



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

MISC. APPL. NO. 59 OF 2015

JEREMIAH MEEME.....1ST APPLICANT

LAARE SPRINGS KENYA LTD..... 2ND APPLICANT

Versus

PETER MURIUNGI ARIMI RESPONDENT

R U L I N G

Extension of time to file appeal and stay of execution

[1] I have before me the application dated 1/9/2015 in which the Applicants are seeking;

a) Enlargement of time to file appeal, and

b) Stay of execution of the Judgment in CMCC NO.188 of 2012 until determination of the intended appeal.

[2] The application is expressed to be brought under Order 50 Rule 6, Order 51 Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules (CPR), Sections 3A and 79G of the Civil Procedure Act (CPA), and all enabling provisions of the Law. The other provisions cited on High Court Vacation Rules are not relevant now. The application is supported by the affidavits of Gibson Maina Kamau and Theophilus Kamwaro Gitau both sworn on 1st September 2015. Mercy K. Thibaru Advocate also swore an affidavit on 11th September 2015 in support of the application.

[3] The major grounds for applying are that;

(a) The Registry staff declined to accept memorandum of Appeal when it was presented within time. The refusal contravened Order 42 Rule 2 of Civil Procedure Rules.

b) The intended appeal is arguable with good chances of success. In addition, the Applicants are ready to deposit the entire Judgment sum in court in a joint interest earning account in the names of advocates for the parties.

[4] The Applicants argued the above grounds in great detail in their written submissions dated 14/9/2015. They took issue with the manner in which Mr. Carl Peters Mbaabu dismissed their explanation on refusal by registry staff to accept the Memorandum of Appeal: they submitted that the explanation was presented by M/s Thibaru in an affidavit under oath and Mr. Mbaabu ought, therefore, to have requested for cross-examination of M/s Thibaru if he actually

believed the said advocate was not telling the truth instead of dismissing the said averments in such casual manner as he did in paragraph 6 of his replying affidavit. They relied on the case of **Guka Fuel Mart Ltd vs. Bwana Mshibi Sungura [2014] eKLR** where Court allowed appeal to be filed out of time because it found that the delay was purely inadvertent and thus excusable. They beseeched the court to allow their request to file appeal out of time.

[5] On stay of execution, the Applicants submitted that the decretal sum is huge and if paid over to the Respondent, they are apprehensive that the Respondent may not refund if the appeal is successful. This apprehension is based on the fact that the financial position of the Respondent is unknown to the Applicants. They also submitted that, during the hearing the Respondent had indicated that he was not in a gainful employment at the time. According to the Applicants, the Respondent did not swear any affidavit in reply to the application to show that this situation has changed. The only averment on the Respondent's status is at paragraph 9 of the affidavit by his counsel which states that he is currently paralytic and has a jobless wife. The Applicants interpreted this averment to be a confirmation that the Respondent will not be able to refund any sums paid to him. Such eventuality will have the effect of rendering the appeal nugatory if it succeeds. The Applicants were, however, careful to state that they are not implying that the Respondent is a man of straw. And that they are simply saying he did not discharge his evidential burden. See (1) **Florence Hare Mkaha -vs- Pwani Tawakal Mini Coach & Another [2014] eKLR**, and **Hon. Phoebe Asiyo and 3 others vs. Martin Njalallel [2008] eKLR**.

The Respondent opposed Motion

[6] The Respondent opposed the Motion through the Replying Affidavit of Carl Peters Mbaabu Advocate and written submissions. The major arguments by the Respondent are;

- a) *That the Applicants have not shown sufficient reasons as to warrant exercise of Court's discretion to enlarge time. They averred that the Applicants were granted 30 days stay which they squandered and did not file any appeal.*
- b) *The allegations that the Memorandum of Appeal was presented on time but the registry declined to accept it is bare, not buttressed by any evidence and is therefore spurious and misleading. According to the Respondent there is no Law that requires Memorandum of Appeal to be presented together with proceedings. Again, the advocate questions why letter and a receipt for proceedings is not annexed if indeed it had been made a condition precedent to filing of appeal. They have not applied for proceedings until now.*
- c) *That the Applicants have not sworn that they sought the assistance of Executive Officer when the registry purportedly refused to accept their Memorandum of Appeal.*
- d) *That the appeal is not arguable at all because the advocate for the Applicant vide letter dated 3/8/2015 advised against appealing the judgment.*
- e) *That a stay of execution cannot be granted in a miscellaneous application but in a substantive appeal of the primary case. Stay should be declined.*
- f) *Substantial loss occurring has not been demonstrated especially based on the fact that the Applicants have not contested all the awards made by the lower court. See letter dated 3/8/2015 marked TKG3. Liability was by consent and so no substantial loss that can occur to the Applicants. The only reason for appealing is that the Insurance shall be called to pay the decretal sum. See; Francis Kabaa -vs- Nancy Wambui & Another [1969] LLR 2482 (CAK), Meru HCCA NO. 117 of 2009 Ronald Dewayne Enock -vs- Charles Wanyama and Meru HCCA No. 58 of 2006.*
- g) *That this application was brought after 32 days and no explanation for the delay has been offered.*

h) On security, the Respondent submitted that unless condition on substantial loss is met, the question of security may not arise. See UAP Provincial Insurance Case and Ronald Dewayne case. Therefore, the promise to deposit the entire sum in a bank is not sufficient to grant stay. The Plaintiff is entitled to enjoy the entire judgment sum as fruits of his judgment.

