



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 126 OF 2016**

**G. ISSAIAS & COMPANY LIMITED.....APPLICANT**

**V E R S U S –**

**JANE NJERI WAWERU**

**JACINTA WANJIRU WANGU (Suing as Legal**

**Representatives of the Estate of DAMARIS**

**WAITHERA WANGUI (DECEASED) .....RESPONDENTS**

**RULING**

1. G. Issaias & Company Ltd, the applicant herein, took out the motion dated 23<sup>rd</sup> March 2016 in which it prayed for the following orders *inter alia*:-

*a. That this matter be certified as urgent and service thereof be dispensed within the first instance;*

*b. That pending the hearing and determination of this application inter-parties, this honourable court be pleased to grant a temporary stay of execution of the judgment and decree delivered on the 19<sup>th</sup> January 2016 in Gatundu Civil Case No. 236 of 2014, Jane Njeri Waweru and Jacinta Wanjiru Wangui (Suing as legal representatives of the Estate of Damaris Waitthera Wangui (Deceased) –vs- G. Issaias & Company Limited;*

*c. That this Honourable Court be pleased to enlarge the time within which the Defendant can file an appeal against judgment and decree delivered on the 19<sup>th</sup> January 2016 in Gatundu Civil Case No. 236 of 2014;*

*d. That the Defendant be allowed to file its memorandum of appeal out of time in terms of the attached draft and marked 'A';*

*e. That the costs of this application be provided for.*

2. The motion is supported by the affidavit of Tina Nduku Kinyua.

When served, Jane Njeri Waweru and Jacinta Wanjiru Wangui the Respondents herein, filed the replying

affidavit they jointly swore to resist the motion.

3. When the motion came up for interpartes hearing, parties recorded a consent order to have the motion disposed of by written submissions.

I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application. I have also taken into account the rival written submissions.

4. When determining an application for stay of execution pending appeal, the principles to be considered are well settled. It suffices to consider the principles stated under Order 42 Rule 2 (2) of the Civil Procedure Rules. The first principle is that an applicant must show that it would suffer substantial loss if the order for stay is denied.

Secondly, the application for stay must be filed without unreasonable delay.

Thirdly, that the court must take into account the kind of security to be provided for the due performance of the decree.

5. Before considering the merits of the motion, it is important to set out in brief the history of this dispute. On 24<sup>th</sup> August 2010, the late Damaris Waithera Wangui is alleged to have been fatally injured by the Applicant's motor vehicle registration No. KBM 415V. The legal representatives i.e. the Respondents herein, filed a compensatory suit before the Gatundu Principal Magistrate's Court.

The Applicant filed a defence to deny the Respondents' claim. On 5<sup>th</sup> November 2015, both parties recorded a consent order on liability. The Applicant agreed to shoulder 80% liability while the Respondents agreed to shoulder 20% liability. On 19<sup>th</sup> January 2016, the trial court delivered a judgment on quantum in favour of the Respondents as follows:-

- Pain and suffering - Ksh. 10,000/=
- Loss of expectation - Ksh. 50,000/=
- Lost years - Ksh.2,520,000/=
- (7000 x 12 x 30)
- Special damages - Ksh. 1,875/=
- Gross - Ksh.2,581,875/=
- Less 20% contribution - Ksh. 516,375/=
- Net total - **Ksh.2,065,500/=**

6. The Applicant is submitting that it is dissatisfied with the aforesaid decision hence it seeks to challenge the same on appeal. The Applicant is now seeking for two orders. First, an order for stay of execution pending appeal and secondly, an order for leave to appeal out of time.

7. I think it is only fair to start with the question as to whether or not the Applicant is entitled to extend time for the Applicant to file an appeal out of time. When it comes to this prayer, the court is given unfettered discretion to determine the prayer.

8. Under Section 79G of the Civil Procedure Act, this court is given the discretion to admit an appeal out time if the Applicant tenders a good and sufficient explanation for not filing the appeal within 30 days. It is the submission of the Applicant that the judgment of the trial court was delivered in the absence of the parties since no notice was issued. The Applicant averred that it only came to know of the existence of

the judgment when its advocate was served with a letter from the Respondent's advocate stating that judgment had been delivered.

9. The Applicant approached the Respondent and proceeded to record a consent order to have a temporary order for stay. The Applicant felt aggrieved by the judgment but unfortunately the time to appeal had lapsed. For the above reason this court was beseeched to grant the Applicant leave to file an appeal out of time.

10. The Respondent is of the view the order for leave to appeal out of time should not be given because the Applicant has given no good or sufficient reasons for the delay to file an appeal within time.

11. After a careful consideration of the rival submissions, it is clear to me that the Applicant has specifically stated that it was not present at the time of delivery of judgment. It is said that no judgment notice was given to it. The Appellant submitted that it only came to learn of the delivery of the judgment after the time set to appeal had lapsed. These assertions have never been controverted by the Respondent.

12. I am convinced that the Applicant has given sufficient reasons.

Consequently I grant the Applicant leave of 14 days to file an appeal out of time.

13. The next question is whether an order for stay of execution pending appeal should be granted. It is the Applicant's submission that if the order for stay of execution is denied, it will suffer substantial loss in that if the decretal sum is paid to the Respondent will not be in a position to refund the money should the appeal succeed. It is said that the Respondent has not shown that he has sufficient means to refund the money when needed.

14. Again, the Respondent did not controvert the Applicant's assertion that the Respondent is not in a position to refund the decretal sum when required upon the success of the appeal.

15. With respect, I am convinced that the Applicant has shown the substantial loss it would suffer if the order for stay of execution is denied.

16. The other consideration is whether the application was filed without unreasonable delay. In my view and having taken into account the circumstances of this application, I am convinced that the motion was timeously filed.

17. The third issue relates to the provision of security for the due performance of the decree. The court retains the sole discretion to determine what form of security should be given whether or not an offer to provide security is made.

18. The Applicant has stated it is ready to abide by any condition imposed by the court.

19. The Applicant has attached to the affidavit filed in support of the motion, a copy of the draft memorandum of appeal. The Applicant has also stated that it will be able to show on appeal that the award of damages of Ksh.2,520,000/= was high and excessive.

In my view, this is an arguable point which if it succeeds may alter the nature of the award on damages.

20. In the end I am convinced that the motion has merit. It is allowed as follows:-

***i. The Applicant is granted leave of 14 days to file an appeal out of time.***

***ii. The Applicant is granted an order for stay of execution pending appeal on condition that the Respondent deposits Ksh.2,065,500/= in an interest earning account in the joint names of the advocates and or firms of advocates. In default, the application for stay will be deemed as having been dismissed.***

Dated, signed and delivered in open court this 20<sup>th</sup> day of December, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent