



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC.APPLICATION NO. E457 OF 2020**

**SUSAN NJUGUINI GACHUI.....1ST APPELLANT**

**SAMUEL CHEGE GITHUA.....2ND APPELLANT**

**VERSUS**

**DORINE ACHIENG OWITI.....RESPONDENT**

**RULING**

The Appellant/Applicant filed a Notice of Motion dated 6th November, 2020 under the provisions of Order 22 Rule 22, Order 42 Rules 4 and 6, Order 50 Rule 4, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 3, 3A and 100 of the Civil Procedure Act, and all enabling provisions of the Law. The prayers before this court for determination are;

**1. Spent**

**2. Spent**

**3. THAT this Honourable Court be pleased to grant the Applicants leave to appeal out of time against the Judgment delivered on 30th September, 2020 in Milimani CMCC No. 3321 of 2019 by Honourable P. Muholi, Senior Resident Magistrate.**

**4. THAT this Honourable Court be pleased to stay execution of the judgement/decree dated 30th September, 2020 by Honourable P. Muholi, Senior Resident Magistrate herein pending the full hearing and determination of the Applicants' intended appeal.**

**5. THAT this Honourable Court be pleased to deem the Draft Memorandum of Appeal attached herewith as duly filed within time.**

**6. THAT the application be heard inter parties on such date and time as this Honourable Court may direct.**

**7. THAT the costs of this application abide the outcome of the intended Appeal.**

The application is premised on the grounds on the face of the application, the supporting affidavit of Pauline Waruhiu, the Head of Legal and Claims Department at Directline Assurance Company Limited, sworn on 5th December, 2020. The Respondent opposed the application through her Replying Affidavit sworn on 30th November, 2020. The parties agreed to have the application canvassed by way of written submissions. The Applicants and the Respondent filed their submissions dated 22nd January, 2021 and 10th December, 2020 respectively.

The present application is premised on the grounds that on 30th September, 2020 judgment was entered against the Applicants in Milimani CMCC No. 3321 of 2019 by Honourable P. Muholi, Senior Resident Magistrate who proceeded to issue 30 days stay of execution which has now lapsed. The Applicants being aggrieved by the said judgement now wish to prefer an Appeal on quantum and seek leave to appeal out of time. It is the Applicants' contention that the appeal, if successful, will be rendered nugatory and they will suffer irreparable damage if execution is not stayed. The Applicants deposes that the Respondent has not disclosed evidence to prove her financial standing. The Applicants aver that they are willing to deposit security for due performance of the decree and that the Respondent shall not suffer any prejudice if the application is allowed as the application is brought in good faith.

The Applicants have relied on the case of *Edith Gichugu Koine v Stephen Njagi Thoithi [2014] eKLR* which set out the principles guiding an Application for leave to file an appeal out of time as follows;

- i. The period of delay
- ii. The reasons of delay
- iii. The degree of prejudice to the respondent if the application is granted.

The applicants also referred to the case of **Julius Kamau Kithaka v. Waruguru Kithaka Nyaga & 2 Others, CA. No. 14 of 2013** where the court referring to the holding in **Henry Mukora Mwangi v Charles Gichina Mwangi- Civil Application No. 26 of 2004** laid down the considerations for extension of time. **Imperial Bank Limited (In Receivership) & Another v Alnashir Popat & 18 Others [2018] eKLR**

The Appellant identified the issues for determination to be whether there was unreasonable delay, reasons given for the delay, whether the respondent will be prejudiced if the application is granted and whether the appeal has chances of success.

The Appellants submit that the Six (6) days delay in filing the Appeal was not inordinate and cited the case of **Imperial Bank Limited (In Receivership) & Another v Alnashir Popat & 18 Others [2018] eKLR** where Justice M'noti held that 10 days delay was not inordinate where the delay was on the ground of further corrections to the proceedings, the sheer bulk of the record of appeal and more than 20 copies of each volume that had to be prepared for the Court and the 19 respondents.

