



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISC APPLICATION NO. 63 OF 2021

ENA INVESTMENT LIMITED T/A ENA COACH

CHARLES OMBETE OSORE.....INTENDED APPELLANTS/APPLICANTS

VERSUS

MUSA MURAMBI NYAMAWI.....RESPONDENT

Coram: Hon. Justice S.M Githinji

Kimondo Gachoka advocates for the applicant

Oluga advocate for the respondent

R U L I N G

The Applicants brought the instant application vide a Notice of Motion dated 27th august 2021 seeking the following orders;

1. Spent

2. Spent

3. That this honourable court be pleased to grant leave to the Applicants/Intended Appellants to appeal out of time against the judgment of Honourable N.C Adalo, Senior Resident Magistrate at Mariakani in SRMCC No. 303 of 2019 delivered on 22.06.2021.

4. That the annexed memorandum of appeal deemed to be properly on record.

5. Spent.

6. That the warrants of attachment and/or any consequent proclamation be stayed pending hearing and determination of the application seeking stay pending appeal out of time and/or any consequent proclamation be declared illegal, unlawful, null, and void of all legal consequences.

7. Spent

8. That this honourable court be pleased to stay further execution and proceedings of the judgment done vide the decree issued by honourable N. C Adalo on 22nd June 2021 pending the hearing and determination of the intended appeal herein.

9. That this honourable Court do allow the applicant to furnish the court with the security in the form of a Bank guarantee from DTB bank.

10. Spent

11. That the costs of the application abide by the outcome of the intended appeal.

12. That this honourable court be pleased to issue any other order and /or direction it deem fit to grant in the circumstances.

The application is supported by the affidavit of one Biasha Khalifa advocate for the appellants who states that judgment was delivered in respect of the parties herein in the trial court on 22.06.2021 where liability was apportioned against the intended appellants at 80% and the respondent was awarded a decretal sum of Kshs. 3,803,061.75.

She states that the applicants being dissatisfied with the said judgment instructed her to file an appeal.

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.

She as well 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 if the sought orders are not granted.

She alleges that the warrants of execution are unlawful as the applicants were not served with any decree and certificate of costs in SRMCC No. 303 of 2019- Mariakani.

The respondent opposes the application vide a replying affidavit dated 13th October 2021 and states that, the application has no basis since the applicants have not met the threshold for granting the orders sought. That there can be no stay of execution where the appeal has not been filed. The respondent further states that the applicants have not given reason why they did not file their appeal within time and in any case the intended appeal does not have high chances of success.

Submissions by the Parties

The Applicants' Submissions

As to whether the advocate is competent to swear the supporting affidavit, the applicants submit that the advocate had instructions and knowledge of facts of the matter. They relied on the authority of *John Muli & Another V Thomas Nzioka Wambua & Another (Suing as Administrators of the Estate of Michael Makau Nzioka (Deceased) [2021] eKLR.*

On whether the warrants of attachments issued are lawful, the applicants submit that there was no notice of entry of judgment or any communication post-delivery of the judgment and warrants of execution are null in the absence of a decree. They relied on the authority of *Rubo Kimnetich Cheruiyot v Peter Kiprop Rotich [2006] eKLR.*

On whether the orders of stay sought should be granted, the applicants submit that stay of execution pending appeal is necessary to safeguard the Applicant/ Intended appellants' right of appeal while balancing the weight of the right of the Respondent enjoying the fruits of judgment delivered by the lower court.

That in balancing the competing interests, the court should consider the following; -

a) Whether the appeal has merit and a high chance of success. To this the applicants submit that the grounds of appeal raised are legal grounds which require to be litigated upon in a full appeal trial.

b) Whether substantial loss would be occasioned by refusal to grant stay; to this they submit that they believe the intended appeal has a high chance of success and are apprehensive that the respondent would not be in a position to refund the sum if paid to him. They cited the authority of Mukoma vs Abuoga.

c) On whether the applicants are ready and willing to furnish security; to this, they submit that under Order 42 Rule 6 (2) a, the applicants/intended appellants do provide for security of costs. They submit that they are willing to provide such security in the form of a bank guarantee.

d) On whether the application was lodged without unreasonable delay, they submit that that there was a 4 days delay occasioned by inadvertence on part of the advocate on record and the said delay was not intentional nor inordinate to be inexcusable.

The Respondents Submissions

The respondent submits that the applicant did not appeal against the subject judgment within a period of thirty days as per the provisions of Section 79 of the Civil Procedure Act. That further, it is upon the discretion of the court to grant leave to appeal out of time and the factors to be considered when deciding on whether or not to grant leave were discussed in the case of *Nicholas Kiptoo Arap Korir Salat Vs. the Independent Electoral and Boundaries Commission & 7 others [2014] eKLR.*

The respondent further submits that the applicants have not given a reason why the appeal was not filed within the stipulated time but rather the applicants had no intention to appeal because they had proposed to pay the decretal sum by six equal instalments. They urge the court not to exercise its discretion in favor of the Applicants.

On whether the court should grant stay of execution, the respondent submits that having demonstrated that the prayer for leave to appeal out of time is not deserved by the applicants, then it follows naturally that the application for stay would have no appeal upon which it must be pegged.

He submits that the relief for stay pending appeal is governed by Order 42 Rule 6 (2) and further by grounds set out in the case of **Antoine Ndiaye V African Virtual University HCCC No. 422 of 2006**.

He further submits that the applicants have not demonstrated how they stand to suffer substantial loss in the event the appeal succeeds and further they have not demonstrated the respondent's inability to pay back the decretal sum should the appeal succeed.

On the issue of security, he submits that the security offered by the applicant should be one that is enforceable against them and as such the bank guarantee offered by the applicants is not binding as it is between Diamond Trust Bank and Directline Assurance Company Limited who are not parties to the suit.

On whether the proclamation should be declared illegal, the respondent submits that the proclamation can only be challenged at the lower court and not in a miscellaneous appeal seeking leave to appeal out of time.

Analysis and determination

Issues for determination

- 1. Whether the applicant should be granted leave to appeal out of time.**
- 2. Whether the court should grant stay of execution pending appeal**

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.”

Therefore, 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 delay, since as was held in **Feroz Begum Qureshi and Another vs. 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 vs. 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.

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 vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (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.

In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so 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 vs. Cumarasamy [1964] 3 All ER 933; Savill vs. Southend Health Authority [1995] 1 WLR 1254 at 1259**.

The instant application was filed on 2nd September 2021 after judgment had been delivered on 22nd June 2021. In essence the 30 days for appeal lapsed on 22nd July 2021. After 22nd July, the applicant were late in filing the appeal by 7 days before the start of the vacation. I do note that the application was filed during the vacation after appeal time had lapsed by 7 days. The explanation given by the applicants for the delay is inadvertence by their advocate. In my view, 7 days is not an inordinate delay which cannot be excused especially where the applicants raise reasonable issues in the intended appeal that can only be determined after a hearing. I do not see the prejudice that would be occasioned to the respondent that cannot be compensated by way of damages.

For the foregoing 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.

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.

This court enjoys discretion to grant stay of execution of decree pending appeal. *In JMM v PM [2018] e KLR* 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.”

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, having granted leave to appeal out of time and having observed that the draft Memorandum of Appeal is not frivolous as it raises triable issues, of whether or not the trial magistrate misdirected herself in application of the principals of awarding damages, and given that the decree is a money decree and therefore the question of the appeal being rendered nugatory if successful does not arise, the prayer for stay has merit.

The above notwithstanding, it is also incumbent upon the Respondent/Decree holder to demonstrate that should the appeal be successful then he is in a position to refund the money decree paid to him.

For the foregoing reasons, I exercise discretion and grant conditional stay of execution of judgment /decree in Mariakani SRMCC No. 303 of 2019 until the intended appeal is filed, heard and determined, upon the applicants depositing in a joint interest earning account of the entire decretal sum awarded in Mariakani SRMCC No. 303 of 2019 within the next 15 days of this ruling, failure to which the stay granted lapses.

Costs be in the cause.

This Court so orders.

DATED, SIGNED AND DELIVERED VIRTUALLY/PHYSICALLY AT MALINDI THIS 14TH DAY OF FEBRUARY, 2022

.....

S.M GITHINJI

JUDGE

In the presence of: -

1. Ms Angela for the Respondent and absence of Mrs Khalifa for the Applicant