



KTI.NO.293/18

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL MISC. APPLICATION NO. 6 OF 2017

JACOB MOKI PAUL.....APPLICANT

VERSUS

DINAH KIPKOECH KIPKORIR.....RESPONDENT

RULING

1. By a Notice of Motion dated the **18th** day of **April, 2017**, the Applicant, **Jacob Moki Paul** seeks stay of execution of the Judgment in **Kitui PMCC No. 348 of 2013** dated **22nd November, 2016** pending hearing and determination of the intended Appeal and that he be granted an extension of time within which he can file the Appeal. Legal Representative of the Estate of **Ahmed Swalleh Mohamed** (Deceased) filed a Notice of Motion dated **27th April, 2017** seeking leave to file an appeal out of time.

2. The application is premised on grounds that the Judgment was delivered without proper notification. That on the **22nd November, 2016** their representative and counter parts were advised that the Judgment was to be delivered on notice since the trial Court was not sitting; the Appeal has an overwhelming chance of succeeding; it is in the interest of justice that the application be allowed; the Applicant is willing to furnish any security that the Court will find just and fit; the Applicant will suffer substantial loss and the intended Appeal will be rendered nugatory.

3. In an affidavit in support of the application the Applicant deponed that Judgment was delivered in his absence where an award of **Kshs. 2,354,512/=** was made. That on **22nd November, 2016** the Court was not sitting and Judgment was to be delivered on notice. That on the **22nd November, 2016** and **21st February, 2017** when both parties' Advocates appeared before the Court the learned trial Magistrate indicated that there was no Judgment pending. She directed them to follow up the matter with the Executive Officer.

4. That they followed up the issue and to their surprise they came to learn from their counterpart that Judgment was delivered on the **22nd November, 2016** despite the fact that the trial Court was not sitting. That the Appeal has a high chance of succeeding because the general and special damages awarded was excessive and unwarranted in light of evidence adduced, the **3rd** Defendant's submissions were not considered which was erroneous and that the application was filed without any delay.

5. The application was canvassed by way of written submissions. It was the submission of the Appellant that the criteria for granting stay of execution pending Appeal was set in the case of **Elena Doudoladova Korir vs. Kenyatta University (2014) eKLR** which stated that:

“The Application must meet a criteria set out in precedent and the criteria is best captured in the case of Halai & Another v Thorton & Turpin (1963) Ltd (1990) KLR 365 where the Court of Appeal Gicheru JA, Chesoni & Cockar Ag. JA (as they all were) held that:

The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.

In addition the issue of whether the intended appeal will be rendered nugatory is critical as was held in the case of Hassan Guyo Wakalo v Straman East Africa Ltd (2013) eKLR as follows:-

“In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other.”

6. That the Applicant will suffer substantial loss because the decretal sum award is **Kshs. 2,354,514/=** without interest an award that is highly excessive and without knowing means of the Respondent she may not refund the same if the Appeal is successful.
7. That upon learning of the Judgment from the Respondent’s Advocate he acted with speed and applied for certified copies of the Proceedings and Judgment and have prepared a draft Memorandum of Appeal.
8. With regard to leave to appeal out of time it was stated that the Judgment was delivered without notice therefore he was not aware, as a result he could not have filed the Appeal. Denying him the right of Appeal would be denying him access to justice.
9. In his submissions the Respondent urged the Court to order the Applicant to pay her half the decretal sum as the Appeal was intended to deny her the fruits of Judgment and it was unmeritorious. That an Appeal is not an automatic condition of stay but if the Court is inclined to grant stay then it should be a conditional one upon payment by the Applicant depositing half the decretal sum and interest in either the Court or in a joint interest earning account in the names of the Advocates on record within fourteen (14) days. She cited the case of **Edward Kamau & Another vs. Hannah Mukuri Gichuki & Another (2015) eKLR** in that regard.
10. It is important to consider the relief sought to appeal out of time prior to considering whether stay of execution should be granted. The principle to be considered in extending time within which to file the Appeal out of time is stipulated in **Section 79G** of the **Civil Procedure Act** which 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.”

The Judgment the Applicant intends to Appeal against was delivered on the **22nd day of November, 2016**. It has been explained that the Judgment was delivered without notice. In her submission the Respondent did not comment on the issue. She was amenable to the Applicant providing security having paid the Respondent half the decretal sum.

11. In the interest of justice I did peruse the Lower Court file to know what actually transpired. Initially the Judgment was to be delivered on the **1st November, 2016**. On the stated date the Judgment was not ready and both parties were absent. The Judgment was deferred to **4th November, 2016**. A similar

scenario was replicated on the stated date. The Judgment was deferred to **22nd November, 2016**. On **22nd November, 2016** the Judgment was delivered in open Court in the absence of both parties. Both of them had not been notified of the date. This Court is therefore satisfied that the Applicant was not able to file the Appeal within time following the mistake of the trial Court.

12. Principles governing granting the discretionary order of stay of execution are set out in **Order 42 Rule 6(2)** of the **Civil Procedure Rules 2010** thus:

“(2) No order for stay of execution shall be made under subrule (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.”

13. In the case of **Carter & Sons LTD vs. Deposit Protection Fund Board & Two Others – Civil Appeal No. 291 of 1997** the Court of Appeal stated that:

“.....the mere fact that there are strong grounds of Appeal would not in itself, justify an order for stay.... the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the Applicant must furnish security; and the application must of course be made without unreasonable delay.”

14. It is argued by the Respondent that the instant application has been made to deny the Respondent fruits of the Judgment. In the case of **Machira & Co. Advocates vs. East Africa Standard (No. 2) (2002) KLR 63** it was stated that:

“..... The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

15. It is argued that the Applicant shall suffer substantial loss. In the case of **Sewankambo Dickson vs. Ziwa Abby HCT – 00 – CC MA 0178 of 2005** the Ugandan Court stated that:

“..... Substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss that is merely nominal...”

16. It was the Applicant’s submission that the decretal sum awarded without factoring in the cost and interest was **Kshs. 2,354,512/=** and it was unlikely that the Respondent would not raise the sum. That the Respondent has not sworn an affidavit of means to confirm that she has means of raising the sum if the Appeal is successful.

17. In the case of **Kenya Hotel Properties Limited vs. Willesden Properties Limited Civil Application Nai No. 322 of 2006 (UR 178/06)** the Court stated that:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in

certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.”

18. In the replying affidavit it was not indicated that the Respondent was capable of repaying the decretal sum in case the Appeal succeeds. The only thing they asked for is half the decretal sum be released to her, then the balance be deposited in the names of both Advocates.

19. I do note that the parties herein recorded a consent on liability at **85:15** for the Plaintiff (Respondent) against the Defendant (Applicant). I have perused the intended Memorandum of Appeal, it is against the damages awarded.

20. In the circumstances I do grant leave to the Applicants to appeal out of time within the next 14 days.

21. Secondly, I grant the Applicant stay of execution of the Judgment and all other consequential orders on condition that he pays the Respondent **Kshs. 1,000,000/=** and **Kshs. 1,200,000/=** be deposited in a joint interest earning account of respective Advocates in a financial institution pending filing, hearing and determination of the intended Appeal within 21 days. In default the orders to stand vacated.

22. Costs of the application shall be in the intended Appeal.

23. It is so ordered.

Dated, Signed and Delivered at Kitui this 22nd day of February, 2018.

L. N. MUTENDE

JUDGE