



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**MISC APPLICATION NO. E005 OF 2020**

**JAIRUS MOMANYI BURANDA.....1<sup>st</sup> APPLICANT**

**AMED RIOBA MASTER.....2<sup>nd</sup> APPLICANT**

**versus**

**OJWANG EMMANUEL OCHIENG .....RESPONDENT**

**RULING**

On 16/9/2020, judgment was entered in favour of the Respondent (plaintiff) for the sum of Kshs. 514,250/= plus interest, against the applicant (defendant) in Migori CMCC 1034/2018). The thirty (30) days allowed for filing an appeal lapsed and the applicant filed the Notice of Motion dated 24/11/2020 seeking the following orders:-

**1) Spent**

**2) Spent**

**3) That the applicant be granted leave to file and serve an appeal out of time against the judgment delivered on 16/9/2020;**

**4) That pending the hearing and determination of this application, the court do grant an order of stay of execution of the judgment and decree of the judgment delivered on 16/9/2020;**

**5) That upon grant of prayers 3 and 4 the court do order that the applicant provides sufficient security in the sum of a bank guarantee from a reputable financial institution to secure the judgment of Kshs. 514,250/=;**

**6) Costs of the application to abide the appeal.**

The grounds upon which the application is premised are in the body of the application and the supporting affidavit of the 1<sup>st</sup> applicant **Jairus Momanyi Buranda**. It is the applicant's contention that the thirty (30) days within which the appeal should have been filed lapsed on 17/10/2020; that the applicant's counsel who had conduct of the matter became unwell with Covid during the stay period and was placed under isolation and did not receive a copy of the judgment in time in order to get instructions from the applicant; that the applicants are aggrieved by the subordinate courts judgment, that the award is substantial and unjustified and they wish to appeal; that the failure to appeal in time was unintentional as it was occasioned by sickness of the counsel and the said delay should not be visited on an innocent litigant; that the judgment sum is substantial and if paid to the respondent, it may never be recovered from the respondent if the appeal succeeds; that the respondent is not a man of means and will never be able to refund the sums; that the appeal raises arguable issues and has high chances of success; that the applicant will suffer irreparable loss if the application is not granted; that the applicants are ready and willing to furnish reasonable security by providing a sound Bank guarantee from a reputable bank.

The applicant also contends that the application was made without unreasonable delay.

The respondent opposed the application through his replying affidavit dated 31/12/2020 and filed in court on 7/12/2020. The respondent has deponed that he is advised by his advocate that the application has been filed two months after the time lapsed since judgment was delivered; that the delay was inordinate; that somebody held brief for the applicant's counsel when the court directed that submissions be filed and the applicants were therefore aware of the date for judgment; that if the applicants' counsel was unable to attend court, he should have sent somebody to hold his brief; that no plausible explanation has been given for the delay; that the applicants do not have an arguable appeal; that the respondent should be allowed to enjoy the fruits of his judgment and that the court should not exercise its discretion in favour of the applicants; that the application is an abuse of the court process, devoid of merit and should be dismissed; that the applicants are able to raise the decretal sum and the application should be rejected.

The court directed that the application be canvassed by way of written submissions. The applicants filed their submissions on 2/3/2021 whereas the respondent filed theirs on 7/1/2021.

I have duly considered the submissions. An application for stay is brought under Order 42 Rule 6 which provide as follows:

**6(i) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(2) No order for stay of execution shall be made under subrule (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 ultimate be binding on him has been given by the applicant.”**

In the case of **Halai & Another vs Thorton & Turpin (1963) Ltd (1990) KLR 365 cited in Industrial Cause No. 7715 of 2011, Elena Doudoladova Korir vs Kenyatta University [2014] KLR at (Nairobi)** the Court of Appeal held as follows: -

**“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, 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.”**

Flowing from Order 42 Rule 6(2) and the above decision, the applicant has to establish that:-

- 1) He will suffer substantial loss if stay is not granted;**
- 2) That the application has been filed without unreasonable delay;**
- 3) the applicant is willing to furnish security for the due performance of the decree;**
- 4) That the applicant has an arguable appeal**

**On the issue of substantial loss**, it is the applicants submission that the decretal sum is substantial and if paid to the respondent, if the appeal succeeds, the applicants are unlikely to recover the sum from the respondent; that the burden rests on the Respondent to prove that he is able to refund the said sum. The respondent in his replying affidavit did not respond to the contention that he was not able to refund the decretal sum. Even in the Respondent’s submissions, the issue was glossed over. In the case of **Kenya Orient Insurance Co Ltd =vs= Paul Mathenge Gichuki & Another [2014] eKLR**, the court held that. The burden of proof that the respondent is not a man of straw and can refund the decretal sum of the appeal succeeds shifts to the respondent once the appellant states that it is not aware of the respondent’s resources.

