



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**MISC. CIVIL APPLICATION NO. E017 OF 2021**

**DENNIS MUGAMBI MUTHURI.....1<sup>ST</sup> APPLICANT**

**KHILJI ENTERPRISES LIMITED.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**GEORGE NDEGWA MUIRURI**

**(Suing as Personal Representative of the Estate of the late**

**GEOFFREY MUIRURI NDEGWA – DECEASED).....RESPONDENT**

**R U L I N G**

1. On 25<sup>th</sup> August 2021, judgment was entered in Chuka CMCC No. 74 of 2018 in favour of the Plaintiff/Respondent against the Defendants/Applicants for a total award of Kshs. 3,221,700/= in General Damages. The Applicants being dissatisfied with the said judgment intend to appeal against the same but are out of the statutory timelines.

2. Before this court is the Notice of Motion application dated 4<sup>th</sup> October 2021 brought under certificate of urgency. The Applicants are seeking for the following orders, *inter alia*:

i. Leave be granted to the Applicants herein to lodge an appeal against the entire judgment and decree in Chuka CMCC No. 74 of 2018.

ii. THAT this honourable court be pleased to stay execution of the decree in Chuka CMCC No. 74 of 2018 pending the hearing and determination of the intended appeal.

iii. THAT this court does allow the Applicant to furnish the court with security in the form of a bank guarantee from the DTB Bank.

3. The application is grounded mainly on the basis that the Applicants were aggrieved by the judgment of the subordinate court and that the delay in filing the appeal within the statutory timelines was occasioned by the unavailability of a copy of the judgment. It was further pleaded that the Applicants are likely to suffer substantial loss if stay of execution and leave to appeal out of time is not granted.

4. In response to the Application, the Respondent filed a Replying Affidavit sworn by George Ndegwa Muiruri on 25<sup>th</sup> October 2021. The Respondent depones that the Application and the intended appeal are merely designed to frustrate realization of the fruits of the judgment in his favour and that the intended appeal as contained in the attached draft does not demonstrate any probability of success.

5. The Application was canvassed by way of written submissions. The applicants filed their written submission on 22<sup>nd</sup> November 2021 while the Respondent filed his written submissions on 8<sup>th</sup> December 2021. Below is a summary of the parties' rival submissions.

**Applicants' Submissions**

6. It was the Applicants' submission that the intended appeal is arguable and that an appellant should not be denied an opportunity to prosecute his appeal or driven from the judgment seat unless the appeal is unarguable.

7. According to the Applicants, the delay in filing the Memorandum of Appeal was occasioned by the fact that the Applicants were not able

to obtain a copy of the judgment immediately in order to consider and deliberate on the same. Further, it was the Applicants contention that the time to lodge the appeal lapse on 25<sup>th</sup> September 2021 which was on a Saturday and due to system failure at the registry, the same could not be assessed soon enough. It was thus their submission that they had demonstrated a good and sufficient cause for not filing the appeal on time and as such they should be granted leave to file their appeal out of time.

8. On the prayer for stay of execution, it was the Applicants' submission that the award of the total sum of Kshs. 3,221,700/= plus costs and interests is a substantial sum and in the event the Respondent is unable to repay the decretal sum, the appeal will be rendered nugatory and the Applicants will be exposed to irreparable damage as the subsequent decree would be no more than a paper decree.

9. On the issue of there being a delay in filing the present application, it was the Applicants' submission there was no inordinate or unreasonable delay on the part of the Applicants in filing this Application.

10. Finally, the Applicants submitted that they were reasonable security by way of a bank guarantee with DTB Bank. As such it was their prayer that they be granted leave to file the Memorandum of Appeal out of time and that an order of stay of execution be issued as prayed in the present Application. The Applicants also prayed that the costs of the Application abide by the outcome of the Appeal.

### **Respondent's Submission**

11. On his part, the Respondent submitted that the reason given by the Applicants that the judgment of the lower court was not available is unmerited as the judgment was read in the presence of counsel for all the parties and the same was available for collection on the very day of the judgment. The Respondent further submitted that the Applicants' reason for the delay in filing the appeal was not backed by evidence as there was no letter that the Applicants adduced demonstrating that they had requested for the judgment.

