



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL MISC APP 70 & 71 OF 2016

NOAH MANGARA MERU

PATRICK WAWERU.....APPLICANTS

VERSUS

BARNABAS MURIMI MBOGO.....RESPONDENT

AND CONSOLIDATED WITH

NOAH MANGARA MERU

PATRICK WAWERU.....APPLICANTS

VERSUS

CHRISTINE WACUKE IRERI (*Suing as the*

Legal Representative of the estate of

SIMON NJAGI MBOGO (Deceased).....RESPONDENT

RULING

1. In these consolidated applications, the applicants are seeking stay of execution of the order of the Embu CMCC No 280 of 2013, pending the hearing and determination of this application. They also seek leave to file the appeal out of time against the said judgement. They have raised 10 grounds in support of their motion, which is expressed to be brought under sections 1A, 3A and 79G of the Civil Procedure Act (Cap 21) Laws of Kenya and Orders 51 Rule 1 and under 42 Rule 6(1) of the 2010 Civil Procedure Rules as well as under Article 151 of the 2010 Constitution and also pursuant to all other enabling provisions of the law.
2. Amongst the grounds in support of the motion are that the respondent was awarded damages both general and special in the sum of Kshs 972,850/-. Secondly the applicants were dissatisfied with the said judgement in regard to which they intend to file an appeal but they found that the time within which to appeal had lapsed. The inability to file the appeal within the required period was due to the restructuring of the applicant's insurer mailing department and also was due to the applicant's counsel, who failed to diligently file the current application upon receipt of instructions to do so. Thirdly, counsel have also stated that the appeal is arguable and has high chances of success.
3. Fourthly, the applicants have stated that they are apprehensive that the respondent may execute the

decree which may result to substantial loss to them, because they may not recover the decretal sum paid to the respondent in the event that their intended appeal is successful. Fifthly, they have also stated that they are ready and willing to have a security for costs for the performance of the decree pending the outcome of the intended appeal. Sixthly, they have also stated that unless stay of execution is granted, the intended appeal will be rendered nugatory. They have further stated that the filing of the intended appeal is not inordinate and the delay has been fully explained.

4. The applicants through their Legal Officer (Ms Ruth Monyangi) have deponed to a 20 paragraph supporting affidavit. I do not intend to recite all paragraphs in that affidavit. It is enough to state that Ms Ruth Monyangi has deponed that judgement was entered in favour of the plaintiffs in the sum of Kshs 972,850/- and that they were advised by their counsel on record vide a letter dated 18th March 2016 about the outcome of the judgement. It is also her affidavit evidence that UAP Insurance Company head office was undergoing renovation and restructuring in particular the mailing department of that company. As a result of that restructuring, some disarray and confusion occurred in their mailing department, the outcome of which their letter dated 18th March 2016 was not placed on its correct file. It is also her further affidavit evidence that on 22nd April 2014 they received the letter of their counsel dated 18th March 2016 which advised them to file the instant application seeking leave to appeal out of time.

5. Furthermore, her affidavit evidence is that as at that time, the period within which to appeal had lapsed by 15th April 2016. It is for these reasons that the delay within which to appeal the instant application was occasioned. It is also her affidavit evidence that there if no stay of execution of the magisterial subordinate court decree, they are apprehensive that the respondent may go ahead and execute the decree in respect of the applicant's properties, which according to her may expose them to suffer substantial loss. She has finally deponed that she believes the advice of their counsel on record that unless stay of execution is granted, the intended appeal may be rendered nugatory.

6. Counsel for the applicants also filed written submissions to which he annexed some authorities. In their submissions, counsel have submitted that they have an arguable appeal and that stay should be granted in order to avoid substantial loss resulting to the applicants. They have also submitted that they are ready and willing to offer security and costs for the performance of the decree pending the determination of the intended appeal. Additionally, they have also submitted that they are ready to deposit the decretal amount either in a joint account operated by them in conjunction with the respondent's counsel or the decretal amount to be deposited in court. It is for these reasons that they are applying to be granted an order of stay of execution and for leave to appeal out of time.

7. The respondent has opposed the applicant's application. In this regard, Valerio Mwathi Njue has deponed to a 15 paragraph replying affidavit in opposition to the applicants' application. The respondents' deponent has deponed that there has been inordinate delay in filing and prosecuting this application, which is nearly one month out of time and has deponed that the application lacks merit and is an abuse of the court process. The deponent has also stated that the explanations and reasons given by the applicant are not plausible, because they have failed to show evidence that there were such renovations and restructuring taking place in the premises of the applicants. According to the deponent UAP Insurance is a large organization which has multiple methods of communication namely, by email, telephone, mobile phone amongst other modes of communication. And for these reasons, they have stated that the affidavit evidence of Ruth Munnyangi is not credible in respect of paragraphs 9 and 10 of her supporting affidavit ,in which she has stated the reasons for not appealing within the prescribed period.

8. The deponent has further stated that the applicants have failed to show sufficient cause for stay of execution and that the appeal will be rendered nugatory if the application is not allowed. The deponent has pointed out that the intended appeal is a sham and unarguable and has no chances of success since the trial court properly applied the law. These are the major matters deponed to in the affidavit of the respondent in opposition to the applicants' application.

9. The respondents also filed written submissions in opposition to those filed by the applicants. In support of their submissions, they cited a number of authorities which I have also considered.

10. I have considered the affidavit evidence of both parties and the rival submissions of their counsel. The issues for determination are (1) whether or not the applicants' have satisfactorily explained the delay of about one month. (2) Whether or not the court should exercise its discretionary power under section 79G of the Civil Procedure Act in favour of granting the applicants leave to appeal out of time as well as granting them stay of execution pending the hearing of this appeal. I believe the affidavit evidence of Ruth Monyangi that their system was undergoing restructuring in particular the department that deals with communications. It is that restructuring that caused the delay in filing and prosecuting the intended appeal. I also believe her evidence that unless stay of execution is granted, the intended appeal will be rendered nugatory. Furthermore, I find that they are ready and willing to open a joint account with the respondents' counsel or to deposit the money in court pending the hearing and determination of the intended appeal.

11. In the light of the foregoing matters, I find that the application of the applicants has merit. I further find that the delay has been explained adequately. I finally find that unless stay of execution is granted, the intended appeal may be rendered nugatory. In the circumstances, I hereby grant their application in terms of prayers No. 2, 3 and 4 of their notice of motion dated 10th May 2016.

12. The grant of these orders in favour of the applicants are made on condition that they deposit into court the decretal sum of Kshs 972,850/- and also to deposit in court a sum of Kshs 15,000/- being security for costs, which should be complied with within a period of three months failing which the order granted herein will lapse. The appeal has to be filed within 30 days failing which this order will lapse.

13. The orders made herein apply with equal force to Misc App No. 71 of 2016.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **17th** day of **AUGUST 2016**

In the absence of counsel for the applicants and in the presence of Mr Andande holding brief for Mr Njue for the Respondent.

Court clerk Njue

J.M. BWONWONGA

JUDGE

17.08.16