

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO. 72 OF 2017

GITHUKU NANCY.....1ST INTENDED APPELLANT

DANIEL KINYUA GAK.....2ND INTENDED APPELLANT

VERSUS

LILIAN MWIKALI MBALUKA

(Sued as administrator of the Estate of

the late Eric Ndambuki (Deceased).....1ST RESPONDENT

KENNEDY JAMES NDAMBUKI

(sued as administrator of the estate of

the late Eric Ndambuki (deceased).....2ND RESPONDENT

RULING

The applicants were defendants in the lower court where the respondents were the plaintiffs. There is a judgment in favour of the respondents in the sum of Kshs. 5,014,212.80/=. The applicants were aggrieved by that judgment and have moved the court by way of Notice of Motion under Sections 3A, 79G and 95 of the Civil Procedure Act, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules seeking a stay of execution pending the hearing and determination of the appeal and leave to appeal the decision of the lower court out of time.

There is a supporting affidavit sworn by the assistant manager of the insurance company that covered the motor vehicle involved in the accident that led to that claim. This is in addition to the grounds set out on the face of the application. The application is opposed and both counsel have filed submissions and cited several authorities which I have considered. Which I have considered.

The averment by the applicants that the judgment was delivered in their absence or that of their advocates has not been seriously controverted. The first time knowledge of the judgment reached the advocate was on 8th February, 2017. The application at hand was filed on 17th February, 2017 which is just about 9 days thereafter. The application was therefore filed timeously.

I have looked at the draft Memorandum of Appeal. There is some substance therein and therefore it is an arguable appeal. Other than demonstrating substantial loss may result if stay is not allowed, the applicants are supposed to address the issue of security in the event any decree may be entered against them. The orders sought are discretionary and the applicants have to persuade the court to extend that discretion in their favour.

The applicants have the right of appeal. At the same time the respondents have a judgment in their favour which they desire to execute so as to enjoy the fruits thereof. In balancing the interests of both parties, I am persuaded to exercise discretion in favour of the applicants and extent time to file the appeal by 30 days.

There shall be a stay of execution provided that the applicants pay the respondents a sum of Kshs. 2,000,000/= and deposit the balance of the decretal sum in an interest earning account in the joint names of the advocates on record within 30 days from the date of this ruling. The costs shall be on appeal.

Dated, signed and delivered at Nairobi this 17th day of May, 2018.

A. MBOGHOLI MSAGHA

JUDGE