The Appellants have stated that the delay in filing the Appeal was because they were trying to trace a copy of the judgment so as to make a decision on whether to appeal or not. The Applicants have relied on the **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another [2018] eKLR where Ngugi J.** held that delay occasioned by failure to get copies of proceedings and judgment where a request had been made within days of the judgment was not inordinate. While in the case of **Hellen Wanza Maeker, Bernard Njoroge Gathua & Another HCC Miscellaneous Application No. 286 of 2009** as cited in **Apa Insurance Limited v Michael Kinyanjui Muturi [2016] eKLR** the court held that delay is excusable where it is contributed to by delay by the court registry to provide typed proceedings, and that in that case the application for leave was made 2 months after the proceedings were available for collection.

It is the Applicants further submission that the respondent has not shown how she will be adversely affected or prejudiced if the application is allowed. Reliance has been placed in the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another (Supra) where the court stated that;**

**“17. Fifth, I am unable to see any substantial adverse effects granting this order will have on the Respondent other than permitting the Applicants to exercise a preciously cherished right of appeal. Lastly, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in the same sense, for example, that the Constitution and the Elections Act place on the timelines for filing Elections Petitions.”**

The Applicants are willing to offer a bank guarantee to act as security for the entire amount and rely on the case of **Selestial Limited v Global Rock Development [2014] eKLR** where the court using its discretion held that the Appellant did not have to furnish such security upfront before arguing the application for stay pending appeal.

The Appellants maintain that their appeal has high chances of success owing to the fact that it is a soft tissue injury claim where the respondent was awarded Kshs. 180,000 which was inordinately high and wholly erroneous. The Appellant cited the case of **Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015** which authority was not supplied to this court and the case of **Julius Kamau Kithaka v. Waruguru Kithaka Nyaga & 2 Others, CA. No. 14 of 2013**, where the court held that it is for the trial court to determine the merits of the appeal and in determining the chances of success the court should look at it *prima facie*.

The Applicants submit that the Notice of Motion dated 5th November, 2020 be allowed, stay be granted pending hearing and determination of the appeal and they be allowed to file their Memorandum of Appeal.

The Respondent on their part maintain that the application is an abuse of the court process, baseless, a non-starter and only meant to prevent her from enjoying fruits of her judgment. The Respondent states that the judgment delivered on 30th September, 2020 was delivered in procedural and substantive manner and ought not be disturbed. Further, the Respondents deposes that the applicants have not demonstrated the loss they are likely to suffer should the decretal sum be paid and that while seeking an equitable relief they have approached the court with dirty hands by not putting to good use the 30 days stay granted. In the event the court grants the prayers sought, the Respondent proposes that the Applicants should be ordered to pay Kshs. 156,476 being 2/3 of the decretal sum and deposit Kshs. 78,238 being the remainder in a fixed deposit joint account of both advocates failure to which execution to proceed.

The Respondent submit that the affidavit supporting the present application is fatally defective and incompetent as the same is sworn by a stranger to the suit since the insurance company is not a party and further there is no proof of authority to depone the same has been supplied. The Respondent has relied in the case of **P.M.M. Private Safaris v Kevin Ijatia [2006] eKLR** where Mutungi J. in dismissing an application for extension of time to file an appeal stated that;

**“To that extent, the Supplementary Affidavit of Lydia W. Gutu, filed on 24/3/06, is not truthful in that it is sworn on behalf of the applicant when in reality she is not the counsel for the applicant, but counsel for the insurer. The insurer is not a party to the proceedings herein. Hence, the Affidavit is sworn by a stranger to the proceedings both at this appellate level and at the subordinate court's level.”**

While in the case of **Kenya Power and Lighting Company Limited v Julius Wambale & Another [2019] eKLR**, Githua J. referred to *Halsbury's Laws of England 4<sup>th</sup> Edition 2003 Reissue Volume 25 at Paragraph 490* where the learned author set out the circumstances under which the doctrine applies in the following terms:

**“Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss....in so far as the assured has been indemnified by that payment for the loss.”**

The Respondent submit that the affidavit of Pauline Waruhiu is incurably defective and should be struck off. To buttress this position, the Respondent has referred to the Court of Appeal holding in the case of ***Mojjo Matanya ole Keiwua V Chief Justice of Kenya & 6 Others, [2008] eKLR*** where it was held that affidavits which are sworn by persons who are not parties to the proceedings before the court are incompetent and ought to be expunged from the court record.

