



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL NO. 265 OF 2017

JOHN SEBAYEN BONANI.....APPLICANT

SAMUEL KINGORI.....APPLICANT

VERSUS

ZIPPORAH NANDAKO NDASAB (suing as

the legal representative of the estate GEORGE

ROBERT NDOMBI NGABO.....RESPONDENT

RULING

1. The application dated 30th June, 2017 seeks orders that:

1. Spent

2. Spent

3. That there be stay of execution of the decree herein pending the hearing and determination of the intended appeal against the judgment and order of the Honourable Magistrate.

4. That the Honourable Court be pleased to grant the applicant leave to file appeal against the Lower Court judgment out of time.

5. That the attached Memorandum of Appeal be deemed as duly filed upon payment of court fees.

2. The application is premised on the grounds stated therein and is supported by the affidavit of Anne Wayamba, a Legal officer in the Applicant's Insurer's Office.

3. It is stated that the judgment of the Lower Court was entered by the Lower Court against the Applicants on 24th May, 2017 for the sum of Ksh.1,447,000/= plus costs. The delay in filing the Appeal is blamed on the delay in obtaining the court file and the insurer's procedures in circulation of their file to ascertain all issues therein. The Applicants are apprehensive that if execution proceeds it will suffer substantial loss and the Appeal rendered nugatory. The Applicants have offered to deposit security for the decretal sum by giving a bank guarantee or performance bond from a reputable insurance company. It is

further stated that the Appeal has high chances of success and that the Respondent will not suffer any prejudice.

4. In opposition to the application, it is stated in the replying affidavit that upon the Applicants request, the Respondent undertook not to execute for 30 days while waiting for the Applicants to settle the decretal sum. It is deposed that the reasons given for the delay in filing the Appeal are an after thought and that the Appeal has no merits.

5. Order 42 rule 6(2) provides for the conditions to be met in an application for stay 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.”

6. 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.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

7. In the case at hand, the instant application was filed on 3rd July, 2017. The judgment of the Lower Court was delivered on 24th May, 2017. Thus there was a delay of about ten (10) days. Although the delay is not inordinate, no letter has been exhibited to demonstrate the alleged delay on the Lower Court’s side.

8. No basis has been laid in support of the Applicants’ assertion that the Appeal will be rendered nugatory and that they will suffer substantial loss. For example, there are no allegations that the Respondent is not capable of refunding the decretal sum.

9. On whether the appeal raises any triable issues, under Order 42 Rule 6(2) of the Civil Procedure Rules, the Applicant is seeking orders of stay pending appeal from the Subordinate Court to the High Court. The Applicants are not required to prove that they have an arguable appeal, unlike if it was an application in respect of an appeal to the Court of Appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98 – Maritha Njeri Wanyoike & 3 others vs Peter Machewa Mwangi & 5 others; Bake ‘N’ Bite (Nrb) Limited v Daniel Mutisya Mwalonzi [2015] eKLR**).

10. To balance the interests of both parties herein, I allow the application on condition that the Applicants do deposit the decretal sum in a joint interest earning bank account of the counsels for both parties herein or in court within 30 days from the date hereof.

11. The Appeal to be filed and served within 7 days from date hereof. Costs in cause.

Date, signed and delivered at Nairobi this 30th day of Jan., 2018

B. THURANIRA JADEN

JUDGE