



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANEOUS CIVIL APPLICATION NO. 13 OF 2017**

**ANTHONY MUSYIMI MUTISYA .....APPLICANT**

**VERSUS**

**PENINA MWELU NDETE (suing as the legal representative of the estate of**

**SHARON MWANGI MARINGA .....RESPONDENT**

**RULING OF THE COURT**

1. The Applicant herein filed an application dated 31<sup>st</sup> January, 2017 seeking for the following reliefs namely:-

***(i) That the time within which to file Memorandum of Appeal be extended.***

***(ii) That this Honourable Court be pleased to extend time and grant leave to the Applicant to lodge a Memorandum of Appeal out of time against the judgement and decree issued at Kithimani Principal Magistrate's Court Civil Suit Number 176 of 2015 – Penina Mwelu Ndeto (suing as the legal representative of the estate of Sharon Mwangi Maringa – deceased) =VS= Anthony Musyimi Mutisya on the 30<sup>th</sup> November, 2016 by the Honourable Senior Principal Magistrate.***

***(iii) That this Honourable Court be pleased to stay execution of the judgment and decree in Civil Suit No. 176 of 2015 at Kithimani SPM'S Court pending the hearing and determination of the intended Appeal.***

***(iv) That this Honourable Court be pleased to issue any orders that it may deem fit, just and expedient in the interest of justice.***

2. The Application is supported by the Affidavit of Maurine Adenje the Claims Deputy Director of the Applicant's Insurers sworn on even date and on the following grounds namely:-

***(a) That judgment was entered on 30/11/2016 in favour of the Respondent whereby the Respondent was awarded Kshs.456,880/= in damages with costs and interest making an aggregate award of Kshs.576, 272/=.***

***(b) The Applicant being dissatisfied with the decretal sum engaged the Respondent Advocate to negotiate on the issue of double award under both the Fatal Accident Act and Law Reform Act.***

***(c) The Respondent's Advocate went on December vacation and resumed on 9/1/2017 but***

*however the negotiations have since collapsed.*

*(d) The Applicant has preferred to file an Appeal to challenge the said judgement.*

*(e) The time within which an Appeal could be lodged has since elapsed.*

*(f) That stay of execution was granted herein which has since elapsed due to the collapsed negotiations regarding the issue of the double award and therefore unless stay of execution is granted the Applicant's Application to Appeal out of time and consequent Appeal will be rendered nugatory and the Applicant will suffer irreparable loss and damage.*

*(g) The Applicant is ready and willing to deposit the decretal amount in Court pending the Appeal.*

*(h) The Applicant is apprehensive that if the decretal sum is paid to the Respondent they may not be in a position to recover the same if the intended Appeal is successful as the Respondent's financial status is unknown as she is a person of straw.*

*(i) The Application will not occasion any prejudice to the Respondent.*

*(j) The Application has been made without unreasonable delay.*

*(k) That the Applicant's Appeal raises pertinent issues and has high chances of success.*

3. The Application was strenuously opposed by John Katiku counsel for the Respondent who swore an affidavit dated 21/03/2017 in which he raised the following grounds of opposition namely:-

*(a) That there is no double award in this matter and that there were no negotiations on the same between the parties as alluded to by the Applicant.*

*(b) The Applicant has not given sufficient evidence on why the time to Appeals should be extended.*

*(c) The Applicant has only filed the Application two months after the judgement was delivered and no reasons for the delay have been given and therefore the Applicant is guilty of laches.*

*(d) The Applicant has not satisfied the principles that the Court should consider in exercise of its discretion to extend time as was laid down by the Supreme Court in NICHOLAS KIPTOO ARAP KORIR SALAT =VS= IEBC & 7 OTHERS SC. APPL. NO. 16 OF 2014.*

*(e) The Applicant has not satisfied the conditions for grant of stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules.*

*(f) The intended Appeal has no chances of success as it is premised on a faulty interpretation of the law by the Applicant.*

*(g) That no substantial loss will be suffered by the Applicant if stay is not granted as the Respondent is not a pauper as she will be in a position to reimburse any monies that shall have been paid.*

*(h) That it is in the interest of justice that the Application should be dismissed with costs as it lacks merit and is an abuse of this Honourable Court.*

4. Parties herein filed written submissions and cited several authorities which I have carefully considered. The issues for determination are as follows:-

**(1) Whether the Applicant has presented justifiable reasons to warrant him to file leave out of time.**

**(2) Whether this court should grant an order of stay of execution pending the hearing and determination of the intended Appeal.**

#### **5. Leave to Appeal out of time:**

The Applicant has beseeched this Court to grant him leave to lodge an Appeal out of time arguing that the delay to lodge the Appeal was not deliberate as his Counsel was then trying to negotiate with the Respondent's Counsel on the issue of double award given by the lower Court and further that the Applicant was pursuing for certified copies of proceedings and judgment from the lower court which delayed. The Applicant urged this Court to rely on the provisions of **Section 3A** and **95** of the **Civil Procedure Act** and to grant the Applicant leave to lodge Appeal out of time. The Respondent on the other hand maintains that the Applicant is guilty of laches and should not be allowed to lodge Appeal out of time and further that the Applicants Appeal has no chances of success whatsoever as it is premised on a faulty interpretation of the law by the Applicant.

