



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. E491 OF 2020

KIMARU MAINA.....1ST PLAINTIFF

AMOS MAINA.....2ND PLAINTIFF

-VERSUS-

BONIFACE ONYANGO ALIWA.....DEFENDANT

RULING

On 30th April, 2020 the Chief Magistrate’s Court at Nairobi delivered its judgment in CMCC No 1545 of 2017 and awarded the respondent Kshs.1,200,000 as general damages attributed to a road traffic accident. The applicants are dissatisfied with the judgment of the trial court but were late in filing their appeal. Their application dated 4th November, 2020 seeks an order for leave to file a memorandum of appeal out of time and an order for stay of execution of the judgment of the trial court pending the hearing of the appeal. The application is supported by the affidavit of Joyce Chichi Advocate. The respondent filed a replying affidavit sworn on 15th December 2020. The application was determined by way of written submissions.

Counsel for the applicants submitted that they were not present when the judgment was delivered. They only became aware of the judgment when counsel for the respondent sent them a letter demanding settlement of the decretal sum. According to counsel the demand was made in August, 2020. By then time to file the appeal had lapsed. They notified their client who gave the instructions to file the appeal. It is submitted that the delay is not deliberate. Counsel referred to Section 95 of the Civil Procedure Act which states:-

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

On the issue of stay of execution, it is submitted that the appeal raises triable issue. The award of Kshs.1,200,000 for a single fracture of the tibia is quite high. The applicants are ready to offer a bank guarantee for the decretal sum. Counsel referred to the case of **BUTT –V- RENT RESTRICTION TRIBUNAL (1982) KLR 417** where the court held:-

- 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.”**

On their part counsel for the respondent maintain that the dispute before the trial court was fully heard and the respondent should be left to enjoy the fruits of his judgment. The judgment of the trial court was delivered on 30th April 2020. The claim that counsel for the applicant was not aware of the judgment is baseless as the respondent's counsel wrote to them a letter dated 12th May, 2020 informing them about the judgment. The delay is not excusable. Counsel rely on the case of **MWANGI –V- KENYA AIRWAYS LTD (2007) KLR** where the factors to be considered by the court as to whether time to file appeal should be enlarged as follows:-

1. **The period of the delay;**
2. **The reason for the delay;**
3. **The arguability of the appeal;**
4. **The degree of prejudice which can be suffered by the respondent if the extension is granted;**
5. **The importance of compliance with time limits to the particular litigation or issue; and**
6. **The effect if any on the administration of justice or public interest if any is involved.”**

It is contended that the application is an afterthought. On the issue of extension of time, it is submitted that the court should consider the balancing principle. The application should be filed without undue delay and substantial loss should be suffered by the applicant if the decree is effected. Counsel referred to the case of **MACHIRA T/A MACHIRA & CO ADVOCATES –V- EAST AFRICAN STANDARD (No.2)** where it was held:-

“to be obsessed with the protection of an appellant or intending appellant in total disregard or hitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”

Counsel maintain that the applicants' counsel were aware of the judgment. No substantial loss will be suffered if the decretal sum is paid. Although the applicants are ready to furnish security for the due performance of the decree, that readiness on the part of the applicants should not be used to trample on the respondent's rights.

The issue for determination is whether the court should enlarge the time for filing the memorandum of appeal and whether execution should be stayed. The applicants contend that the judgment was delivered in the absence of their counsels. The supporting affidavit conveniently did not attach the letter which notified the applicants' counsel about the entry of judgment. The submission that they came to know about it in August, 2020 is not supported by any document. Equally, the replying affidavit of the respondent did not attach the letter sent to the applicants' counsel informing them about the entry of judgment. The written submissions of the respondent indicate that the letter is dated 12th May, 2020. It is not clear why the same was not annexed to the replying affidavit.

In the case of **WASIKE –V- KHISA & ANOTHER (2004) 1 KLR 197**, Githinji J, (as he then was) held inter alia:-

1. **In exercising its discretion the Court is guided by such factors as the merits or otherwise of the intended appeal, whether the extension of time will cause undue prejudice to the respondent and the length of the delay**
2. **It would be a fetter on the wide discretion of the Court to require a minute examination of every single act of delay and to require every such act to be satisfactorily explained.**
3. **It is not every delay in taking any appropriate step required that would disentitle a party to any relief. It is only the unreasonable delay which is culpable and whether or not delay is unreasonable will depend on the circumstances of the case**

The parameters for extension of time to lodge an appeal are now settled. Both counsels referred to the case of **MWANGI –V- KENYA AIRWAYS LTD (Supra)**. It is clear to me that the judgment of the trial court was delivered in the absence of counsel for the applicants. It is not clear whether the date of 30th April, 2020 had been set by the trial court in the presence of both counsel or a notice was issued by the court. If we are to go by the applicants' own version that they came to know about the entry of judgment in August, 2020, it is evident that it took over one month for them to file the current application. The reason for the delay is not convincing.

On the arguability of the appeal, I do find that the appeal is arguable. The dispute involves award of damages. Assessment of general damages arising from accidents is an exercise of discretion by the court. The need to interrogate whether the trial court exercised its discretion judiciously raises a triable issue. The draft memorandum of appeal also raises an issue on liability. The judgment of the trial court has not been availed to this court and it is not clear how liability was arrived at. It is also not clear what guided the trial court to award the damages it awarded to the respondent.

Counsel for the respondent has reiterated the need to balance between the applicants' right to appeal and the respondent's right to enjoy the fruits of the judgment. It is easy to allow part of the decretal sum to be paid to the decree holder if the court is in a position to know the facts

of the case. If liability had been agreed upon before the trial court or if the decree holder was a passenger in the accident vehicle, the court can proceed and order that part of the decretal sum be paid to the accident victim. However, where the background of the case is not known, the possibility of the entire judgment being set aside cannot be ruled out. This makes it difficult for the court to order part payment of the decretal sum.

The applicants are ready to provide a bank guarantee as security. It is true that the applicants' readiness to provide security should not be the main reason to deny the decree holder the fruits of his judgment. However, that requirement to a very large extent, in my view, was intended to assist the decree holder who will be kept waiting for the fruits of his judgment while assured that the decretal sum shall be quickly available should the appeal be terminated in one way or the other in his favour. Equally, the appellant's financial position will be dented and he will not pack the appeal in court with the intention of frustrating the appellant's early realization of his judgment but will zealously pursue his appeal with the possibility of securing back the security.

Given the circumstances of the case, I do find that the application herein is merited and is granted as prayed on condition that the applicants do provide a bank guarantee for the sum of Kshs. One Million, four hundred Thousand (KShs.1,400,000) within sixty (60) days hereof. Costs shall follow the outcome of the appeal.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF MARCH 2021

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S. CHITEMBWE

JUDGE