



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 587 OF 2015

SAMUEL KARIUKI.....1ST DEFENDANT/APPLICANT

GABRIEL MUHORO GATHU.....2ND DEFENDANT/APPLICANT

VERSUS

JOSEPH WAIGWA KIMATHI.....RESPONDENT

RULING

1) **Samuel Kariuki and Gabriel Muhoro** the Applicants herein took out the motion dated, 16th December 2015, in which they sought for the following orders:

i. That this application be certified as urgent and be heard exparte in the first instance.

ii. This honorable court be pleased to grant leave to the Applicants to appeal out of time against the judgment of the Honourable M. Chesang (Resident Magistrate) delivered on 9th October 2015 in Milimani CMCC 7055 of 2013; Joseph Waigwa Kimathi versus Samuel Kariuki & Another;

iii. That this Honorable court be pleased to stay execution of the Decree issued pursuant to the judgment delivered on 9th October 2015 in Milimani CMCC NO. 7055 of 2013; Joseph Waigwa Kimathi versus Samuel Kariuki & another pending the hearing and determination of the Application herein;

iv. That this Honorable Court be pleased to stay execution of the Decree issued in pursuant to the judgment delivered on 9th October 2015 in Milimani CMCC No. 7055 of 2013; Joseph Waigwa Kimathi versus Samuel Kariuki & another pending the hearing and determination of the appeal;

v. That the costs of this application abide the outcome of the intended Appeal.

2) The parties have filed their respective written submissions, which I have considered. I have also considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed for and against the application. The Applicant avers that on 9th October 2015, judgment was entered in the lower court for the Respondent against the Applicant in which the Applicants were held 100% liable for the accident. The Applicants dissatisfied with the aforesaid judgment intend to appeal against the decision but they are out of time. They requested the court to exercise its inherent power under section 3A and 95 of the Civil Procedure Act to enlarge time to enable the Applicants file an appeal out of time. They further asserted that they have an arguable Appeal since the lower court awarded excessive damages which were not proportionate to the injuries suffered by the Respondent. They averred that they have a

good and sufficient reason to warrant the filing of an appeal out of time since their advocates were not aware that the judgment had been delivered since the same was delivered in their absence and that they came to know of its existence when they were served with a letter from the Respondent's advocates demanding payment of the decretal amount.

3) On the order for stay of execution, the Applicants submitted that substantial loss will occur since the Respondent means are unknown to ascertain whether he will be capable of refunding the decretal sum in the event that the Applicants are successful with the appeal. They alluded to the fact that there is no affidavit of means on record which shows the Respondent's financial status. On the prayer for stay of execution, the applicants averred that the sum of kshs 1,500,000/= being the decretal sum is a substantial amount which if not paid, would render the appeal nugatory. They further claimed that the application was brought without undue delay and that they were ready and willing to furnish reasonable security.

4) The Respondent on the other hand contends that the Applicants were negligent, there was inaction on their part and that they had no valid excuse for the delay. He averred that on 20th August 2015, the lower court scheduled the delivery of the judgment to be on 8th October 2015 but later rescheduled it to 9th October 2015, however, the Respondent's advocates despite being served with the mention notice did not attend court or enquire later on what transpired in court. They accused the Applicants of indolence since they wrote to them on 4th December 2015 but the Applicants waited for a period of 2 weeks to file the current application citing that the delay was caused by attempt to obtain a copy of the judgment. He asserted, that the Memorandum of Appeal does not disclose genuine points of the law and fact but only remain as mere denials. On the matter of stay of execution, the Respondent argued that no substantial loss will be suffered by the Applicants who have not shown by way of evidence, that they will suffer any loss. He argued that the application was filed with unreasonable delay given that the judgment was delivered on 9th October 2015 and the application filed on 16th December 2015. He further stated that it is the practice to peruse the court record upon discovering that the judgment was delivered without necessarily requesting for a copy of the judgment for purposes of filing an application for stay. On security he proposed that half of the decretal sum be paid to the Respondent while the other half be deposited in a joint interest earning account in the names of the Respondent's and Applicant's advocates.

5) I have considered the reasons that have been advanced by the Applicants for failing to file their appeal within the stipulated 30 days. The Applicants contend that the, Judgment herein was delivered on 9th October 2015 without notice, and they came to be aware upon receipt of correspondence for the Respondent's counsel demanding payment of the decretal sum on 4th December 2015. They further claimed that they received a copy of the judgment on 10th December 2015 and six days later i.e on 16th December 2016, they filed the current application. There is indeed a possibility that the Applicants were not aware that the judgment had been delivered hence the delay in lodging their appeal. I am satisfied with reasons advanced by the Applicant for failing to file an appeal on time, which reasons I find sufficient. I will therefore exercise my discretion and grant leave to the Applicant to appeal out of time.

6) In regard to the second prayer for stay of execution, the principles to be considered in an application for stay are well settled. Firstly, there must be threat of substantial loss on the part of the Applicant if the orders of stay fail to issue. Secondly, the application must have been brought without unreasonable delay and thirdly, the provision for security has to be considered.

7) On the first principle, the Applicants are required to show that they will suffer substantial loss. The cornerstone of the jurisdiction of the court in determining whether or not to grant stay of execution pending appeal is the fact that substantial loss will occur upon the Applicants unless a stay is granted. The legal burden of proof lies with the Applicants to show that the Respondent will not be able to refund the decretal sum if it is paid over to them, should the Applicants show that, the burden of proof shifts to the Respondent to demonstrate that he has the capacity to refund the decretal sum should the Appeal be successful. In this case, the Applicants claim that they are a renown company that would easily make the payment should the appeal fail. They further claim that the Respondent has not adduced any evidence in the form of an affidavit of means to illustrate that he is capable of refunding the decretal sum should the appeal succeed. Certainly, the Respondent has not shown that he is capable of refunding the decretal sum

of kshs 1,500,000/= should the same be remitted to him. It is therefore in the interest of justice, that the issue of substantial loss be considered in this case.

8) The second principle to be considered is that an Applicant must file the application for stay without unreasonable delay. As stated above, Judgment herein was delivered on 9th October 2015, which judgment the Applicants claim they were not aware of since they were not served with a notice and the same was therefore delivered in their absence. They claim that they became aware of the judgment on 4th December 2015 when the Respondent's advocates wrote to the Applicant's advocate demanding the decretal amount. The Applicants then proceeded to file the application on 16th December 2016, which was 12 days after. Given the circumstances of this particular case, I am convinced that the Applicants were not aware of the delivery date of the judgment which had been rescheduled, as a result of which they inadvertently filed this application over two months later. I therefore find, in the circumstances, that the application was filed without undue delay.

9) Thirdly, the court must take into consideration the provision of security for the due performance of the decree. On this principle, the Applicants have offered the security that the court deems fit. The Respondents on the other hand, have proposed that half or it be paid to him while the other half be deposited in a joint earning accounting in the name of the Respondent and Applicant's advocates. I find it just to have the Applicants deposit security in a joint account.

10) In the end, I find the motion to be well founded. Consequently arising from the application this court grants the following

orders:

- i. The Applicants are hereby granted leave of 10 days to file the appeal out of time.
- ii. An order for stay of execution of the judgment delivered on 9th October 2015 and the resultant decree pending appeal on condition that the Applicants deposits the decretal sum of kshs. 1,500,000/= in an interest earning account in the joint names of advocates and firms of advocates within 30 days from the date hereof. In default the aforesaid motion will be deemed as having been dismissed.
- iii. Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 19th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicants

..... for the Respondent