I must point out that once a judgement is delivered in a civil action, a party seeking to lodge an Appeal must do so within thirty (30) days from the date of delivery of the judgment or ruling, a party seeking to lodge an Appeal must do so within thirty (30) days from the date of delivery of the judgement or ruling as the case may be. In the instant case judgement was delivered by the lower Court on the **30<sup>th</sup> Day of November, 2016** and hence the Memorandum of Appeal should have been lodged by close of business on the 30<sup>th</sup> day of December, 2016. The present Application was filed on the 3/2/2017 about two months and three days after the due date for filing the memorandum of Appeal. Clearly there was delay on the part of the Applicant to lodge the memorandum of Appeal. The issue for the Court's consideration is whether the Applicant has given reasonable explanation for the delay to the Court. Extending time to file Appeal out of time is essentially at the discretion of the court. This is the position as was held in the case of LEO SILA MUTISO =VS= ROSE HELLEN WANGARI MWANGI MBICA NO. 255 OF 19976 as follows:-

***“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay; secondly, the reason for the delay; thirdly, the chances of the appeal succeeding if the Application is granted and fourthly, the degree of prejudice to the Respondent if the application is allowed.”***

This Court is also guided by the Supreme Court decision in the case of NICHOLAS KIPTOO ARAP KORIR SALAT =VS= IE.B.C. & 7 OTHERS – SC APPL. NO. 16 OF 2014 where the court laid down seven principles to be considered whenever an Applicant seeks the court to extend time to file pleadings as follows:-

***(a) It is not a right of a party. It is an equitable remedy that is only available to a describing party at the discretion of the Court.***

***(b) A party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court.***

***(c) Whether the Court should exercise the discretion to extend time is a consideration to be made on a case to case basis.***

***(d) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.***

***(e) Whether there will be any prejudice suffered by the Respondent if the extension is granted.***

***(f) Whether the Application has been brought without undue delay and***

***(g) Whether in certain cases like election petitions, public interest should be a consideration for extending time.***

Further to the above authorities this Court is also guided by the Provisions of **Sections 95 and 79G** of the Civil Procedure Act as well as Order 50 Rule 6 of the Civil Procedure Rules which provide as follows:-

**- Section 95 Civil Procedure Act:-**

***“Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by the Act, the Court may in its discretion, from time to time enlarge such period, even though the period originally fixed or granted may have expired.”***

**Section 79G Civil Procedure Act:-**

***“Every Appeal from a Subordinate Court to the High Court shall be filed within a period of thirty (30) 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 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.”***

**Order 50 Rule 6 Civil Procedure Act:-**

***“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the Justice of the case may require, and such enlargement may be ordered although the Application for the same is not made until after the expiration of the time appointed or allowed:***

***Provided that the costs of any Application to extend such time and of any order made thereon shall be borne by the parties making such Application unless the Court orders otherwise.”***

From the above authorities and the provisions of the Civil Procedure Act and Rules, it is quite clear that this Court has wide discretionary powers to consider the present Application if the Applicant has established that indeed he merits an order of leave to file Appeal out of time. The Applicant has admitted that he was truly late in lodging the Memorandum of Appeal and has stated that upon the delivery for the judgement by the lower Court, he engaged the Respondent on the issue of the double award of general damages and that in between the Respondent's Counsel went on December vacation and within no time he realized the period for lodging Appeal had lapsed. The Applicant has also indicated that he has an arguable Appeal mainly on the issue of double award of general damages under the law Reform Act and Fatal Accidents Act. It is noted that the Applicant was late by two months and three days. I find the filing of the Application is not unduly late since the same has been made within two months after the delivery of judgement. This Court is a Court of equity and will not shut the Applicant out but will give the Applicant an opportunity to ventilate his case. Even though the Respondent is already on the seat of judgement she could be cushioned by way of costs so as to enable the Applicant argue his appeal on merits. The issue raised in the Applicant's memorandum of Appeal namely that the Respondent was awarded damages under the law Reform Act being pain and suffering and loss of Expectation of life and at the same time was awarded damages for Loss of Dependency under the Fatal Accidents Act yet the beneficiaries under both Acts were the same and hence there was double award of damages and which made the intended Appeal to be arguable. I am therefore inclined to give the Applicant the benefit of doubt and allow him to lodge his Appeal out of time in order to ensure that justice is done in this matter. I am fortified by the decision of the East African Court of Appeal in PATEL =VS= E. A. CARGO HANDLING SERVICES LTD [1974] EA 75 where the Court held that the main concern of the Court is

to do justice to the parties and that the Court will impose conditions on itself to fetter the wide discretion given to it by the Rules. Again the Court's role as the reservoir of justice to parties was stated by Justice Mativo in WACHIRA KARANI =VS= BILDAD WACHIRA [2016] eKLR as follows:-

