



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 127 OF 2015

GICHOHI SUSANA.....APPLICANT

VERSUS

PHILIP MUCHOKI NGUGI and LUCY WANJIRU NGUGI

**(suing as administrators of the estate of the late) JOHN NGUGI
MWANGI).....RESPONDENTS**

RULING

1. The Respondents sued the Applicant in Milimani Commercial Courts Civil Suit No. 252 of 2009. Judgment in that matter was entered on 20th January, 2015. The Applicant has now filed a notice of motion dated 27th March, 2015 seeking leave to appeal against the said judgment out of time and stay of execution of the judgment and decree thereto pending hearing and determination of the intended appeal.

2. The application is based on the grounds set out on the body of the application and the supporting affidavit of Erastus Mwaniki who is the legal officer of the Applicant's insurer. He averred that judgment in the matter was scheduled for delivery on 14th January, 2015 but upon inquiry, the Applicant's counsel was informed at the registry that the judgment was not ready and that the said judgment was delivered without notice to the Applicant. That the advocate who was handling the matter left the firm without proper handing over to his predecessor. He explained that it was upon the perusal of the court file that it was discovered that the judgment had been delivered in the absence of the Applicant's advocate. He stated that the time within which to file an appeal and for stay of execution had run out by the time instructions to file appeal was given. He explained that the delay was inadvertent on the part of counsel for the intended Appellant. Mr. Mwaniki stated that the appeal has high chances of success and expressed the Applicant's willingness to comply with this court's order for security of costs.

3. This application was opposed vide the replying affidavit of Peter Mwaura Kamau, the advocate in conduct of the Respondent's case. Mr. Mwaura contested that after the close of the defence case, the matter was mentioned for submissions on 3rd December, 2014 to confirm if parties' submissions had been filed and that on that date, judgment was slated for 20th January, 2015. He contended that the judgment was delivered on 20th January, 2015 and not 14th January, 2015 as alleged. He stated that there is no apparent reason for the delay in filing the appeal and that the reasons for delay given are misleading and aimed at getting sympathy from the court. He stated that this appeal has no chances of success since no eye witness was called during the defence hearing.

4. The only submissions on record are those of the Respondent. The said submission is essentially a

reiteration of the averments in the replying affidavit. I have given due consideration to the application herein. What this court is to look out for pertaining leave to file appeal out of time is whether sufficient reason for delay in filing the appeal has been tendered by an applicant. Section 79G of the Civil Procedure Act Cap 21 provides as follows:-

“Every appeal from a Subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”(Emphasis mine).

5. It was explained that the judgment was to be delivered on 14th January, 2015 but was not delivered on that date and that the counsel who was in conduct of the matter at the time left the firm without proper handing over. While the Respondent contend that the judgment was never scheduled for delivery on 14th January, 2015 rather it was delivered on 20th January, 2015 as scheduled on 3rd December, 2015 when the matter was mentioned for submissions, the Respondent has not tendered any evidence to prove that the judgment was scheduled for 20th January, 2015. In the circumstances, I am inclined to find the Applicant's reasons for delay sufficient. In view of the foregoing, I find that the delay of almost two (2) months no inordinate since it shall not occasion the Respondent any loss that cannot be compensated in costs.
6. The second limb of the application is stay of execution pending appeal. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the right of an Appellant who is exercising his undoubted right of appeal, are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court will weigh this against the success of a litigant who should not be deprived of the fruits of his judgment. The court is called upon to ensure that neither party suffers prejudice. This was well stated in the case of **M/s Portreitz Maternity v. James Karanga Kabia, Civil Appeal No. 63 of 1997** where the Court had this to say:-

“That right of appeal must be balanced against an equally weighty right of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

7. The Applicant is thereby required under Order 42 Rule 6 of the Civil Procedure Rules, 2010 to establish that the application herein has been filed timeously, that it stands to suffer substantial loss if orders of stay is not granted and that it can furnish security. As I have found earlier in this ruling, this application was filed timeously, that limb is therefore spent. On whether or not the Applicant stands to suffer substantial loss, it was the Applicant's position that if the orders sought are not granted, its appeal shall be rendered nugatory and furnish security for costs. On the issue of loss, the Applicant stated that if the order of stay is not granted and the appeal succeeds she may not be in a position to recover the decretal sum. It is trite law that where an applicant alleges that the Respondent is a man of straw or is unable to refund the decretal sum, the burden to prove otherwise shifts to the Respondent. See the Court of Appeal's decision in the case of **ILRAD v. Kinyua(1990) KLR 403 at Page 406** where it was held as follows:-

“We have considered what Mr. Sehimi has said. However, we must “observe that the onus was upon the respondent to rebut by evidence that the claim that the intended appeal if successful would be rendered nugatory on account of his(respondent’s) alleged impecunity”.

In this case the Respondents did not rebut being unable to refund the decretal sum nor proved their financial capability thereby the intended Appellant is found to have established that is shall suffer

substantial loss if the orders sought are not granted.

8. On the issue of the security, I am satisfied that the Applicant's offer of security is in line with Order 42 rule 2 (c) which requires that security be furnished. In view of the foregoing, I find merit in this application. It is hereby allowed in the following terms:-

- a) The Applicant is hereby granted stay of execution of the judgment in Milimani Commercial Courts Civil Suit No. 252 of 2009 entered on 20th January, 2015 pending the hearing and determination of this appeal.
- b) The Applicant is hereby granted fourteen (14) days leave to file an appeal against the aforesaid judgment out of time.
- c) The Applicant to deposit the decretal sum of KShs. 1,168,550/= in a joint interest earning account in the names of the parties' firm of advocates within the next thirty (30) days from the date of this ruling failure to which the application shall stand dismissed.
- d) Costs shall abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 29th day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

N/A for the Applicant

N/A for the Respondent