



REPUBLIC OF KENYA



KENYA LAW
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**Mwaura v Nyale (Miscellaneous Application 71 of 2021)
[2023] KEHC 17523 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION 71 OF 2021**

SM GITHINJI, J

MAY 18, 2023

BETWEEN

SIMON MWAURA INTENDED APPELLANT

AND

AGNESS UMAZI NYALE RESPONDENT

RULING

Background

- 1 For determination is the applicant's notice of motion dated October 30, 2021 seeking the following orders;
 1. Spent
 2. Spent
 3. Spent
 4. That this honourable court be pleased to grant leave to the applicants/intended appellants to appeal out of time against the judgment of Honourable Stephen K. Ngii Principal Magistrate at the Chief Magistrate's Court Mariakani in CMCC No 475 of 2017 dated March 10, 2021.
 5. That the annexed memorandum of appeal be deemed to be properly on record.
 6. That this honourable court be pleased to stay further execution and proceedings of the judgment done *vide* the decree and certificate of costs emanating from Mariakani CMCC No 475 of 2017 pending the hearing and determination of the intended appeal herein.
 7. That this honourable court allow the applicant/intended appellant to furnish the court with security in the form of a bank guarantee from DTB Bank.



8. That costs of this application abide by the outcome of the intended appeal.
- 2 The application is supported by the affidavit of one Biasha Khalifa advocate for the appellant who states that judgment was delivered in respect of the parties herein in the trial court on March 10, 2021 where the applicant was ordered to pay the respondent general damages for Kshs 1,500,000 plus costs and interests of the suit.
- 3 She stated that the applicant being dissatisfied with the said judgment instructed her to file an appeal.
- 4 She further states that the decree entered is of a substantial sum of money and the applicants are apprehensive that if the respondent is paid and the appeal is successful, they may not be able to recover the same from the respondent whose means are unknown.
- 5 Further, she states that the applicants' insurance company is ready and willing to furnish security in the form of a Bank guarantee from DTB Bank. And that the respondent will not suffer any prejudice or damage that is not capable of being compensated by way of costs. Further the applicants stand to suffer prejudice and irreparable substantial loss.
- 6 She further contends that there would be no prejudice occasioned to the respondent in the event the application is allowed
- 7 The respondent opposed the application *vide* a replying affidavit dated October 13, 2021 and states that, the facts made by the applicant are speculative as there is no execution intended or in progress. Further, the application has been brought 7 months after delivery of judgment hence inordinately delayed and the respondent stands to suffer prejudice if the application is allowed as she still requires further medical care.

Submissions, Analysis and Determination

- 8 I have evaluated the submissions by the parties of which I do not wish to reproduce here. The issues that arise for determination are;
1. Whether the applicant should be granted leave to appeal out of time.
 2. Whether the court should grant stay of execution pending appeal.
- 9 Section 79G of the [Civil Procedure Act](#) provides that:
- “Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
- Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
- 10 An applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in *Feroz Begum Qureshi and another v Maganbhai Patel and others* [1964] EA 633, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in *Daphne Parry v Murray Alexander Carson* [1963] EA 546 that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay,



the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

11 As to the principles to be considered in exercising the discretion on whether or not to enlarge time, in *First American Bank of Kenya Ltd v Gulab P Shah & 2 others* Nairobi (Milimani) HCCC No 2255 of 2000 [2002] 1 EA 65 the court set out the factors as;

- i. the explanation if any for the delay;
- ii. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
- iii. Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favor of the applicant.

12 In an application for extension of time, where the court is being asked to exercise discretion, there must be some sound grounds before the court to enable its discretion to be favorably exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favor and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman v Kumarasamy* [1964] 3 All ER 933; *Savill v Southend Health Authority* [1995] 1 WLR 1254 at 1259.

13 The instant application was filed on November 1, 2021 after judgment had been delivered on March 10, 2021. In essence the 30 days allowed for appeal lapsed on April 10, 2021. This application was brought approximately six months after the prescribed timeline. The explanation given by the applicants for the delay is due to inadvertence by their advocate. In my view, the delay is inordinate; however, I find that this was not due to reasons by the applicant but inadvertence of his advocate. There is no prejudice that would be suffered by the respondent that would not be compensated by way of damages.

For the above reasons, I find and hold that the prayer for leave to appeal out of time is merited. The same is allowed and the applicants are granted seven days from the date of this order to file and serve the respondents with the memorandum of appeal together with the order herein granting leave.

14 On the prayer for stay of execution of judgment or decree of the trial court pending the hearing and determination of the intended appeal, order 42 rule 6(2) of the *Civil Procedure Rules* provides that:

“No order for stay of execution shall be made under sub rule (1) unless-

- a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.



15 This court enjoys discretion to grant stay of execution of decree pending appeal. In *JMM v PM* [2018] eKLR it was stated:

“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favor without just cause.”

16 Order 42 rule 6 of the *Civil Procedure Rules* grants this court as an appellate court, as well as the trial court wide discretion to stay execution of decrees pending appeal. In the present case, leave to appeal out of time has been granted and, from the draft memorandum of appeal, it is vivid that it is not frivolous. It raises triable issues of whether or not the trial magistrate misdirected himself in determining liability at 100% and in application of the principal of awarding damages. Indeed, the decree is a money decree and therefore the question of the appeal being rendered nugatory if successful does not arise as it was not shown that the respondent (decree holder) is so impecunious that he cannot refund the decretal sum awarded if paid out to him. The applicant has failed to demonstrate that he will suffer irreparable loss in the event that stay is not granted. He has offered security for the due performance of decree in the form of a bank guarantee.

17 The foregoing notwithstanding, it is also incumbent upon the respondent (decree holder) to demonstrate that should the appeal be successful, she is in a position to refund the decretal sum paid to her, of which she hasn't.

18 For the above reasons, I exercise discretion and grant stay of execution of judgment /decree in Mariakani CMCC No 475 of 2017 until the intended appeal is filed, heard and determined, upon the applicant depositing in a joint interest earning account the entire decretal sum awarded in Mariakani CMCC No 475 of 2017 within the next 30 days of this ruling in default the granted stay lapses.

19 Costs of this application which is assessed at Kshs 20,000 shall be paid by the applicant to the respondent within 15 days from today, in default the respondent be at liberty to execute for recovery of the same.

20 It is so ordered.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 18TH DAY OF MAY, 2022.

S.M. GITHINJI

JUDGE

In the Presence of; -

Kimondo Gachoka advocates for the Applicant absent

Mr Katete holding brief for Grace Okumu who's for the Respondent

