



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**MISCELLANEOUS APPLICATION NO 440 OF 2013**

1. **STEPHEN M KIMANI**  
2. **RUTH NJERI MATHU.....APPELLANTS**

**VERSUS**

**STEPHEN RURIGI NJOROGE.....RESPONDENT**

**RULING**

1. The Applicants seek by **notice of motion dated 24<sup>th</sup> April 2013** leave to lodge appeal out of time against the decree of the lower court passed on 4<sup>th</sup> December 2012. It is a money decree (damages of KShs 150,000/00 plus costs and interest awarded). The intended appeal is against quantum only.

2. The Applicants also seek stay of execution of decree pending disposal of the intended appeal. On 2<sup>nd</sup> May 2013 interim stay was granted by consent subject to the Applicants depositing in court within 30 days the decretal amount (KShs 202,000/00 for purposes of the order). They fulfilled that condition.

3. There is a supporting affidavit sworn by 2<sup>nd</sup> Applicant. She depones, *inter alia* –

(i) That she was not aware of the judgment entered against her until she was served with proclamation dated 19<sup>th</sup> April 2012.

(ii) That summons to enter appearance had been served directly upon the 2<sup>nd</sup> Applicant's insurers who appointed their own counsel to act in the matter. The 2<sup>nd</sup> Defendant went to the insurer's advocates after the proclamation and then reliably leant of the judgment.

4. The Respondent opposed the application by **replying affidavit filed on 15<sup>th</sup> May 2013**. The grounds of opposition emerging therefrom include -

(i) That the Respondent's advocates wrote to the Applicants' advocates on 19<sup>th</sup> December 2012 informing them of the judgment delivered on 4<sup>th</sup> December 2012 and demanding payment.

(ii) That the 2<sup>nd</sup> Applicant is therefore not candid about when she leant of the

judgment.

(iii) That the Applicants' advocates gave the impression that their client wanted to pay the decretal sum.

(iv) That the application is only an afterthought intended to delay justice.

5. I have considered the submissions of the learned counsels appearing. No authorities were cited.

6. The Applicants have an undoubted right of appeal which they want to exercise. I accept the 2<sup>nd</sup> Applicant's plea that the advocates acting in the matter on the Applicants' behalf were instructed by the insurance company; their communication regarding entry of judgment and related matters were most likely to the insurance company and not to the Applicants. It is therefore likely that the Applicants did not know about entry of judgment until the attachment by proclamation.

7. In the circumstances of this case I am thus satisfied that there has not been unreasonable delay in applying and there is good cause why appeal was not lodged in time.

8. Interim stay was granted upon a condition that the Applicants duly met. The Respondent's decree is secure. The court was informed that the intended appeal will be against quantum only. There is thus no reason why the Respondent should be kept out of the entire decree pending appeal.

9. I will in the circumstances order as follows –

(a) The Applicants are hereby granted leave to appeal against quantum only. Memorandum of appeal shall be filed within fourteen (14) days of delivery of this ruling.

(b) There shall be stay of execution of decree pending disposal of the intended appeal upon the following conditions –

(i) Out of the sum of KShs 202,000/00 deposited in court by the Applicants on 31<sup>st</sup> May 2013 the sum of KShs 100,000/00 shall be released to the Respondent (through his advocates on record) in partial payment of the decretal sum.

(ii) The balance of the deposit in the sum of KShs 102,000/00 shall remain deposited as security pending disposal of the intended appeal.

(c) Parties shall have liberty to apply.

10. Costs of the application shall be in the intended appeal. In the event that no appeal is filed the Respondent shall have the costs.

11. Those will be the orders of the court.

**DATED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JUNE 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JUNE 2013**