12. On the issue of the chances of the appeal succeeding, the Respondent submitted that the Applicants failure to adduce evidence in their defence and provide the lower court with their submissions on quantum makes the intended appeal a technical appeal bereft of any question of substantive merit of the lower court's judgment.

13. As regards the prayer for stay of execution, it was the Respondent's submission that the Applicants have failed to demonstrate any substantial loss that they are likely to suffer if the decree of the lower court is satisfied. According to the Respondent, he has a legitimate expectation of fruition of his judgment since 2018 and that this court should ensure that that legitimate expectation is achieved by declining the Application.

### **Issues for determination**

14. I have considered the application, the affidavits in support of and opposition of the application as well as the rival submissions of the parties. In my view, the main issues for determination by this court are:

- i. Whether the Applicants should be granted leave to lodge an appeal out of time against the entire judgment and decree in Chuka CMCC No. 74 of 2018.
- ii. Whether the execution of the decree in Chuka CMCC No. 74 of 2018 should be stayed pending the hearing and determination of the intended appeal.
- iii. Whether the Applicants should be allowed to furnish this court with security in the form of a bank guarantee from the DTB Bank.
- iv. Who should bear the costs of the application?

### **Analysis**

#### **A. Filing an appeal out of time**

15. **Section 79G of the Civil Procedure Act** deals with the time for filing appeals from subordinate courts and states:

***“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.”***

16. In **Paul Musili Wambua v Attorney General & 2 others [2015] eKLR**, the Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated the following;

***“...it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the***

application is granted, the degree of prejudice to the respondent if the application is granted.”

17. Was the present application filed without unreasonable delay? Judgment in the lower court was delivered on 25<sup>th</sup> August 2021. The statutory timeline for filing the appeal lapsed on 25<sup>th</sup> September 2021 and this application was filed on 5<sup>th</sup> October 2021. The delay for filing the application was for 10 days. In my view, such a delay cannot be said to be inordinate. The Applicants have also explained that the 10 days’ delay in filing the appeal was occasioned by the time it took to obtain a copy of the judgment. Given the facts of this case, I opine that the Applicants have had a good and sufficient cause for not filing the appeal in time.

#### **B. Stay of Execution**

18. The Applicants have sought stay of execution pending hearing and determination of the intended appeal.

19. **Order 42 Rule 6 Civil Procedure Rules (2010)** is the foundation of the jurisdiction of the Court in granting stay of execution and the provision specifies the circumstances and or conditions under which either the court or an appellate court may order Stay of execution of a decree or order pending an appeal. **Order 42 Rule 6** provides:-

*“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(2) No order for stay of execution shall be made under subrule (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.”*

20. These are conditions upon which the Applicant must satisfy in order to be granted the orders of stay of execution.

21. This is an application that invokes the discretionary powers of the court. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

**“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**

**2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**

**3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**

**4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**

**5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”**

22. In the words of the Court of Appeal, substantial loss is the corner stone for the grant of stay. The Applicants herein have pleaded that they are likely to suffer substantial loss unless stay of execution is granted. Indeed, an award of Kshs. 3,221,700/= plus costs and interests is a substantial sum and in the event the Respondent is unable to repay the decretal sum, the appeal will be rendered nugatory. Furthermore, the Applicants have disclosed that they are ready and willing to furnish this court with security in the form of a bank guarantee from the DTB Bank.

#### **Conclusion**

23. In my view, therefore, the Applicants have satisfied the the threshold for the grant of leave to appeal out of time and for stay of execution. I opine that the application dated 4<sup>th</sup> October 2021 is merited and I allow it as prayed.

Costs to abide the outcome of the appeal.

I direct that the applicant executes a bank guarantee in the decretal sum as security within 21 days from today.

**Dated, signed and delivered at Chuka this 3<sup>rd</sup> day of February 2022.**

**L.W. GITARI**

**JUDGE**

**3/2/2022**