The Respondent has referred the court to the case of ***Mwangi v Kenya Airways Ltd [2003] KLR 487***, where the Court of Appeal suggested the consideration of the following factors in exercising discretion to grant leave to appeal out of time. They include; the period of delay, the reason for the delay, the arguability of the appeal, the degree of prejudice which could be suffered by the Respondent if the extension is granted, the importance of compliance with time limits to the particular litigation or issue; and the effect if any on the administration of justice or public interest if any is involved.

It is the respondent’s submission that the applicants have failed to give any reasonable explanation or placed any sufficient material before court for the delay in filing their appeal. Reliance has been placed on the case of ***Monica Malel & Anor. V R, Eldoret Civil Application No. 246 of 2008 where Aganyanya J. held that*** when a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants had appeared to show.

The Respondent further submits that the court in applying the balancing principle should allow her to enjoy the valid court judgment entered in her favour after inter-parties hearing. That despite being in the corridors of justice from 2019, the respondent is yet to receive compensation for the injuries sustained. The case of ***M/s Portreiz Maternity V James Karanga Kabia, Civil Appeal No. 63 of 1997*** where the court held that the *right of appeal must be balanced against an equally weighty right; that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.*

The respondent referred to the case of ***Antoine Ndiaye v African Virtual University [2015] eKLR*** where Gikonyo J. while laying down the principles for stay orders **stated that;**

**“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:**

- a) The application is brought without undue delay;**
- b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and**
- c) 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.”**

While the case of ***Machira T/A Machira & Co. Advocates v East African Standard [2002] eKLR***, where the court held *inter alia* that “... 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 the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

The Respondent submit that there was delay on the part of the applicant even after being informed of the judgment through a demand letter and that the present application is an afterthought. The Respondent further submit that the applicants have not demonstrated that they will suffer substantial loss and rely on the case of ***Macharia T/A Macharia & Co. Advocates Vs East Africa Standard [2002] eKLR 63*** where the court held that details and particulars of substantial loss must be proved and that this burden does not shift to the respondent. Further, in ***James Wangalwa & Another V Agnes Naliaka Cheseto [2011] eKLR*** it was held that substantial loss entails establishment of other factors which show that execution will create a state of affairs that will irreparably affect the applicant’s position in case the appeal is successful. Similarly in the case of ***New Wide Garments EPZ (K) Ltd v Ruth Kanini Kioko [2019] eKLR, Odunga J.*** held that substantial loss is a factual issue which must be raised in the supporting affidavit and supported by evidential materials.

The Respondent prays that in considering the issue of costs which the appellants are willing to furnish, the court should balance the interests of the parties and order payment of Kshs. 156,476 to the respondent and deposit the balance in a fixed joint interest account. To support this position, the respondent has cited the case of ***Edward Kamau & Another V Hannah Mukui Gichuki [2015] eKLR***, where the court balanced the right of appeal by the applicants and of enjoyment of a lawful judgement by the respondent.

The issues for identified for determination by this court are:

- i. Whether the supporting affidavit is defective and incompetent for want of capacity by the deponent;
- ii. Whether the applicants have satisfied the conditions precedent to grant of an order of extension of time to file an appeal and order of stay of execution pending appeal.

On the first issue, the respondent has argued that *Pauline Waruhiu* is a stranger to the proceedings and did not have capacity to swear the affidavit as the insurance company was not a party to the primary suit. The applicants did not file a further affidavit to respond to the averments in the replying affidavit nor did they file any submissions in reply. The attack on the competence of the supporting affidavit was thus not challenged by the applicants. Be that as it may, it is the court's duty to interrogate the issues raised by the respondent to establish whether or not they are factual and whether the said affidavit is incurably defective. In the supporting affidavit is sworn by Pauline Waruhiu, she describes herself as:

***“...the Head of Legal and Claims Officer at Directline Assurance Company Limited who are the insurers of the motor vehicle registration number KAU 396G and at whose instance this claim from is claimed from and which is being appealed from and i am conversant with the issues relating to this suit and i am duly authorized and competent to make this affidavit by dint of M/s Directline Assurance and at Common law and its right to defend, settle and. or prosecute any claims in the insured's name”***

Further, I note that although the respondent only alleges in her submissions that Pauline Waruhiu was not duly authorized to swear the supporting affidavit there is no averment to that effect in her replying affidavit dated 30th November, 2020. The averment of Pauline Waruhiu that she was conversant with the issues relating to the suit amounted to evidence on oath which could only be controverted by other evidence to the contrary through a replying affidavit.