***“The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice applicable to all Courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, ex debito justice, to have any determination which effects him set aside.”***

The Respondent has argued that the Applicants intended Appeal has no chances of success as it is premised on a faulty interpretation of the law by the Applicant. As noted above, the Applicant has raised in his draft memorandum of Appeal a germane issue namely double award of general damages under the law Reform Act and Fatal Accidents Act whereby the beneficiary is the same. It is my considered view that the same could be an arguable ground in the intended Appeal. Further an Applicant need only prove or establish one arguable point bearing in mind that an arguable Appeal is not necessarily one that will succeed but one that is not frivolous. The Respondent has not convinced this Court that the Applicant's intended Appeal is frivolous in any way. I am therefore inclined to grant the Applicant leave to file Appeal out of time.

#### **6. Stay of execution pending the hearing and determination of the intended Appeal:**

The Applicant has sought for an order of stay of execution of decree pending the determination of the intended Appeal on the grounds that his Appeal will be rendered nugatory if stay is not granted and further that he stands to suffer substantial loss and that the Application has been made without undue delay and lastly that he is ready and willing to deposit the decretal sums into Court pending the determination of the intended Appeal. The Applicants main worry is that the Respondent's means are unknown and that the Respondent might not refund same in the event the Appeal succeeds thereby putting the Applicant in great substantial loss.

On the other hand the Respondent maintains that an order of stay of execution should not be granted as the Applicant has not satisfied the conditions for granting such orders as stipulated under Order 42 Rule 6 (2) of the Civil Procedure Rules. The Respondent's Counsel submitted that the Respondent is not a pauper and that she is in a position to refund the monies if she is called upon to do so. Counsel further submitted that should stay be granted then the same should be conditional upon the Applicant paying half the decretal sums while the other half is deposited in a joint interest earning account in the names of the Advocates on record pending the final determination of the intended Appeal.

Order 42 Rule 6(2) of the Civil Procedure Rules is quite clear on the conditions that an Applicant who seeks an order for stay of execution is required to satisfy. It is noted that the Applicant filed the present Application about two months after the judgement was delivered by the lower Court. Even though the Respondent has maintained that the delay is inordinate, I find the explanation offered by the Applicant plausible and excusable in the circumstance. The two months in my view is not inordinate so as to deny the Applicant an opportunity to ventilate his intended Appeal. The Applicant has also indicated that he is ready and willing to deposit the decretal sums in Court as the intended Appeal is canvassed. That being the position I find the Respondent's interest would not be prejudiced as security has been offered and she could access the money as soon as the Appeal is disposed of. Indeed the Respondent should not be kept away from the fruits of the judgment but then the scales for justice demand that a balance should be struck between the two opposing sides and ensure that each party is not denied justice. On the issue of whether the Applicant stands to suffer substantial loss, the Respondent's view is that the Applicant has not demonstrated the same. The Applicant maintains that the Respondent will not be in a position to refund the decretal sums if paid in the event the intended Appeal succeeds. The Respondent was thus invited to rebut that allegation by showing that she will be in a position to do so but it is noted that the Respondent herself did not depose an affidavit showing her means and therefore I find she failed to

dislodge the Applicant's fears. The decretal sums of **Kshs.456,880/=** plus costs and interest is not a small sum by any standards and the Applicant would suffer substantial loss in the event the intended Appeal succeeds while the Respondent by then would not be in a position to refund the same. Hence I find the Applicant has satisfied the conditions provided under Order 42 Rule 6 of the Civil Procedure Rules.

7. In the premises, it is the finding of this Court that the Applicant's Notice of Motion dated 31/1/2017 has merits. The same is allowed in the following terms:-

***(a) The Applicant is granted leave to file Appeal out of time. The Appeal to be filed within 14 days from the date of this ruling.***

***(b) A stay of execution of the decree in Kithimani Principal Magistrate's Court Civil Suit No.176 of 2015 is hereby granted pending the hearing and determination of the intended Appeal on condition that half of the decretal sums be paid to the Respondent and the balance thereof be deposited into a joint interest earning account in the names of the Advocates on record within thirty (30) days from the date of this ruling failing which the stay shall automatically lapse.***

***(c) The costs of the Application be borne by the Applicant.***

Dated, signed and delivered at **MACHAKOS** this **19<sup>th</sup>** day of **September, 2017**.

**D. K. KEMEI**

**JUDGE**

**In the presence of**

Miss Mbugua -for Applicant

Musyimi - for Respondent

Kituva - Court Assistant