



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISC. APPLICATION NO. 96 OF 2014**

**DANIEL MUTISO MAKAU.....APPLICANT**

**VERSUS**

**JACINTA WAYUA MUIA.....1<sup>ST</sup> RESPONDENT**

**CHRISTINA NZISA MULINGE.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated 16<sup>th</sup> June, 2014 seeks orders that the applicant be granted leave to appeal out of time and the annexed Memorandum of Appeal be deemed as filed upon payment of court requisite fees and that the court do grant a stay of execution pending hearing and determination of the intended appeal.
2. The delay in filing the appeal is blamed on the misplacement of the file in the office of the Applicant's insurer. It is argued that the delay is not inordinate and that the intended appeal has high chances of success. That the applicant will suffer substantial loss if stay is not granted as the Respondents may not be able to refund the decretal sum. The applicant is ready to provide security in the form of an insurance bond.
3. The application is opposed. It is deponed that the delay has not been sufficiently explained and that the applicant has not shown which substantial loss he will suffer. That the Respondents are farmers with great resources who own more than ten (10) acres of land each and own cows. That if the court is inclined to allow the application, 50% of the decretal sum be released to the Respondents and the balance be deposited in a joint interest earning account.
4. The application was argued by way of written submissions. I have considered the rival submissions.
5. The principles of the law to be considered on whether or not to allow an application to extend the time within which to appeal are settled. See for example **Barclays Bank of Kenya Ltd vs Martha Karwirwa Antony (2010) eKLR** where the Court of Appeal cited with approval the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application No. 225 of 1997** where it was stated as follows:

***“the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay, secondly, the reason for the delay, thirdly, possibly, the chances of the appeal succeeding if the application is granted,***

***and fourthly the degree of prejudice to the Respondent if the application is granted.”***

6. Judgment was delivered on 4<sup>th</sup> April, 2014. The application herein was filed on 16<sup>th</sup> June, 2014. This was a delay of 2<sup>1/2</sup> months. The delay is not inordinate and it has been explained that the file was misplaced in the office of the insurer. I have looked at the annexed grounds of appeal. The same raises triable issues which need to be ventilated. There is no prejudice that can be suffered by the Respondent that cannot be compensated by way of damages.

7. Under **Order 42 rule 6(2)** of the **Civil Procedure Rules 2010** –

***“(2) No order for stay of execution shall be made under subrule (1) unless –***

***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***

***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”***

8. The Applicant has contended that he will suffer substantial loss as the Respondents may not be able to refund the decretal sum if the appeal succeeds. Although the Respondents have averred that they own valuable property, no documents have been exhibited in support thereof. As stated by the Court of Appeal in the case of **National Industrial Credit Bank Ltd –vs- Aquinas Francis Wasike & Another Civil Application Nai 238 of 2005 (UR. 144/2005):-**

***“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – See for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”***

9. The court however has to balance the interests of both parties. According to the Memo of Appeal, the Applicant is aggrieved by the award which they have termed as manifestly excessive. Liability is not contested.

10. With the foregoing, I allow the application on condition that the Applicant do release 50% of the decretal sum to the Respondent and deposit the balance in court or in a joint interest earning account of both parties within 30 days from the date hereof. In default execution to issue.

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**B. THURANIRA JADEN**

**Dated and delivered** at Machakos this 20<sup>th</sup> day of May, 2015

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