

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION 397 OF 2018

KENYA REDCROSS HEADQUATERS1ST APPLICANT

ABDULAZIZ ISMAEL2ND APPLICANT

VERSUS

WILSON ODHIAMBO ONG'ALE & NEREA SHIKUKU ANDABWA

(Suing as the administrators of the Estate of PHELESIA ACHIENG-DeceasedRESPONDENTS

RULING

By an application dated 13th July, 2018 the applicants seek orders to be allowed to lodge an appeal out of time, and that there be a stay of execution of the judgment and decree of the lower court delivered on 18th April, 2018. The grounds for seeking those orders are set out on the face of the application and the supporting affidavit sworn by the legal officer of CIC General Insurance Limited which had insured the applicants.

The application is opposed and there is a replying affidavit sworn by the respondents herein. Parties have filed their respective submissions which I have on record. The orders sought are discretionary which discretion is required to be exercised judicially.

The foundation of the orders sought is to be found in Order 42 Rules 6 of the Civil Procedure Rules which is among the provisions of law cited by the applicants.

The applicants have the right of appeal while the respondents have a judgment in their favour. The court is supposed to balance the rights of the parties in addressing applications of this nature. Any prejudice to the respective parties should be avoided. The lower court suit was filed in the year 2016 and the determination made in April, 2018. By any standards this suit has been heard and determined expeditiously.

The application was filed about 3 months from the date of the judgment but it will be evident from the record that whatever transpired thereafter was done expeditiously. In any case, no prejudice has been alleged has been occasioned by the filing of the application three months after the original judgment. In the event this judgment is executed and the appeal succeeds, there will be yet another round of litigation to recover the money so paid or any part thereof. I must also bear in mind the contemplated grounds of appeal which appear in the draft Memorandum of Appeal attached to the application.

Doing the best I can in the circumstances of the case, I allow the application and grant leave to the applicants to file the appeal within 30 days from the date of this ruling. There shall also be a stay of execution of the lower court judgment as prayed pending the determination of the appeal. However, that is on condition that the entire decretal sum is deposited in an interest earning account in the names of both advocates on record within the same period of 30 days. The costs hereof shall be on appeal.

Dated, signed and delivered at Nairobi this 18th day of December, 2018.

A. MBOGHOLI MSAGHA

JUDGE