



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

**MISC APPLICATION NO. 60 OF 2018**

**LAARE KAMUKUNJI STORES LIMITED.....APPLICANT**

**-VS-**

**CHARITY KAIYANANIA.....1<sup>ST</sup> RESPONDENT**

**JUSTUS KINYUA RITHAA.....2<sup>ND</sup> RESPONDENT**

(Suing as the Administrators and Legal Representatives of the Estate of Stephen Kaburu (DECEASED))

**RULING.**

1. Before me is a Motion on Notice dated 29<sup>th</sup> March, 2018 which is brought pursuant to the provisions of **Order 50 Rule 6 of the Civil Procedure Rules and Sections 65, 79A, 79G and 3A of the Civil Procedure Act**, in which the applicant seeks a stay of execution of the judgment delivered on 16<sup>th</sup> February, 2018 and extension of time within which to file a memorandum and record of appeal.
2. The grounds upon which the motion is grounded were set out in the body of the Motion and in the affidavit sworn by Joseph Mwai, the head of Legal at UAP Insurance Company Limited, the insurers of the Applicant's vehicle. These include that, judgment was delivered on 16<sup>th</sup> February 2018, but due to system upgrade there was misplacement of some documents and in particular communiqués between the defendant's insurer and its advocates on record. That they failed to instruct their advocates in time to lodge the appeal. That, their advocates on record sent them a reminder of the judgment on 19<sup>th</sup> March, 2018, whereupon they had an opportunity to review the judgment closely and noted that the award made under general damages was excessive contrary to established precedents and that they had been informed by their advocates that the time for filing the appeal had lapsed and the same could only be admitted out of time.
3. The application was opposed vide a Replying Affidavit of Julius Kiogora Ariithi sworn on 10<sup>th</sup> April, 2018. He deposed that; the impugned judgment was delivered on 13<sup>th</sup> February, 2018, that at the trial liability was not consented to and the applicant did not adduce any evidence in court, whereupon judgment was entered in favour of the respondents for a sum of Kshs 1,561,835/=. That, the applicant's insurers delayed the payment despite numerous promises to settle and that if the defendant was dissatisfied by the judgment, it ought to have filed the appeal on or before 13<sup>th</sup> March, 2018, but they never did so for reasons which had not been explained to court.
4. That the applicant was guilty of inordinate delay which was not excusable in the circumstances since the applicant's insurers had agreed to pay the decretal amount and the alleged appeal was therefore but an afterthought.

5. When the matter came up for hearing on 11<sup>th</sup> April, 2018, the parties agreed that the application be canvassed by way of written submissions. The court directed that the parties do file and exchange submissions within 14 days with a rider that any submissions not filed and served within the stipulated period would be struck out. As at the time of writing this ruling the applicant had not filed any submissions.

6. It was submitted for the respondent that the applicant was guilty of inordinate delay, which delay had not been satisfactorily explained and that the applicant was seeking a stay pending a non-existent appeal. That, the applicant's application was not supported by any affidavit of the applicant's manager or any other officer of the company but rather one Joseph Mwai the Legal Officer of UAP Insurance Company and it was therefore not possible to know who was appealing. The cases of *Joseline Kinanu Murungi – vs- Aniceta Kajuju. Meru HCCC Misc. Appl. No. 183 of 2009* and *Gerald Mwirigi –vs- M'Mbui M'Mwirichia & Douglas Meme Meru HCCC Misc Appl. No. 102 of 2006* were relied on by the respondent in opposition to the application.

7. I have carefully considered the application and the submissions and authorities relied upon by the respondent. This is an application for stay of execution and for leave to appeal against the judgment delivered on 16<sup>th</sup> February 2018.

8. Though the appellant did not cite the relevant provisions underlying applications for stay of execution, the circumstances under which the court will grant a stay of execution pending appeal are clearly set out in Order 42 Rule 6 of the Civil Procedure Rules. These are; that the application should be made timeously; the applicant must demonstrate that he would suffer substantial loss if the stay is not granted and that the applicant must give security for the due performance of the decree.

9. On the first limb, Judgment was delivered on 13<sup>th</sup> February, 2018, time to appeal expired on 13<sup>th</sup> March, 2018. The instant application was filed on 29<sup>th</sup> March, 2018. The delay was for a period of approximately 16 days. The explanation offered by the applicant was that there was a system upgrade which caused misplacement of documents, in particular communiqué between the defendant's insurer and its advocates that it was only on 19<sup>th</sup> March 2018, that their advocates on record sent them a reminder and got an opportunity to review the judgment closely. No evidence was tendered by the applicant to show that there was communication breakdown or that there was any reminder of 19<sup>th</sup> March, 2018 as alleged. There was no evidence that the applicant has even applied for proceedings for purposes of preferring an appeal. In the circumstances and in absence of any reasonable explanation to the contrary, I find the delay herein to be inordinate. The same was not satisfactorily explained.

10. As regards the second limb, the applicant contended that there was imminent danger of execution of the judgment. That should the monies be paid out, the applicant would suffer substantial loss as the amount involved was substantial and the ability of the respondent to refund such money was untested. It was not positively alleged that respondents were people of straw who would not be able to refund the decretal amount in the event the appeal was successful. Similarly, the contention by the applicant that the amount awarded under general damages was excessive was without basis as the injuries alleged to have been suffered has not been stated and the same can only amount to mere speculation. Taking into totality all the circumstances of this case I am not satisfied that the applicant has demonstrated that it would suffer substantial loss and this ground must as well fail.

11. As regards the 3<sup>rd</sup> limb; provision of security, the applicant contended that it was willing to offer security and deposit bank guarantee for the judgment amount in court and comply with such alternative orders as to security as the court may order. Even though it is apparent that the applicant has met this condition, the 1<sup>st</sup> and 2<sup>nd</sup> limbs having not been met, the 3<sup>rd</sup> limb must as well fall by the wayside. Accordingly, I find that the applicant has not met the requisite threshold to enable this court exercise its discretion in its favour for grant of stay of execution. The prayer for stay of execution is therefore dismissed in its entirety.

12. With regard to the prayer for leave to appeal out of time, **Section 79G of the Civil Procedure Act**

gives the court the discretion to extend time and admit the appeal out of time if it is satisfied that there was sufficient cause for not filling the appeal in time.

13. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR* the Supreme Court of Kenya set out the principles to be applied in such applications as follows:-

***“this being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a court should consider in exercise of such discretion:***

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;***
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court***
- 3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis;***
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;***
- 6. Whether the application has been brought without undue delay; and***
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”***

14. In the present case, there was a delay of about 16 days. The reason advanced was that it was due to system upgrade, the same caused misplacement of documents and in particular communiqués between the defendant’s insurer and its advocates on record and that as such they failed to instruct their advocates on time. That it took time for the applicants to get a copy of the judgment from the trial court.

15. The applicants did not offer any evidence to show that there was any upgrade as alleged. Similarly, they did not indicate when the said upgrade was conducted and when it ceased. Further, there was no evidence to show when the subject judgment was applied for and when it was received. In the circumstances, I find that no reasonable explanation has been offered. To the contrary, the respondents who have a judgment in their favour will further be kept away from enjoying the fruits of the same for no reason at all.

16. In the circumstances, I am not inclined to give the applicant more time. The application is without merit and the same is hereby dismissed in its entirety with costs to the respondents.

**DATED and DELIVERED** at Meru this 27<sup>th</sup> day of June, 2018

**A. MABEYA**

**JUDGE**