In this case, the respondent has not discharged that burden, that he has the means to repay the decretal sum if it is paid to him. It means that if the sum is paid to the respondent, the applicant will suffer substantial loss and the appeal will be rendered nugatory.

**On whether there was unreasonable delay in bringing this application:** the judgment was delivered on 16/9/2020. The appeal should have been filed within thirty (30) days, by 17/10/2020. This application was filed on 30/11/2020 about one and a half months since the time lapsed; Exhibited by the applicant is a copy of a document from **Lancet Kenya, in respect of Elizabeth Omao** dated 19 /10/2020 which the applicant explains was the counsel’s medical report showing that she had contracted the Covid 19 virus. I note that the report is dated 19/10/2020 about two days after the time for filing of this appeal lapsed. It seems the counsel may have fallen sick before 19/10/2020. No explanation has been given why another counsel could not have held her brief. However, all circumstances considered, I find that the delay of 1 ½ months is not unreasonable.

**Whether the applicant is ready to furnish security;** the applicant has offered to avail a bank guarantee with a reasonable bank. The court was not bound by that offer because it is the court that decides on the kind of security if at all. However, the fact is that the applicant is ready and willing to provide security for the due performance of the decree.

Grant of an order of stay of execution is an exercise of the court’s discretion. Each case will depend on its own special circumstances. The essence of stay is to preserve the status quo so that the appellant can exercise his right of appeal but the court has to ensure that the respondent is not prejudiced because he has a judgment which he should be allowed to enjoy. In this case, I find that the applicant is deserving of an order of stay.

**Whether leave can be granted to the applicant to file an appeal out of time.** Sections 79G and 95 of Civil Procedure Act deal with filing of appeals from the subordinate courts and enlargement of time to file appeal. Section 79 G Civil Procedure Act 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 such period any time which the lower court may certify as having been requisite the preparation and delivery to the appellant of a copy of the decree or order.”**

Section 95 Civil Procedure Act provides as follows:

**“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.”**

The principles to be considered in exercising the court’s discretion whether or not to enlarge time to file appeal were set out in **First American Bank of Kenya Ltd =vs= Gulab P. Shah & Others HCC 2255/2000 [2002] IEA 65:-**

- 1) The explanation if any, for the delay;**
- 2) The merits of the contemplated action, whether the appeal is arguable;**
- 3) Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.**

**In Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi Civil Appeal 255/ 1997**, the court, when considering the exercise of discretion to extend time, had this to say:-

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”**

The court has already considered the cause of the delay. The delay was due to the counsel’s ailment and this court does find that the delay of 1½ months is not inordinate.

**Whether the applicant has an arguable appeal:** the applicant is disputing the award in damages for being exorbitant. That is arguable. Since the applicants will provide security for the due performance of the decree, the respondent will not suffer any prejudice. I hereby allow the application for leave to file appeal out of time.

In the end I make the following orders:-

- 1) Leave is hereby granted to the applicants to file and serve their appeal out of time;**
- 2) The appeal be filed and served within sixty (60) days hereof.**
- 3) There be stay of execution of the decree/judgment delivered on 16/9/2020 in CMCC 1034 of 2018 on condition that the applicants deposit Kshs. 300,000/= in an interest earning account of both counsel for the applicants and the respondent within fourteen (14) days from today’s date..**
- 4) In default, the order of stay to lapse automatically;**
- 5) Costs of this application to abide the appeal.**

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 15TH DAY OF APRIL, 2021**

**R. WENDOH**

**JUDGE**

**Ruling delivered in the presence of:-**

Ms Okota for the Respondent

Kimondo & Gacgoka for the Applicant – Absent

Ms Oloo Court Assistant