



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**MISC. APP. NO. 36 OF 2015**

***(Consolidated with Misc. App. No. 37 to 45 of 2015)***

**1. ALI ZULEKHA**

**2. ALI ABSY NASSIR.....APPLICANTS**

**=VRS=**

**1. REHEMA SHUNGU also known as**

**REHEMA KAHINDI KARISA**

**2. DAVID MURIGI WAMAI**

**3. ANTHONY KOSGEI.....RESPONDENTS**

**R U L I N G**

The Applications dated 6<sup>th</sup> August 2015 seeks orders of stay of execution in the respective lower court proceedings as well as leave to file appeal out of time. Parties herein agreed to determine the applications by way of written submissions. The applications are similar and seek the same orders. The applicants had filed similar application namely miscellaneous application numbers 44 to 50 of 2015 through the firm of Kairu & Mccourt Advocates but the same were withdrawn by consent.

The contention of the applicant is that there was a road traffic accident on 22<sup>nd</sup> September 2009 involving motor vehicle registration numbers KBA 981 Y a Canter and KBB 447G, a matatu. The trial court apportioned liability at 70:30% between the two vehicle. The applicants were meant to bare the larger portion. Judgment was delivered on 23<sup>rd</sup> July 2014 but the applications were filed on 10<sup>th</sup> August 2015. The applicants contend that they applied for certified copies of the Judgment on 24<sup>th</sup> July 2014 soon after the delivery of the judgment. However, the court delayed the processing of the proceedings and judgment. It is submitted that the delay can be purportedly explained as there was another advocate on record and the proceedings were not processed on time.

It is further submitted that the apportionment of liability was erroneous and that the amount of damage awarded to each accident victim is excessive. The applicants settled most of the claims due to threat of execution. However, the applicants would still wish to pursue their respective appeals.

On his part, counsel for the respondents contend tht the appeals are an afterthought. The applicants

satisfied the decree and there was no intention to appeal. No certificate of delay has been annexed to show that there was delay on the part of the court in supplying the proceedings. It is further submitted that no notice of change of advocates has been filed as the applicants were initially represented by a different firm of advocates. There was no threat of execution and the applications fully settled their respective share of the judgment. The orders of stay of execution will not serve any purpose as the decretal sum has been fully paid. The judgment was delivered on 17<sup>th</sup> September 2014 and the letter requesting proceedings of 24<sup>th</sup> July 2014 is not valid as it relates to a different suit namely CMCC NO. 76 of 2010; there is a delay of about one year and such delay is inordinate.

The pleadings show that indeed the applicant settled the decretal sums. There is no evidence that there was threat of execution. The prayers for stay of execution can therefore not be granted. There is nothing to stay as the decree was fully satisfied. The only prayer for the court's consideration is the one seeking leave to appeal out of time. The lower court judgment seems to have been delivered on 17<sup>th</sup> September 2014. The current applications were filed on 10<sup>th</sup> August 2015. This is a period of about eleven (11) months. The proceedings of the trial court have not been annexed to show when the same were certified. It is also clear that the applicant did not comply with the requirement that after judgment is delivered, any changes of advocates has to follow the correct lawful procedure. No consent between the firm of Kairu & Mccourt and Kithi & Co. Advocates was filed.

The record shows that on 14<sup>th</sup> September 2015, Counsel for both parties recorded a consent whereby the similar applications filed by the firm of Kairu & Mccourt Advocates were marked as withdrawn. Parties agreed to deal with the applications filed by the firm of Kithi & Co. Advocates. I do find that despite the deficiency in following the correct change of advocates procedure, the current applications are lawfully before the court due to the consent. The consent brought the firm of Kithi & Co. Advocates on board.

The decretal sum has been settled. The applicant still would like to pursue appeal against the decision of the trial court. It is contended that the decision to satisfy the decretal sums was intended to avoid execution. A proper way of avoiding execution would have been paying the money to court or into a joint account of both advocates while pursuing the intended appeals.

I would equate the applicant's zeal to pursue appeal to that of an accused person who is convicted and serve his/her sentence but would like to still pursue an appeal. This normally happens when the appeal take too long to be determined or in case where the accused is sentenced to serve non-custodial sentence. I do find that the payment of the decretal sums should not bar the applicant from pursuing their right of appeal.

The next issue relates to the long delay in filing the applications. The applicants acknowledged that the delay is quite long. No certificate of delay has been annexed should the court allow the applications, the applicant will have to prove that there was delay on the part of the court. I do find that the absence of the certificate of delay cannot be a good reason to dismiss the application at this stage.

The dispute is attributed to a road traffic accident. The applicants are entitled to question the decision of the lower court with respect to both assessment of liability and quantum. The intended appeals are not frivolous. I do find that the applications are merited and the same is hereby allowed. The applicants to file and serve their memorandum of appeal within fourteen (14) days hereof; thereafter the applicants to file and serve the record of appeal within ninety (90) days hereof. Due to the delay in filing the applications, the applicants are hereby condemned to meet the costs of the applications. For the avoidance of doubt, the application shall be treated as one for purposes of costs.

Dated, signed and delivered at Malindi this 26<sup>th</sup> day of **November** 2015.

**SAID J. CHITEMBWE**

**JUDGE**