



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. APPLICATION NO. E599 OF 2021**

**HEZEKIAH GITAU MBITIRU.....1<sup>ST</sup> APPLICANT**

**FRANCIS MUTUA MUTINDA.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**MARY WAIRIMU MUNDIA.....RESPONDENT**

**RULING**

1) Hezekiel Gitau Mbitiru and Francis Mutua Mutinda, the 1<sup>st</sup> and 2<sup>nd</sup> applicants herein respectively took out the motion dated 10th December 2021 whereof they sought for the following orders:

- i. THAT this application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.*
- ii. THAT this honourable court be pleased to grant the applicants leave to file a memorandum of appeal out of time.*
- iii. THAT this honourable court be pleased to order a stay of execution of the judgment issued by the honourable trial court on 22/9/2021 pending the hearing and determination of this application.*
- iv. THAT this honourable court be pleased to order a stay of execution of the judgment issued by the honorable trial court on 22/09/2021 pending the hearing and determination of the intended appeal.*
- v. THAT the application be heard interpartes on such date and time as this honourable court may direct.*
- vi. THAT the costs of this application abide the outcome of the appeal.*

2) The applicants filed the affidavit sworn by Ebby Wanjala in support of the application. Mary Wairimu Mundia the respondent herein, filed the replying affidavit sworn by Nelson Kaburu to oppose the application. When the motion came up for interpartes hearing, learned counsels made oral arguments.

3) I have considered the grounds stated on the motion and the facts deponed in the rival affidavits. I have further considered the rival oral submissions made by learned counsels.

4) It is the submission of the applicants that the respondent was awarded a sum of ksh.579,430/= by the trial court in the judgment delivered on 22nd September 2021.

5) The applicants further aver that the respondent's advocate has now written to them demanding payment of the judgment sum. It is stated by the applicants that they intend to appeal against the trial court's judgment but the time fixed to appeal has lapsed and that the temporary order for stay of execution of decree granted by the trial court also lapsed.

6) The appellants have argued that their advocate failed to obtain a copy of the judgment to enable them take instructions

on appeal.

7) The applicants further aver that their intended appeal has high chances of success and that they are willing to provide a bank guarantee for the decretal sum as security for the due performance of the decree.

8) It is their argument that the application was filed without unreasonable delay. This court was urged to find that unless the orders sought are granted, the applicants would suffer irreparable loss and damage and that the appeal would be rendered nugatory.

9) The respondent opposed the application arguing that the applicant failed to attend court for delivery of judgment on 22.9.2021, despite having been informed of the judgment date. The respondent also pointed out that the applicants failed to obtain a temporary order for stay to last for 30 days since they were absent from court during the delivery of judgment.

10) It is further argued by the respondent that failing to obtain a copy of the judgment is not a good reason enough for this court to grant the applicants leave to appeal out of time.

11) The applicants are seeking for two main orders. **First**, is an application for leave to file an appeal out of time. The second order is that for stay of execution pending appeal. The court has a wide discretion in determining an application to appeal out of time so long as the applicants show sufficient cause.

12) In this case the applicants have merely stated that they received a copy of the judgment after the time to appeal had lapsed. There is no explanation as to why it took long for the applicants to obtain a copy of the judgment. This court is unable to exercise its discretion in favour of the applicants because they failed to offer sufficient cause. Consequently, I decline to grant the applicants leave to file an appeal out of time.

13) As regards the second prayer for stay, the principles are well settled. **First**, the application must be filed without unreasonable delay. In this case the judgment was delivered on 22nd August 2021. The instant application was filed on 10th December 2021. I am satisfied that the application for stay was filed without unreasonable delay.

14) The second principle is that an applicant must show the substantial loss it would suffer if the order for stay is denied. It is the submission of the applicants that unless the order for stay is granted, they would suffer substantial loss in that the respondent would execute thus rendering the appeal nugatory.

15) The submission by the applicants does not establish the substantial loss. It was incumbent upon the applicants to show the actual substantial loss they would suffer if the order for stay is denied. It should be noted that execution is a lawful process which at times will lead to loss of property. It cannot be said that it amounts to substantial loss. I find that the applicants have failed to establish the substantial loss.

16) The third principle is the provision of security for the due performance of the decree. The principle can only be taken into account if the applicant establishes the substantial loss which is not the case here.

17) Finally, when dealing with an application for stay of execution of the decree pending appeal, it is presupposed that there is exists an appeal or that one has already obtained leave to appeal out of time. In this matter the applicants, have failed to obtain leave to file an appeal out of time and have also failed to show the substantial loss if the order for stay is denied.

18) In the end, I find the applicants motion dated 10<sup>th</sup> December 2021 to be without merit. The same is dismissed with costs being awarded to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 11TH DAY OF FEBRUARY, 2022.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

.....for the Respondent