It is not disputed that the deponent was indeed a legal officer working with the insurance company that had insured the motor vehicle that was involved in the accident which was the subject matter of the primary suit. Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 provides that an insurance company which has issued a motor vehicle policy against 3<sup>rd</sup> party risks is under a mandatory legal duty to satisfy any judgment entered in favour of a 3<sup>rd</sup> party against the owner of the motor vehicle in question who is its insured while Section 10 (2) of the same Act provides that the insurer will only be liable to satisfy the judgment entered against its insured if it was notified of the proceedings in which the judgment was delivered before or within 14 days of the commencement of the proceedings.

This court is of the view that the above sections of the law bestows upon the insurer an interest in the proceedings, judgment, appeal and any other application thereof because it is required by law to satisfy the judgment obtained against its insured. Therefore, as an officer of the insurer, it goes without saying that Pauline Waruhiu had knowledge and was conversant with the proceedings in the trial court.

In view of the foregoing, this court finds that the supporting affidavit is competent and properly before the court. The respondent's claim that the supporting affidavit is incompetent for want of capacity by the deponent is not well founded and cannot be sustained. There is no restriction in law that only parties to a suit should swear affidavit in relation to the suit. The applicants are the insurer's clients who may not even know the court process and entirely rely on their insurer to defend the case.

#### **Leave to Appeal out of Time;**

Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

***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.***

Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd [2003] KLR*. They include the following:

***i) The period of delay;***

***ii) The reason for the delay;***

***iii) The arguability of the appeal;***

***iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;***

***v) The importance of compliance with time limits to the particular litigation or issue; and***

***vi) The effect if any on the administration of justice or public interest if any is involved.***

The judgment was delivered on 30th September, 2020 while the present application was filed on 5th November 2020, six (6) days after the lapse of the 30 days stay of execution granted by the trial court. The appellants have submitted that the delay was because they were trying to trace a copy of the judgment so as to make a decision on whether to appeal or not. The reason for delay which is one of the principles for granting leave to file an appeal out of time was not pleaded in the affidavit, it is only indicated in the submissions. There is no evidence on record to support the assertion that indeed, the applicants were trying to trace the judgment of the trial court or the proceedings thereof as elucidated in the authorities relied on. I agree with the respondent that the appellants have failed to demonstrate and/or give a substantive reason for the delay. However, this court takes judicial notice that the judgment was delivered during the downscaling of court operations due to Covid-19 and therefore, it would have taken some time to trace the judgment.

**Stay of execution;**

The present application invokes the discretionary powers of the court which must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 that empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows:

***“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.”***

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 appellants 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.”***

In the Court of Appeal case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** as cited by the High Court in **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR** it was held;

***“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a Respondent or lack of them. Once an applicant expresses a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”***

In the case at hand, the Respondent has not disclosed any source of income that she would use to refund the Applicant the decretal amount should the appeal succeed and the fact that the respondent is facing challenges in life as submitted, i am satisfied that the Appellant/Applicant has established that it will suffer substantial loss if the intended execution is not, stayed. It also follows that if the Respondent executes the judgement and the Applicants appeal succeeds, then not only will the Applicants suffer substantial loss but the appeal will also be rendered nugatory.

The Appellants/Applicants have indicated their readiness to furnish security for the due performance of the decree by offering a bank guarantee to act as security for the entire decretal amount. The Respondent proposes payment of Kshs. 156,476 which is two thirds of the decretal sum to the respondent and deposit the balance in a fixed joint interest account of the parties advocates.

I do find that the application dated 5<sup>th</sup> November 2020 is merited and the same is granted as prayed subject to the applicants to furnish a bank security for the entire decretal sum of ksh. 234,714 within 45 days hereof. The applicants to file the Memorandum of Appeal within 14 days hereof. Costs shall follow the outcome of the appeal.

**Dated and Signed at Nairobi this 10<sup>th</sup> day of March, 2021**

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**S. CHITEMBWE**

**JUDGE**