REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO.317 OF 2014

ERICK NYALE ……..…….1ST APPLICANT

SELF MZUNGU MAGOYO …….2ND APPLICANT

VERSUS

MWANAMBUA MUSA MWANYUMBA (Suing as the mother and administrator of the Estate of:

MUSA ALI MWARINDANO…….....……RESPONDENT

(Being and appeal against the entire Judgment of the Hourable R. M. Kitagwa R M IN Mombasa CMCC NO. 2613 of 2011 of 7th August 2014)

AND

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MISC. CIVIL APPLICATION NO.318 OF 2014

ERICK NYALE…….....……..1ST APPLICANT

SELF MZUNGU MAGOYO …….....…..…….2ND APPLICANT

VERSUS

SINIA KAMAU (suing as the mother and administrator of the estate

of the late MWANIA KAMAU …….....…….....……..RESPONDENTS

(Being an Appeal against the entire judgment of the Honourable R. M. Kitagwa R. M. in Mombasa CMCC No. 2614 of 2011 of 7th August 2014.)

R U L I N G

1. Judgment was entered in favour of respondents and against the applicants for Ksh 1,030,000/= in **Mombasa CMCC Case No. 2614 of 2011** and Ksh 1,320,000 in **Mombasa CMCC No. 2613 of 2014.** The applicants filed the Notice of Motion both dated 19th September 2014 in which they seek extension

of time to file and serve Memorandum of Appeal against the said judgment and stay of execution of the lower court's judgment pending hearing and determination of the intended appeals.

2. Section 79 G of the Civil Procedure Act Cap 21 provides that 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. That section provides as follows:

> **"97 G. 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."**

3. The applicants state that the delay in lodging the appeal is purely inadvertent and excusable. In the supporting affidavit sworn by ROSELYNE KIHARA, Assistant Legal Officer at Kenya Orient Insurance Limited, it was deponed that:

- ***"…the delay in lodging the appeal is purely inadvertent and is excusable due to email correspondence delays/hiccups with our advocates on record who received our instruction to file the appeal on 11th September one day after laps of time, despite us sending instructions earlier on 26th August 2014."***
- ***"That our advocates on record have indicate (sic) to us that they have had email delays/hiccups from the 24th August 2014 and its only as at 11th September 2014 that all emails sent during the stated period have been received though delayed."***

4. The averments were confirmed by ANNE KAGURI learned counsel for the applicants in her supporting affidavit where it was deponed:

- ***"That from the 24th August 2014 to 11th September 2014, our law firm had technical hitch and had email delays/hiccups and we could not receive email sent from some of our clients including the applicants' insurers herein."***

- ***The said email delays/hiccups was only detected when the applicant's insurers herein called on us on 11th September 2014 to enquire whether we had filled (sic) appeal herein since they had sent us instructions on via email on 26th August 2014… to appeal against the whole of the said judgment***."

5. The respondent opposed the prayer for extension of time. In her replying affidavit filed on 11th November 2014, it is deponed *inter alia* as follows:

- ***"The applicant's assertion that the delay was due to email correspondence delay/hiccups with their advocates who received instructions to file an appeal on 11th September 2014, six days after time has lapsed, despite sending instructions earlier on 26th August 2014, does not hold, in view of the increased communication technology, they should have communicated with the advocate to know the position of their intended appeal through other means of communications."***

6. The respondents went on to state that the applicant's failed to annex the alleged email correspondences to support the application for the court to believe and confirm the allegations.

7. I have considered the parties' rival submissions. The power to extend time is in section 79 G (see proviso of that section).

8. A word of caution the strict reading of that proviso shows that a party should seek extention to file an appeal out of time after having filed such an appeal. That was the holding in the case GERALD M'LIMBINE -V- JOSEPH KANGANGI (2009) eKLR. I would have, going by that holding struck out the prayer for leave to file an appeal out of time but that prayer is saved from being struck out because the applicants had annexed to their applications the draft memorandum of appeal. Is there sufficient explanation of the delay? I find on *prima facie* basis that there is sufficient explanation. I find no reason not to believe the applicants' insurer's legal officer that they sent instructions to the applicant's advocates to appeal on 26th August 2014 but the same were not received until 11th September 2014 due to technical email hitch. The same position was confirmed by Ms. Anne Kaguri, learned counsel for the applicants who is an officer of this court and I find no reason not to believe her either. The delay herein was not inordinate. In my view, the applicants have laid sufficient basis upon which the time within which to file the appeal should be enlarged. The applicants said email being protected by section 134 (1) of the evidence Act, was privileged and no adverse action can be taken by the fact that it was not produced.