[7] The Respondent also submitted on the affidavit of M/s Thibaru Advocate which he said should be struck out, first, because it was never served on them; and second, it was filed without leave of court. He relied on the case of **Meru HC Succ. No.313 of 2013, Esther Kaga Francis -vs- Latif M'Ikiara & Another** where an affidavit filed without leave was expunged.

[8] The Respondent also distinguished the authority cited by the applicants. The Respondent further found fault in reliance by the Applicant on the ground that appeal herein shall be rendered nugatory which he said is a test applicable in the Court of Appeal under rule 5(2)(b) of the Rules of that Court and not in the High Court. In sum, the Respondent concluded that the Applicants have not discharged their burden of proof that the Respondent cannot refund the decretal sum herein. They referred the court to **Section 107, 108, 109, 110, 111 and 112 of the Evidence Act** as well as **Geoffrey Kamau Njathi -vs- Naivas Ltd [2013] eKLR**. They beseeched the Court to decline both requests.

DETERMINATION

[9] I have two requests before me for determination, namely:

- a) **Enlargement of time to file appeal out of time; and**
- b) **Stay of execution pending appeal.**

The threshold for each of these requests is distinct. I will begin with the request for enlargement of time to file appeal out of time.

Enlargement of time to file appeal out of time

[10] Courts of law have discretion in law to enlarge time for taking a certain legal step or proceeding as the justice of the case demands and, where necessary on such terms as it deems fit. What is the Applicant saying to justify enlargement of time? The major argument is that M/s Thibaru Advocate presented a Memorandum of Appeal in the registry for filing on 28/8/2015 but the registry staff declined to receive it because it was not accompanied by proceedings. She averred this in her affidavit sworn on 11th September 2015. The affidavit was however objected to by Mr. Mbaabu on two fronts: (1) that the affidavit was filed without leave of the court; and (2) it was not served on him. I have perused the court record and it is clear that on 9/9/2015 court allowed the Applicant to file and serve a further affidavit to the application dated 1/9/2015. There was no time limit which was set for the filing of the said further affidavit. The affidavit in question was filed on 16/9/2015 and is, therefore, perfectly in order. The court declines to strike it out.

[11] I now move to consider the merits in the averment by M/s Thibaru in her affidavit. I note that the affidavit by M/s Thibaru does not give the particular person who rejected the Memorandum of Appeal because it was not accompanied by proceedings. It does not also give details of any or other steps the advocate took after the unfortunate incident in the Registry, say, seeking assistance from the Executive Officer or the Deputy Registrar of the court to have the alleged decision by registry staff rescinded. I say so because counsel was aware that there is no strict requirement that a party must file a Memorandum of Appeal accompanied by proceedings. Nonetheless, there is one important averment; that M/s Thibaru received the Memorandum of Appeal herein from Theophilus Kamwaro Gitau advocate on 26/8/2015 with instructions to file it at Meru High Court. In light thereof, I will treat this as a case of careless

omission by counsel which I think should not be visited upon a client who has signified great desire to exercise his right of appeal. Again, the delay herein is not contumelious and is excusable. Accordingly I allow the applicants to file an appeal out of time. The appeal shall be filed and served within 14 days of today.

Stay of execution

[12] Courts have said time without number that stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules is a discretionary relief which entails a novel balancing of two competing rights. On the one hand, there is the Respondent's right to enjoy the fruits of his judgment; and on the other, the Applicants right of appeal which includes right that his appeal will not be rendered nugatory. To help the court carry out this balancing act, the Law has developed certain thresholds or prescription under Order 42 rule 6 of the Civil Procedure Rules. The umbrella consideration is that sufficient cause must be established to warrant stay of execution. In making that decision the court will consider the following matters;

- a) **Whether the application for stay has been filed without delay;**
- b) **Whether substantial loss will occur on the Applicant unless stay order is issued; and**
- c) **The type of security that is sufficient for the due performance of the decree that may ultimately be binding on the Applicant.**

Timely filing of application

[13] This threshold is normally simple to determine. The judgment herein was delivered on 31/7/2015 and this application was filed on 2/9/2015. The amount of time between the two events cannot be said to be inordinate in the circumstances of this case. I find that this application was filed without inordinate delay. That hurdle is surmounted. I will go to the next.

Substantial loss occurring

[14] This is the cornerstone of the jurisdiction of the court in granting stay of execution. As I stated earlier, application for stay of execution pending appeal is a matter of balancing two competing rights; that of the Respondent to the fruits of his judgment; and of the Applicant to appeal. As a principle of law, a successful party should never be denied immediate realization of the fruits of his judgment except on sufficient legal cause. Similarly, an appellant must not be reduced into a pious explorer in the world of administration of justice or make his appellate journey to be a barren venture because he cannot realize the fruits of a successful appeal. But, how will the court hold these rights in almost symmetrical bound and avert the above misfortunes.

