



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL CASE NO. 149 OF 2014

BENSON MUANGE MBITHUKAAPPLICANT

VERSUS

ALEX KAMOLORESPONDENT

RULING

1. By way of **Notice of Motion** dated **1st October 2014**, the applicant seeks leave to appeal out of time against judgment on quantum of damages delivered by **Mavoko Court** presided over by **Ooko P.O. Senior Resident Magistrate** on the **29th August, 2014** and stay of execution of the stated judgment.
2. The application is premised on grounds that the applicant intends to appeal against the judgment on quantum of damages; the sum awarded is substantial; the appeal has a high chance of succeeding; no stay order of 30 days was granted at the delivery of judgment; the appeal will be rendered nugatory; the applicant will suffer substantial loss; the applicant is willing to deposit part of the decretal sum in court as security; the appeal was not filed within time as the applicant did not receive instructions from his client on time and the application has been filed without unreasonable delay.
3. The applicant relied upon a supporting affidavit sworn by **Erustus Mwaniki**, the Legal manager at Directline Insurance Company Limited who deponed that they had not instructed their advocates on record hence the delay in filing of the memorandum of appeal. That the respondent being a man of straw means if the appeal succeeds the applicant will be prejudiced as the sum of **Kshs.120,000/=** being general damages and **Kshs.6,290/=** special damages will not be refunded.
4. In a response thereto the respondent averred that the application is not made in good faith and is aimed at delaying payments in this matter; stay of execution was granted by consent and the application is an abuse of the court process.
5. The application was canvassed by way of written submissions which have been taken into consideration.
6. An appeal from the Lower Court to the High Court ought to be filed within a period of thirty days from the date of the decree. However, the appeal may be filed out of time if the applicant satisfies the court that there was a good cause for not filing it on time. (**See Section 79G of the Civil Procedure Act**).
7. In the case of **Aviation Cargo Support Limited versus St. Mark Freight Services Limited (2014) eKLR**. It was stated thus:

“The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its merit. For the court to exercise its discretion in favour of an applicant, the latter must demonstrate to the court that the delay in lodging the record of appeal is not

inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to the court as soon as was practical.”

8. In the affidavit in support of the application the applicant avers that the memorandum of appeal was not filed in time because instructions were not obtained in time. The judgment was delivered on the **29th August, 2014**. This application was made on the **6th October, 2014**, approximately a month and a week thereafter. Although there was no attempt to buttress the alluded to reason for the delay in appealing, the delay in the circumstances was not inordinate hence excusable.
9. It is argued that if the stay of execution order sought is not granted the applicant will suffer substantial loss. The only reason given is that the respondent is a man of straw whose whereabouts are unknown. In his reply the respondent was silent on this particular allegation. Having not disputed the allegation it is possible that the applicant may suffer irreparable loss in event of the appeal succeeding.
10. The applicant has expressed willingness to furnish security for due performance of the decree.
11. In the premises I grant orders as follows:
 - i. The applicant is hereby granted leave to file the appeal out of time within 14 days.
 - ii. There be stay of execution on condition that the applicant deposits the entire decretal sum in court within 14 days hereof.
 - iii. Costs of the application shall be borne by the applicant in any event.
12. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 23RD day of APRIL, 2015.

L. N. MUTENDE

JUDGE