9. On the second prayer for stay of execution of judgment pending hearing and determination of appeal, the only issue to consider is whether appellant has satisfied the conditions set out in **Order 42 Rule 6(2)** of the Civil Procedure Rules.

10. Order 42 Rule 6 (2) provides:

> ***"(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 orders as may ultimately be binding on him has been given by the applicant."***

11. The applicants, in the affidavit in support of the application after stating that they are dissatisfied by the lower court's judgment then deponed that ***"Substantial loss may result to the applicants and/or their insurers"*** if order of stay is not grated, ***that "the applicants shall suffer irreparably if execution proceeds"*** and that ***"the applicants and/or their insurer are bound to lose substantially should the orders sought not be granted and the judgment sum will be beyond the applicants and/or their insurer reaches."***

12. The conditions of granting a stay pending appeal was subject of the decision in the case **KENYA SHELL LIMITED –vs- KIBIRU (1986) KLR** where it was stated –

> ***In Kenya Shell Limited Vs Kibiru (1986) KLR 410, Platt, Ag.JA (as he then was) at page 416 expressed himself as follows:***
>
> ***"It is usually a good rule to see if Order XLI rule 4 (now Order 42 Rule 6(2) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."***

On the part of Gachuhi, Ag JA (as he then was) at 417 he stated-

> **"It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment."**

13. It is therefore a requirement that before an order of stay of execution can be granted, there must be evidence of substantial loss to the applicant. It is not sufficient to merely state that the applicant would suffer loss. It must be clear the nature of loss and the damages the applicant would suffer if stay is not granted. The applicants case is not helped by the fact that it is pleaded that "the judgment sum will be beyond the applicants' and/or their insurer reaches". Ordinarily, it is expected that in an application of this nature, the applicants would plead that the judgment sum if paid out would not be recoverable because the respondent is not in a financial position to refund the same. In this case, it is the applicants who have pleaded that the judgment sum would be beyond their reach. Does that imply that they are not in a position to satisfy the decretal sum and would that be a basis to order stay of execution? In my view the applicants' application fails for having satisfy the threshold of Order 42 Rule 6(2).

14. In considering an application of stay it is important to also consider that the respondent has a right to enjoy the fruits of his judgment. This is well captured in the decision of **SOCFINAC COMPANY LIMITED -vs- NELPHAT KIMOTHON MUTURI (2013) eKLR** where the learned Judge referred to another case as follows:

> **"In Macharia T/A Macharia & Co. Advocates vs East African Standard (No 2) (2002) KLR 63** it was held that:
>
> **" to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposition party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay for further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".**

15. The accident, the subject of this application occurred way back on 26th May 2007, nearly eight (8) years ago. The respondents should not be denied an opportunity to enjoy the fruits of their judgment unless for sufficient cause. In the end and in view of the above finding the Notice Motion dated 19th September 2014 is determined by making the following orders:

> **i. There be extension of time to file and serve Memorandum of Appeal against the judgment and decree entered in Mombasa CMCC No. 2614 of 2011 on 7th August 2014.**
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> **ii. The Memorandum of Appeal to be filed within fourteen (14) days of the date of this order in default of which the leave shall stand discharged.**
>
> **iii. The prayer of stay of execution of judgment and decree entered in Mombasa CMCC No. 2614 of 2011 on 7th August 2014 is denied.**
>
> **iv Since the applicants have succeeded only partly, there shall be no order as to costs.**

Dated and delivered at Mombasa this 25th day of June 2015.

MARY KASANGO

JUDGE

25.6.2015

Coram

Before Justice Mary Kasango

C/Assistant – Kavuku

For Applicants:

For Respondents:

Court

The Ruling delivered in their presence/Absence in open court.

MARY KASANGO

JUDGE