substantial loss if execution takes place thereby rendering the Appeal nugatory; that the Applicant is ready and willing to offer security and comply with any reasonable conditions to be imposed by the court.
3. The application was opposed by the Respondents on several grounds *inter alia*: that there was inordinate delay to lodge appeal and the application; that the intended appeal is not arguable; that the Applicant has not fulfilled the conditions of Order 42 Rule 6 of the Civil Procedure Rules; that the application is meant to frustrate the Respondents from enjoying the fruits of the judgement; that in the event that the application is allowed then the sum of **Kshs.3,000,000/-** be paid to the Respondents while the balance be deposited into an interest earning account in the names of both Advocates for the parties pending the hearing and determination of the appeal.
4. Parties agreed to canvass the application by way of written submissions.
5. I have considered the rival affidavits and the submissions by learned counsels. I find there are three

issues necessary for determination namely:-

(i) Whether the Applicant has satisfied the conditions provided by Section 79G of the Civil Procedure Act.

(ii) Whether the Applicant has satisfied the conditions imposed by order 42 Rule 6 of the Civil Procedure Rules.

(iii) Which order can the court grant?

6. As regards the first issue, Section 79G of the Civil Procedure Act allows a party to lodge appeal out of time if he or she shows good cause. Hence an Applicant must demonstrate that circumstances were beyond his control and which made him not to lodge the appeal in time. I have looked at the draft Memorandum of Appeal and note that the lower court judgement was delivered on 16/05/2019 and that the appeal ought to have been lodged by close of business on the 16/06/2019. As it is, the Applicant is already late since the present application has been lodged two days outside the stipulated period for lodging the appeal. I have noted that the Respondents have vehemently opposed the reasons given for the delay and have indicated that the Applicant's lawyers in conduct of the matter ought to have been diligent to lodge the appeal even in the absence of their clients. However the claims manager of the applicant's underwriter has clearly indicated that the directors were out of the country and hence the delay. I am satisfied by the explanation offered by the Applicant since it could not have been lawful and professional for the Applicant's lawyers to proceed to lodge appeal without being given the requisite instructions. In any case the delay to lodge appeal was only two days. The Respondents have claimed that the appeal which mainly is on the issue of quantum of damages is not arguable. I am not persuaded that the intended appeal is unarguable since from the draft Memorandum of Appeal the Appellant's grouse is on one of the heads of damages awarded by the trial court. That is a triable issue and hence the need to allow the Applicant ventilate his appeal on the merits. The Applicant will be given a timeline within which to lodge the same while the Respondent's concerns will be cushioned by an award of costs. Suffice here to state that the Respondents are yet to commence execution of the judgement and decree. I find the Applicant has satisfied the requirements of Section 79G of the Civil Procedure Act.

7. As regards the second issue, Order 42 Rule 6 of the Civil Procedure Rules provides three conditions to be met by an Applicant seeking an order of stay of execution pending appeal namely: that the Application has been made without unreasonable delay; that substantial loss may result to the Applicant unless the order for stay of execution is made; that security is furnished for the due performance of the decree.

It is noted that the judgement complained of was delivered on the 16/05/2019 and hence the appeal if any ought to have been lodged by the 16/06/2019. The present application was filed on 18/06/2019 which is just two day outside the stipulated period. I find there was no inordinate delay by the Applicant and hence that threshold has been met by the Applicants.

On the issue of substantial loss the Applicant has averred that he stand to suffer loss and damage if he is compelled to pay up Kshs.4 million before the appeal is canvassed. Indeed the decretal amount is a tidy sum by any standards. The loss of such a sum will definitely cause a dent on the Applicant's Insurer's finances. I note that the Respondents have claimed that they are being prevented from accessing the fruits of the judgement. However the Respondents have failed to show that they have the means to refund the sums in the event the appeal succeeds. Hence I find the Applicant has met the threshold.

On the issue of Security, the Applicant has stated that he is ready and willing to abide by conditions to be imposed by the court. Indeed security is a pre-requisite for a grant of stay of execution of a judgement or decree. The Applicants Memorandum of Appeal is mainly on the issue of quantum of damages but not on liability. If that is the case, then I find that the Respondents are not likely to leave the court empty handed at the determination of the Appeal. The Respondents have sought for the release of Kshs.3 million while the balance is to be deposited into an interest earning account in the joint names of both Advocates. The Applicant did not file a further affidavit in response to the said suggestion. However, that notwithstanding, I find the amount suggested by the Respondents Counsel to be on the higher side since

the appeal is yet to be heard and determined. Further it can go either way in that the quantum might be reduced somewhat and hence a reasonable figure ought to be given. I find a sum of Kshs. 1 million would be adequate as security and which is to be deposited with the Respondents while the balance be deposited into a joint interest earning account in the names of both Advocates pending the determination of the appeal. That arrangement takes care of the concerns of the parties.

8. In the result, I find the Applicants applications dated 18/06/2019 has merit. The same is allowed in the following terms:-

(a) The Applicant is granted leave to lodge appeal and to file Memorandum of Appeal within 14 days from the date hereof.

(b) An order of stay of execution of judgement and decree in Kithimani SRMCC No. 78 of 2017 is hereby granted upon the Applicant depositing the sum of Kshs.1 million with the Respondent while the rest of the decretal sums be deposited in a joint interest earning account in the names of both Advocates for the Parties within the next thirty (30) days from the date of this ruling failing which the stay shall lapse.

(c) The costs of the application are awarded to the Respondents.

Orders accordingly.

Dated and delivered at **Machakos** this **19th** day of **December, 2019**.

D. K. Kemei

Judge