



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 4 OF 2017

1. KIOKO PETER

2. DENNIS KAVUU MBONDO.....APPLICANTS

VERSUS

JOSEPHINE N. KIMEU(suing as the legal representative of the estate of

JUSTUS K. MUTISYA.....RESPONDENT

RULING

1. Before me is a Notice of Motion dated 23rd January, 2017. It is expressed to be brought under Section 1A, 1B, 3A and 79G of the Civil Procedure Act, Order 42 Rules 6, and Order 51 Rule 1 of the Civil Procedure Rules 2010. The Applicants seek the following orders:

a. That there be stay of execution of the judgment entered against them in Machakos CMCC No. 17 of 2016 pending hearing and determination of their intended appeal.

b. That the applicants be granted an extension of time within which to file the appeal against the judgment.

2. The application is premised on the grounds on the face of the application and the supporting affidavit of Kioko Peter. He stated that the judgment slated for delivery on 30th November, 2016 before court No. 1 in the lower court was delivered without notice to the parties. That the delay in the filing of the appeal was caused by the failure of court to issue a fresh notice of delivery of judgement since court 1 was not sitting on 30th November, 2016. That they have an arguable appeal for reasons that the award of loss of dependency and pain and suffering was excessive and unwarranted in light of the evidence adduced and that the magistrate erred in law and in fact in not taking into account an award made under the Law Reform Act when making an award under the Fatal Accident Act. It was stated that the respondents stand to suffer no prejudice if the orders sought are granted rather the applicants are likely to suffer substantial loss and their intended appeal shall be rendered nugatory. The applicants expressed willingness to abide by any orders made by this court.

3. The application was opposed by the Respondent's replying affidavit filed on 30th January, 2017. She contested that the judgment was read on 30th November, 2016 after a notice was issued to all parties. That there is no explanation why the applicants did not attend court when the judgement was read. That there is no appeal on record to warrant the court to exercise its discretion and grant stay and further that the applicants have not satisfied the conditions for stay. That she is working and is able to refund any sums paid to her. She contended that the intended appeal is on quantum yet the applicants are not offering to pay half of the decretal sum as a sign of good faith.

4. In their submissions, the applicants stated that they shall suffer substantial loss since the sum is substantial. It was submitted that the record confirms that upon being made aware of the judgment by an email from the respondent's advocate's official email address, the applicants acted speedily and applied for certified copies of proceedings and judgment. That the applicants are covered under an insurance policy under a reputable financially stable company that will be able to pay the respondent in the event the appeal fails. It was submitted that the magistrate failed to adhere to Order 21 of the Civil Procedure Rules to deliver judgment on notice. The applicants cited **Elena Doudoladova Korir v. Kenyatta University [2014] eKLR**, **Juma Ali Mbwana & another v. Umi Omar Musa [2014] eKLR**, **Iye Mohammed Bakari v. Maweni Estates Limited & 2 Others [2006] eKLR** and **Esther Wanjiru v. Jacline Arege [2014] eKLR** in support of their arguments.

5. The respondent on the other hand submitted that the applicants have not satisfied the conditions of stay of execution. It was stated that the applicants have not stated the kind of loss they shall suffer and submitted that it is not enough to merely state that they will suffer substantial loss. In this regard the respondent relied on **Machira t/a Machira and Company Advocates v. East African Standard [2002] KLR** and **Kenya Shell Limited v. Benjamin Karuga Kibiru & Ruth Wairimu Karuga [1982-1988] 1KAR**. It was submitted that the applicants are only interested in challenging quantum of damages and it is just that half of the decretal sum be paid to the respondent. To illustrate the principle of half decretal sum the applicant relied on **Mohan Meakin Ltd v. Mutunga Kiundi Nairobi Civil Application No. 252 of 2000** and **Antoine Ndiave v. African Virtual University., Civil Suit No. 422 of 2006**.

6. This application herein is premised on **Order 42 rule 6** of the **Civil Procedure Rules** which specifies the circumstances under which this court may order stay of execution of a decree or order pending an appeal. The conditions are laid down under **Rule 6(2)** thus; applicant must satisfy the court that he/she stands to suffer substantial loss if stay is not granted; that the application had been filed without unreasonable delay and 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. In that regard I am guided by the court's decision in **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 17th November, 2016 and this application filed on 23rd January, 2017. In view of section 79 G, it is clear that the application was filed out of the prescribed time and there is therefore delay. The question that arises is whether or not the delay was inordinate and inexcusable. The applicant's explanation was that the judgment was issued without notice by the court. Despite the respondents' contention that mention notice was issued to the parties, the mention notice annexed does not establish that the said notice was received by the firm of Masire & Mogusu Advocates who are the applicants' advocates. I therefore make an inference that the applicants were not served. The appellant's intended appeal raises arguable issues. In the circumstances if this application is denied, the appeal shall be rendered nugatory. I further note that the applicants have expressed their willingness to abide by the court orders. In the end, I find that the applicants have satisfied all conditions of stay of execution. In the end this application succeeds and I make orders as follows:

- a. The Applicant granted leave to file the Appeal within 14 days from the date hereof.
- b. There be stay of execution of the judgment and decree of the judgment entered on 17th November, 2016 in Machakos CMCC No. 17 of 2016 upon the applicants herein depositing the decretal sum in a joint interest earning account opened in the names of the parties' advocates within (30) days from the date of this ruling.
- c. Cost shall abide in the Appeal.

Dated, Signed and Delivered at Machakos this 27th day of September 2018

D. K. KEMEI

JUDGE

In the presence of:

N/A Abuga - for Applicants

N/A Mutua - for Respondent

Josephine - Court Assistant