



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC. CIVIL APPLICATION NO.70 OF 2011

CHAIRMAN B.O.G. CHAVAKALI HIGH SCHOOL1ST DEFENDANT

DISHON MATSIGI SILINGI2ND DEFENDANT

V E R S U S

JACINTA XAVIERS (suing as the Administrator of

Of the estate of the late PETER NGUSALE MOTOKA.....RESPONDENT

MARY MMBONE MUTOKAINTERESTED PARTY

R U L I N G

On the 21/8/2004 a road traffic accident occurred along Tambach-Kabarnet road at 2.40 p.m. involving motor vehicle registration number KAR 090 L Isuzu bus. One of the victims of the accident was PETER MUTOKA who suffered fatal injuries. The deceased's wife filed this suit and the same was fully heard and judgment delivered on 4th May 2011. The plaintiff was awarded a sum of KShs.1,600,000/= plus costs.

By a notice of motion dated 18th November 2011 the applicant are seeking to be granted leave to file and lodge an appeal out of time. They are also seeking an injunction restraining the respondents from executing the decree in Kakamega CMCC NO.198/2005 pending the hearing and determination of the intended appeal. The application is supported by the affidavit of Mr. Aggrey Shitsama sworn on 18th November 2011.

The main contentions raised in the application and in the submission of the applicants' counsel, Mr. Osango is that the applicants applied for certified copies of the proceedings and paid for them on 25/5/2011. The proceedings were supplied by the court on 10/11/2011. The 1st applicant had to convene a full Board meeting to decide on the matter and the meeting was held on 8th October 2011. Counsel for the applicants argued that the intended appeal is arguable and that the delay in filing the appeal has been explained.

Mrs. Muleshe, counsel for the respondent opposed the application and relied on the respondent's replying affidavit sworn on 23rd January 2012 and the written submissions. The respondent contend that the applicants are guilty of laches and have failed to satisfactorily explain why the appeal was not filed on time.

I have perused the pleadings of the trial court as well as annexures to the appellant's affidavit. I have also perused the written submissions of counsels and the authorities cited therein, I do hold that the applicants have satisfactorily explained the delay in not filing the appeal within time. It is not the intention of the court to shut out parties who feel aggrieved from pursuing their rights through appeal. I note from the pleadings that the applicants did not call any evidence. I will grant prayer one (1) of the application dated 18/11/2011 as prayed.

As for prayer two (2) for injunction, I do not see the reason as to why the applicants are seeking an injunction instead of a stay of execution. However, having granted prayer one above, it will be futile to allow the applicants to pursue their appeal while on the other hand the respondent is executing the decree. While it is the applicants' right to pursue their appeal, it is equally the respondent's right to enjoy the fruits of her judgment. Although the 1st applicant is a school that is not likely to close shop and disappear before the appeal is heard, the respondent has to feel secure that upon the finalization of the appeal and if the same is held in her favour, she would quickly realize the fruits of her judgment. To this end, I do order that the respondent deposit the decretal sum in a joint account of the firms of Phoebe Munihi Muleshe and Shitsama Advocates. The decretal sum to be deposited within sixty (60) days hereof. The account to be opened in one of the reputable Kenyan Banks.

In the end the application to file appeal out of time is allowed. The applicants to file their appeal within fourteen (14) days hereof. The applicants to deposit the decretal sum as ordered herein within sixty (60) days failing which the respondent shall be at liberty to execute.

Delivered, dated and signed at Kakamega this 28th day of March 2012

SAID J. CHITEMBWE

J U D G E