



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 341 of 2008**

**JAMES KAGAI KANGARU.....1<sup>ST</sup> APPELLANT**

**AIC KIJABE STATION MANAGEMENT...2<sup>ND</sup> APPELLANT**

**VERSUS**

**SAMUEL NDUNGU CHEGE.....RESPONDENT**

**R U L I N G**

James Kagai Kangaru and AIC Kijabe Station Management, (hereinafter referred to as 1<sup>st</sup> and 2<sup>nd</sup> appellants), seek orders for leave to file appeal out of time and to have the memorandum of appeal filed on 25<sup>th</sup> June, 2008 deemed to have been properly filed.

The 1<sup>st</sup> and 2<sup>nd</sup> appellants also seek an order for stay of execution of the judgment of the Principal Magistrate, delivered on 8<sup>th</sup> May, 2008 in Limuru Resident Magistrate's Court Civil Case No. 88 of 2007, pending the hearing and determination of the intended appeal.

The 1<sup>st</sup> appellant has sworn an affidavit in which he explains that the delay in filing the appeal in time arose because the 1<sup>st</sup> appellant had to consult with his insurers. It is contended that Samuel Ndungu Chege, the respondent herein is not a man of means, to be able to refund the decretal sum should the appeal be successful.

Pursuant to a court order issued on 26<sup>th</sup> June, 2008, the appellant has deposited a sum of Kshs.400,000/= into court as security. Counsel for the appellants relied on the case of *Musalia Mwenesi Advocate Vs Kan General Supplies Ltd & 3 Others High Court Misc. application No. 56 of 2006* (Milimani). He submitted that the appellant had complied with the principles for granting an order of stay of execution as set out under Order XLI Rule 4(2) of the Civil Procedure Rules.

For the respondent it was submitted that no sufficient cause has been shown for granting leave to file the appeal out of time. It was maintained that there was no evidence of any consultation or correspondence between the applicant and his insurers. It was submitted that the appellant's application

was incompetent as it was premised on an incompetent appeal, the appeal having been filed without leave of the court. It was maintained that the court has no powers to grant orders for stay of execution pending an intended appeal.

The court was further urged if inclined to grant the application to order the deposited amount released to the respondent and the balance of the decretal sum deposited in court in view of the fact that, liability was agreed upon by consent and the appeal is therefore against the quantum of damages only.

It is evident that the appellant was rather lax in pursuing his appeal and appears only to have been spurred into action by the process of execution which was initiated by the respondent. Nonetheless a period of 16 days delay is not so inordinate as to justify shutting out the appellant from pursuing his appeal. The explanation given for the delay although unsupported by any evidence is not really unbelievable or unreasonable.

It is true that the appeal as filed was defective as no leave had been given by the time of filing the appeal. That however is precisely the reason why the appellant's first prayer is leave and the 2<sup>nd</sup> prayer is to regularize the appeal by having the same deemed as properly filed. Once these prayers are granted, the appeal is no longer an intended appeal and the court can proceed to consider the prayer for stay of execution pending appeal. The respondent has not controverted the appellant's allegation that he is not a person of means and that he may have difficulties in refunding the decretal sum should that become necessary.

However, I take note of the fact that judgment on liability was entered by consent of both parties. The fact that the appellant disputes the quantum awarded is not sufficient reason to keep the respondent away from the fruits of his judgment. Accordingly, I make the following orders: -

- (1) Leave shall issue to the appellants to file their appeal out of time.
- (2) The memorandum of appeal filed on 25<sup>th</sup> June, 2008 shall be deemed properly filed.
- (3) An order for stay of execution pending appeal shall issue on the following conditions: -
  - (a) That the sum of Kshs.400,000/= deposited in court by the appellant shall be released forthwith to the respondent.
  - (b) That the appellant shall deposit the balance of the decretal amount into an interest earning account with a reputable financial institution in the joint names of the parties' advocates within 30 days from the date hereof.
  - (c) That the appellant shall file a record of appeal within 90 days from the date hereof and take all necessary action to facilitate the speedy disposal of the appeal.
  - (d) That the order for stay of execution pending appeal shall lapse 12 months from the date hereof unless otherwise extended by the court.

Orders Accordingly.

**Dated and delivered this 28<sup>th</sup> day of July, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Mwanyala for the appellant

Ngare for the respondent