



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

**MISC. APPLICATION NO. 129 OF 2016**

GITHIRE PETER .....1<sup>ST</sup> APPLICANT

PETER NGARUIA .....2<sup>ND</sup> APPLICANT

VERSUS

KENNEDY KIMUYU .....RESPONDENT

**RULING OF THE COURT**

1. The Notice of Motion application before the Court is dated and filed herein on 8<sup>th</sup> June, 2016, by the Defendant. The application seeks to secure the following orders;

- a. That this application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.*
- b. That this Court be pleased to grant the Applicants leave to file an Appeal out of time.*
- c. That this Court be pleased to order a stay of execution of the Judgment issued by the trial Court on 21<sup>st</sup> April, 2016 pending the hearing and determination of this application.*
- d. That this Court be pleased to order a stay of execution of the Judgment issued by the trial Court on 21<sup>st</sup> April, 2016 pending the hearing and determination of the intended Appeal.*
- e. That the application be heard inter partes on such date and time as this Court may direct.*
- f. That the costs of this application abide the outcome of the Appeal.*

2. The application is premised on the grounds set out therein, and is supported by affidavit of **Joan Oburu** sworn on 8<sup>th</sup> June, 2016.

3. The Plaintiffs' case is that Judgment herein was entered on 21<sup>st</sup> April, 2016 and Applicant was found to be 100% liable. The Respondent was awarded Kshs. 130,000/= in general Damages and Kshs. 17,965/= in Special damages with costs and interest. The Applicant being dissatisfied with the Judgment sum intends to file an Appeal to challenge the same. However, the time within which the Judgment dated 21<sup>st</sup> April, 2016 can be appealed according to statute has since lapsed. The 30 days stay of execution granted in this matter has since lapsed and unless Stay of Execution is granted the Defendant's/Applicant's application to Appeal out of time and consequent appeal will be rendered nugatory and the Defendants/Applicants will suffer irreparable loss and damage. The Applicants' case is

that they received a copy of Judgment from their advocates on record, **M/S Kairu & Mc Court Advocates**, three weeks after the delivery of the same and immediately proceeded to review it with a view of making their informed and final decision on the available options. The delay in availing a copy of the said Judgment was due to inadvertent delay on the part of their advocates who mistakenly filed away the file after receiving the copy of Judgment in an honest belief that he had forwarded the same to the client for consideration. Upon the said review, the Defendants/Applicants have now instructed their advocates to Appeal against the quantum awarded in the said judgment. The Applicants are ready, willing and able to furnish such reasonable security within such time as the Court may direct. This application will not occasion any prejudice to the Plaintiff/Respondent. The application has been done without any unreasonable delay.

4. The application is opposed vide Replying Affidavit of **Kennedy Kimuyu** sworn and filed herein on 27<sup>th</sup> June, 2016. The Respondent's case is that the prayers sought cannot be granted because the applicant has not given convincing reasons why he should be allowed to appeal out of time or why he should be given stay of execution. The Respondent submitted that in an application seeking leave to appeal out of time the application must be accompanied by the decision to be appealed against, and that sufficient cause for appealing out of time must be shown and the delay must be explained. In this case, the Respondent submitted that the applicant chose not to adhere to any of these conditions hence the application must fail or be refused.

5. Parties made oral submissions before the Court. I have carefully considered the application and opposition to the same. I raise the following issues for determination;

***i. Whether sufficient cause has been given for failure to file appeal within the time limit.***

6. At this juncture this Court cannot go into the merits of the intended appeal. The only issue for determination is whether there are justifiable grounds for delay. Before I go into that, it is to be noted that judgment was delivered herein on or about 21<sup>st</sup> April, 2016 and the Court granted thirty (30) days of stay of execution during which time the Applicants was to appeal. The Applicants did not appeal hence this application. The Applicants' reason is that they received a copy of the said judgment three (3) weeks after the delivery of the same and immediately proceeded to review it and by the time they reached a decision time had already lapsed.

7. The first thing that this court notes is that the Applicants are not candidly explaining how they utilized the thirty (30) days. If three (3) weeks lapsed, they were still left with more days to make a review. By the time they allegedly received a copy of the judgment they already knew that they were running late. Nine (9) days were more than sufficient time to file an appeal in this matter. There are nothing complex in these proceedings that the appeal could not have been filed within the said nine (9) days, even if it were only two (2) or three (3) days. I therefore do not accept the reason given for the delay, and I agree with the Respondent that the decision to appeal after the expiration of the said thirty (30) days was actually an afterthought. Further, there are procedural details which the application lacks, and these are: failure to attach the copy of the judgment to be appealed against, the effort spent in looking for proceedings, if that was a factor, and the strain experienced in attempting to meet the deadline.

8. For the foregoing reasons, I do not find that the application is merited and I dismiss it with costs to the Respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED THIS 19<sup>TH</sup> DAY OF JULY, 2016**

**E.K.O. OGOLA**

**JUDGE**

**Present**

Mr. Kyalo holding brief for M/S Wambua for the Respondent

Court Assistant – Ms. Doreen