The incidents of legal burden of proof and evidential burden

[15] The law has placed a legal burden of proof on the Applicant to show that substantial loss will be visited upon him. Substantial loss does not represent any particular amount or size. It cannot be quantified by any particular mathematical formula. Rather it is a concept which refers to any loss, great or small that is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal. See the case of **Tropical Commodities Suppliers Ltd & others vs. International Credit Bank Ltd (in liquidation)** (supra) where Ogola J made a superb analysis of the jurisprudence on substantial loss within East Africa, the United Kingdom and others. In our case, at least the Applicant should show that, if the funds are paid over to, he cannot recover same from the Respondent if the appeal is successful. Substantial loss, therefore, lies in the inability by the Respondent to make a refund of money paid to him. But the question has always been; how does the applicant discharge this burden?

[16] I have said in other cases that mere averment that “*assets or sources of income of the*

Respondent are not known” is not sufficient; that would be and is the easiest assertion any Applicant can make. There has to be cogent evidence that creates reasonable financial limitation on the part of Respondent as to call upon the Respondent to rebut. It is at that point where the Respondent will fail without adducing any or further evidence, that evidential burden is created upon the Respondent to show his means. On this I am content to cite a work of the court in the case of **Winfred Nyawira Maina vs. Peterson Onyiego Gichana [2015] eKLR** that:-

I think the foregoing justifies a little rendition on evidential burden for a fuller understanding of the decision of the court in this matter. The way I understand the law, the term Burden of proof, entails the Legal burden of proof and evidential burden. The two terminologies are most of the time misunderstood; albeit distinct. I am concerned mostly with the evidential burden which initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. See HALSBURY’S Laws of England, 4th Edition, vol. 17. Therefore, the Applicant must first lay prima facie evidence against the Respondent if evidential burden is to be created on the shoulders of the Respondent. In simple terms see what the Supreme Court said in the case of **Raila Odinga vs. IEBC & 3 Others [2013] eKLR that:-**

“...a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden”.

[17] Have the Applicants discharged their legal burden of proof? The Applicants were careful in their submissions and clearly stated that they were not saying that the Respondent is a man of straw. They only relied on the admissions by the Respondent during the hearing and the averments by Counsel in the Replying affidavit to the effect that the Respondent was not in any gainful engagement and so was his wife. Reading from the material before the court, as a result of the injuries sustained in the accident that occurred on 12/10/2011, the Respondent was paralyzed on his left side, lost his earning capacity and has had to attend physiotherapy clinics at a cost of Kshs.600/= each day. Given those circumstances, to try and use his condition or resultant adverse consequences of the accident upon the Respondent’s abilities is most insensitive. The court is not being moved by sympathy but by the law that; more was needed to show that the Respondent cannot make a refund of the decretal sum herein. The Applicants have not really shown how substantial loss will result unless stay of execution is granted. And in the absence of evidence, the court is unable to say that evidential burden was created as to call upon the Respondent to establish his means. I am fully aware that I should not expect the Applicants to provide fine details of the inability of the Respondent to refund the decretal sum but much was needed from the Applicants other than merely stating that they are apprehensive that he would not be in a position to refund the decretal sum because he said during the hearing that as a result of the accident he is not in any gainful employment. Stating that the Respondent is not currently engaged in any gainful employment or that it is not clear what sources of income he has got is not enough to warrant a stay of execution. See case of **Kenya Shell Ltd -vs- Benjamin Karuga Kibiru and Another [1982-1988]1 KAR 1018**. Where a search on company register was lauded as bona fide belief on which an applicant can swear an affidavit that the company held no assets to its name.

[18] Each case turns on its own merits and facts. It must be noted that liability was agreed by consent of parties and it is not one of the points of appeal. Similarly, legal advice marked TKG3 does not seem to support a serious quest by the Applicant. Moreover, the proposal to deposit the entire sum in a joint interest account is also not made in good faith or out of recognition of the right of the Respondent to enjoy the fruits of his judgment. The proposal is totally oblivious of the fact that liability is not being challenged and that the Applicants made proposals on quantum of damages. In the absence of proof that substantial loss would be visited upon the Applicants unless stay is granted, I should dismiss the application in its entirety. However, I shall determine this application purely in the interest of justice. Accordingly I order that 2/3 of the decretal sum shall be paid to the Respondent and 1/3 thereto shall be deposited in an interest earning account in the joint names of counsels for the parties within 30 days from today. Each party shall bear its own

costs. It is so ordered.

**Dated, Signed and Delivered in open Court at Meru this 29th
day of October 2015**

F. GIKONYO

JUDGE

In the presence of:

Kioga advocate holding brief for Mbaabu advocate for respondent

No appearance for applicants

Court clerks: Mwenda/Mark

F. GIKONYO

JUDGE