



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Miscellaneous Civil Application 46 of 2012

WAWERU JANE.....1ST APPLICANT

JOSEPH WAWERU MUCHINE.....2ND APPLICANT

VERSUS

JAMES MWANGI GATURO

(Suing as the legal representatives of the estate of

SIMON KIMARU MWANGI.....RESPONDENT

RULING

By the Notice of Motion dated 21/3/2012, the applicants Waweru Jane and Joseph Waweru Muchine seek the exercise of this court's discretion to enlarge time and grant the applicant leave to file and serve a memorandum of appeal out of time in terms of the draft memorandum of appeal filed herein. The applicants also pray that there be a stay of the decree in Nyahururu CMCC 250/2011 pending hearing and determination of the intended appeal. The application is supported by grounds found in the body of the application and an affidavit sworn by Lilian Munyiri, the Legal Officer of Gateway Insurance Co. Ltd. Who were the insurers of the applicants. The judgment in the lower court is said to have been delivered on 11/1/2012, in absence of the parties or the applicant's advocate; that the applicants learnt of the judgment when they were served with notice of taxation on 14/3/2012, by the respondent's advocates, with a bill of costs dated 24/2/2012 (LM2). After the judgment was read on 11/1/2012, the applicants' advocates wrote to the respondent's advocates on 17/3/12 informing them of the judgment. This application is brought by the insurers under the principle of subrogation because the applicants are dissatisfied with the judgment and wish to appeal. It is the applicants' contention that the delay in failing to appeal was not deliberate; there has not been inordinate delay in bringing this application; that the intended appeal raises pertinent issues of law and fact; that the respondent will not suffer loss that cannot

be compensated in costs and the applicants are willing to give security by depositing an insurance bond.

For the court to enlarge time within which to file an appeal it is upon the applicant to demonstrate that there is a good and sufficient cause to do so. The explanation that the applicant gives for the delay is that the applicant was not aware of the date for judgment of the court. However, the applicant has not bothered to exhibit the judgment of the trial court but instead has filed the plaintiff's bill of costs. The court cannot say with certainty when the judgment was delivered.

Although the applicant seeks an order of stay pending appeal, he has not moved the court under the relevant provisions of law i.e. **Order 42** of the **Civil Procedure Rules**. For the court to grant an order of stay of execution the applicant has to satisfy the following:-

1. That substantial loss will result if an order of stay is not granted;
2. That the application is made without delay;
3. Security for due performance of the decree or order.

As to whether the application was brought timeously, for unknown reason the applicant did not find it important to exhibit the judgment of the lower court. The court cannot confirm when the judgment was delivered. Further, without the judgment appealed from this court cannot establish whether the applicant will suffer irreparably if the order of stay is not granted. The applicant has not demonstrated that the respondent is a man of straw and will not be able to repay the decretal sum in the event the appeal succeeds. Although the applicant is willing to provide security for due performance of the decree, yet he has not satisfied the other requirements. The applicant has right to appeal against an order of the court and the power to extend time for filing appeal is discretionary. I exercise this court's discretion and allow the applicant to file his appeal out of time. The said appeal should be filed and served within 7 days hereof in default the order will lapse. As regards the prayer of stay of execution the same is declined for the above stated reasons.

The application is hereby declined and dismissed.

DATED and DELIVERED this 8th day of June, 2012.

R.P.V. WENDOH
JUDGE

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PRESENT:

Serling holding brief for Mr. Wangombe for the applicants

N/A for the respondent
Kennedy – Court Clerk