



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC.APPL. NO. 520 OF 2019

SIMBA COACH LIMITED.....1ST APPLICANT

JUMBA MWANDURYA MBEGA.....2ND APPLICANT

-VERSUS-

JULIUS OWINO.....RESPONDENT

RULING

1. The Applicant filed an application under certificate of urgency dated **16th October 2019** seeking for orders: -

a. Spent

b. Leave to file appeal out of time

c. Spent

d. That this Honorable Court be pleased to stay execution of the judgment/decree pending hearing and application of the intended appeal.

e. That pending the hearing and determination of this application the Honorable Court be pleased to order 60 days stay of execution of its orders to its judgment dated 30th April 2020 and delivered via electronic means (e-mail) on 1st May 2020;

f. That the costs of this application be provided

2. The application is supported by an affidavit sworn by **Isabella Nyambura** a Claims Director at Directline Assurance Company Limited. She averred that judgment was delivered on 3rd September 2019 and applicants were granted 30 days stay of execution which have since lapsed and the plaintiff/respondent may execute at any time.

3. She averred that due to slight delay on the part of the client in issuing instructions for appeal, the time upon which an aggrieved party ought to appeal lapsed; that the applicants' advocates have prepared a memorandum of appeal as instructed and attached a copy to the supporting affidavit.

4. The respondent averred that the applicants may not be able to recover the decretal amount from the respondent in the event that the appeal is successful.

5. Further the respondent averred that they are ready and willing to furnish court with reasonable security that the court may order; and the intended appeal is meritorious and unless stay is granted, the intended appeal will be rendered nugatory and no prejudice will be suffered by the respondent if this application is allowed.

6. In response the respondent filed replying affidavit dated 16th November 2019.

APPLICANT'S SUBMISSIONS

7. The applicant reiterated the grounds on the face of the application and gave background of the case. Counsel submitted that the accident occurred on 28th August 2016 involving motor vehicle registration number KBQ 901Z in the respondent was a passenger; that after hearing judgment was delivered and the applicant is dissatisfied with quantum and seeks to file appeal out of time

8. The applicant submitted that **Order 42 Rule 6(2)** lays down conditions which the applicant must satisfy in order to deserve orders of stay of execution pending appeal as set out in the case of **Halai & Another V Thornton & Turpin [1963] KLR 365** cited in the case of **Industrial Cause Number 1715 of 2011, Ellena Doudoladova Korir v Kenyatta University [2014] KLR** at Nairobi where the court of appeal held as follows: -

“The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions. First the applicant must establish sufficient case, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

9. On substantial loss, the applicant submitted that from the memorandum of appeal, the applicant has high chances of success and the decretal amount is substantial and if stay is not granted, the appeal will be rendered nugatory.

10. The applicant submitted that the burden of prove that the respondent will not be able to refund shifts to the respondent the moment the applicant states that he will not be able to refund the money; that the respondent’s dire need of the decretal amount confirm that he will not be able to refund were the intended appeal to succeed.

11. On application being filed without delay, the applicants’ advocate submitted that they filed application to pay within 21 days in the lower court upon lapse of the 30-day stay granted on delivery of judgment; that this was done before receiving instructions on 15th October 2019; that the applicants were no longer willing to pay; and they filed this application on 16th October 2019. That the applicant ought to have filed appeal within 30 days from date of delivery of judgment but filed 25 days late and submitted that 25 days is not inordinate.

12. The applicant submitted that after wide consultations on both liability and quantum, they opted to file appeal and submitted that the applicant should not be ousted from the seat of justice and they should be granted an opportunity to prosecute the appeal to its logical conclusion; and urged court to rely on **article 59 of the constitution** which provide that justice should be administered without undue regard to procedural technicalities.

13. Applicant further submitted that they deposited the entire decretal amount in court on 20th November 2019 which shows seriousness on their part in prosecuting the intended appeal and not intended to delay the matter and deny respondent fruits of judgment as alleged by the respondent.

14. On whether the appeal is arguable, the applicant submitted that the appeal is on quantum and submitted that arguable appeal is not one which must succeed but one which is not frivolous; and submitted that the draft appeal established a single arguable ground that an award of kshs 300,000 for soft tissue injuries were manifestly exaggerated and that ground merit consideration by this honorable court.

15. In conclusion, the applicant submitted that as much as the respondent has a right to enjoy fruits of the judgment, the applicant being aggrieved has a right to appeal.

RESPONDENTS SUBMISSIONS

16. The respondent submitted that conditions for grant of leave to appeal out of time are set out in the case of **Paul Musili Wambua V Attorney General & 2 others [2015] eKLR** being length of delay, reason for delay, chances of appeal succeeding and prejudice to the respondent if the application is granted.

17. The respondent submitted that after lapse of 30 days stay granted after delivery of judgment, the respondent filed an application for stay orders pending payment of decretal sum indicating that the delay was due to failed system in their institution; and they were allowed but they failed to comply; and submitted that it is clear there is delay on part of the applicant in bringing this application; that they are guilty of lethargy and if they were aggrieved of the judgment, they would not have sought stay to make payment; that the application before court is an afterthought and a delay tactic and the applicants should not be allowed to benefit from their own indolence at the expense of the respondent. Respondent further submitted that the applicant has not given reason for the delay.

18. As to whether the appeal has chances of success, the respondent submitted that the applicant is inviting court to find that the damages awarded were excessive and urged the court to note that in the lower court, they had prayed for damages of kshs 500,000 but the amount awarded is less than what was submitted by the plaintiff; that the appeal has no merit.

19. The respondent further submitted that he will be prejudice by delay in satisfaction of the judgment.

20. As to whether the applicant has met all the conditions for grant of stay, the respondent submitted that the applicant has not explained what any loss that it will suffer if application is not allowed and cited the case of **Equity Bank Limited Vs Taiga Adams Company Limited Civil Appeal No.722 of 2000** where the court held that the only of establishing that the applicant will suffer loss if execution is carried out, the respondent would not be able to pay in the event the appeal succeed.

21. On security the respondent submitted that the applicant has not stated the amount they are willing to deposit as security. The respondent submitted that the application is not merited; that it does not satisfy requirements of **Order 42 Rule 6 of the Civil Procedure Rules**.

ANALYSIS AND DETERMINATION

22. I have considered averments and submissions by the parties herein. I note that the applicant intends to appeal on quantum and that

initially they had filed an application in the lower court to be granted time to pay decretal amount. The ground they have cited for appeal is that the award is excessive. The reason given for delay in filing appeal is that the client delayed in giving instructions to appeal and the dependent from the insurance company averred that they decided to appeal after wide consultation.

23. The applicant has averred that their lawyer filed this application shortly after getting instructions to appeal. The applicant has not explained what made them change the mind after filing application for stay pending payment. Respondents argument is that the intended appeal is delay tactic. I do agree that the respondent deserve to enjoy fruits of the judgment but I am of the view that the respondent be granted an opportunity to have their ground of appeal heard; I will however allow the applicant to file appeal out of time subject compliance with the requirements that I will set out hereunder.

24. FINAL ORDERS

- 1. Leave to file appeal out of time is hereby granted to the applicant**
- 2. Appeal to be filed within 14 days from today's date**
- 3. Half the decretal amount to be paid to the respondent and the other half to be deposited in a joint interest earning account in the name of both counsels herein**
- 4. Compliance with order 3 above within 21 days from the date of this ruling.**
- 5. No orders as to costs.**

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 4TH DAY OF MARCH 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Schola/Jeniffer - Court Assistant

Ms Barasa counsel for applicant

Ms. Kiberenge counsel for respondent