



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**

**MISCELLANEOUS CIVIL APPLICATION NO. 20 OF 2017**

**1. PAUL NDUNGU**

**2. ELIAS NDUNGI MWAURA ..... APPLICANTS**

**VERSUS**

**1. STELLA NDUNGWA MUSAU**

**2. DOMINIC MUTISO**

**3. MERCY WANJIRU..... RESPONDENTS**

**RULING**

1. The Applicants herein have filed a notice of motion dated 28<sup>th</sup> February, 2017 seeking leave to appeal out of time and stay of execution of the judgment and decree in Kithimani Principal Magistrate's Court Civil Suit No. 109 of 2014 pending the hearing and determination of the intended appeal. The reasons advanced is that the applicant's appeal has high chances of success and the thirty day stay period granted by the trial court within which the appeal is to be filed has lapsed. That the advocate who was handling the matter left the firm without proper handing over leading to the delay for which judgment was learnt about after stay period had lapsed. That the Applicants stand to suffer substantial loss since there is a likelihood that the applicants will be unable to recover the decretal sum awarded from the Respondents.

2. In response thereto, the 1<sup>st</sup> Respondent filed a replying affidavit on 14<sup>th</sup> March, 2017. She contended that the deponent of the supporting affidavit has no capacity to swear the affidavit since neither she nor Direct Line Assurance Company are a party to the suit. That the affidavit has been sworn on the basis of the principle of subrogation which principle does not apply herein. That no reasonable grounds have been advanced for grant of the orders sought. That the applicants were served with the judgment in good time and have not explained why they failed to file the appeal within the prescribed time. That the allusion that there was no proper handing over of the file cannot be a reason since the applicants were aware of the terms of the judgement. It was further contended that the applicants have not demonstrated what substantial loss they shall suffer. That her means was disclosed during trial and the applicants are misleading this court.

3. I have given due consideration to the application and the submissions tendered in support of each party's case. With regard to the respondent's argument on the principle of subrogation, I do agree with the respondents. See K. I. Laibuta; Principles of Commercial Law at page 254 where the author stated that:

***“Having compensated the insured, the insurer is entitled to take advantage of and enforce any legal and equitable rights and remedies that the insured has or might have enforced against such third party whether in contract or in tort. ...”***

4. Halsbury’s Laws of England 4<sup>th</sup> Edition (2003 reissue) at para. 490 states:

***“Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss...”***

5. While I acknowledge the above position, the deponent in swearing the supporting affidavit did not indicate that the insurer was the one initiating the appeal as alleged by the respondents. Considering the interest of the insurer in insurance matters, there is no law that bars it from having interest in a case that involves it. That argument therefore fails.

6. This is an application seeking stay of execution. It is therefore premised on **Order 42 rule 6** of the **Civil Procedure Rules** which specifies the circumstances under this court may order stay of execution of a decree or order pending an appeal. **Rule 6(2)** lays down the conditions which an applicant must satisfy in order to deserve orders of stay of execution pending appeal. The applicant must satisfy the court that he/she stands to suffer substantial loss if stay is not granted and that the application had been filed without unreasonable delay. The applicant must also show that he/she is willing to offer such security as may be ordered by the court. The power to extend time is discretionary and cannot be exercised on whim rather it is to be granted on sound reasons. The onus to give the reasons is on the Applicant. **Fakir Mohamed v Joseph Mugambi & 2 others Civil Appl. No. 332/04 (ur):-**

***“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika \_\_\_ M’Ethare \_\_\_ & Attorney \_\_\_ General Civil application. NAI. 8/2000 (ur) and Murai v. Wainaina (No. 4) [1982] KLR 38.”***

7. Section 79G of the Civil Procedure Act, CAP 21, provides as follows with regard to the time for filing of appeals:-

***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.***

Judgment was delivered on 25<sup>th</sup> January, 2017, and in view of the proviso of Section 79 G, the Applicant is out of time. The motion has however been made timeously since it was filed only three days late. However, this court has to determine whether or not the delay is reasonable or unreasonable. The reason advanced by the Appellants is that the counsel who was in conduct of the matter did not hand over the file before leaving the firm. In my view this is a reasonable explanation. Considering that the motion is late with only three days and the explanation given herein I find that the delay is not unreasonable.

8. The second issue is whether the Applicants have demonstrated that they stand to suffer substantial loss. From the memorandum of the appeal one of the grounds is the trial magistrate misdirected himself in awarding special damages for material damage without proof. In my view this is an arguable ground of appeal. Further the applicants argued that they will be unable to recover damages in the event the application is not allowed. The respondents other than stating that her means was disclosed in trial, has not furnished any such evidence before this court as required. See the Court of Appeal's decision in the case of **ILRAD v. Kinyua(1990) KLR 403 at Page 406** where it was held as follows:-

***“We have considered what Mr. Sehimi has said. However, we must “observe that the onus was upon the respondent to rebut by evidence that the claim that the intended appeal if successful would be rendered nugatory on account of his (Respondent’s) alleged impecunity”.***

9. For security, the Appellant herein has indicated willingness to deposit security which takes care of the concerns of the Respondent.

10. In view of the foregoing, the Applicants have satisfied the requirements of Order 42 Rule 6. This Application is hereby allowed in the following terms:-

**(a) The Applicants to file the Appeal within the next 14 days.**

**(b) The Applicants do deposit the decretal sum in a joint interest earning account in the names of the advocates of both parties herein within the next 30 days failing which the stay shall lapse.**

**(c) The costs shall abide the outcome of the Appeal.**

Orders accordingly.

Dated and delivered at Machakos this **19<sup>th</sup>** day of January, **2018**.

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

N/A for Kairu & Mc court- for the Applicants

N/A for Nzave for the Respondents

Kituva - Court Assistant