



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 25 OF 2020

DAVID WANYOIKE ND'UNGU.....INTENDED APPELLANT

-VERSUS-

1) HAMISI MWANDURI MGANA

2) HAMISI OMARI BEMBUCHE (*Both Suing*)

as the Legal Representatives of the estate of (Deceased).....RESPONDENTS

RULING

1. This is a **Ruling** on a **Notice of Motion** application dated **10th February, 2020** and taken out by the Intended Appellant (hereinafter referred to as "the Applicant"). By the said application, the Applicant seeks for the following orders:-

a) Spent;

b) That this Honourable Court be pleased to grant leave to the Applicant to appeal out of time against the Judgment of the Honourable Magistrate P. Wambugu Principal Magistrate in Kwale Principal Magistrates Court Civil Suit No 425 of 2018 and Judgment delivered on 11th September, 2019;

c) Spent;

d) That this Honourable Court be pleased to stay execution of the Judgment and decree in Kwale Principal Magistrates Court Civil Suit No. 425 of 2018 pending the hearing and determination of the intended appeal herein;

e) That the costs of this application abide the outcome of the intended appeal.

2. The application is premised on the grounds on its face and the **affidavit** of **Isabella Nyambura**, the **Applicant's legal manager**, sworn on **10th February, 2020**. In essence, the Applicant's case is that, the trial court delivered its Judgment on **11th September, 2019** and awarded the Respondents general damages for Kshs.1,665,625/=, special damages of Kshs.60,000/= together with costs and interests of the suit. The Applicant was dissatisfied by the said Judgment on award of quantum and has preferred an appeal to this court.

3. The Applicant appreciates that the Appeal should have been filed within 30 days after the Judgment was delivered, but has advanced no reason to explain the delay in bringing the Appeal. What the deponent states is that the delay was inadvertent and is highly regretted.

4. The Applicant avers that the intended Appeal is merited and will be rendered nugatory if the orders sought are not granted. Similarly, it is argued that if the orders for stay are not granted, the applicant will suffer substantial loss because the award involves a colossal sum which if paid to the Respondents, he is unlikely to recover the sum in event of a successful Appeal since the Respondents would be unable to refund the same. The Applicant further states that he is willing to deposit the entire decretal sum in a joint account as security for the intended Appeal.

5. The Application is opposed by the Respondents and in doing so they jointly filed a **Replying Affidavit** sworn on **12th February, 2020** by

the 1st Respondent, **Hamisi Mwanduri Mgana**. In that affidavit the Respondents term the application as an abuse of the court process, the same having been filed long after delivery of the Judgment without reasonable explanation or exercise of due diligence.

6. Mr. Hamisi further avers that Judgment on liability was entered by consent and the Appeal being only on quantum, the Applicant should have shown good gesture by offering to pay the Respondents more than half of the decretal sum and the balance to be deposited in a joint account. It is also his averments that the present application is meant to delay the enjoyment of the fruits of the Judgment in their favour. He therefore prays that the application be dismissed with costs.

7. On 17th February, 2020, parties agreed to canvass the **Notice of Motion** application by way of written submissions. The court record shows that both parties obliged with the Applicants filing his submissions on 15th January, 2021 while the Respondents filed theirs on 16th July, 2020.

Applicant's Submissions

8. The Applicant's submissions reiterate the grounds adduced both on the face of the application and in the **Supporting Affidavit** with an addition that the intended Appeal is as a result of the Applicant's insurer's exercise of its right of subrogation and the four months' delay exhibited was caused by the very fact that the insurer had issued instructions to appeal after the expiry of 30 days in which an appeal can be filed. According to the Applicant, it is within this courts discretion to grant an order extending the time for filing the intended Appeal as well as staying any execution until the Appeal is heard and determined.

Respondents' Submissions

9. The Respondents' submissions similarly buttress the arguments held in the **Replying Affidavit** but point out that the Judgment sought to be appealed against was delivered on 11th September, 2019 in the presence of Applicant's Counsel, hence he has been aware of the Judgment all along.

10. The Respondents further submit that although it is within the court's discretion to extend the time for filing the appeal, the same should be exercised judicially and based on the laid down legal principles for extension of time as well as stay. In this case, it is argued that the Applicant has not met the threshold and consequently, the intended appeal is not arguable nor does it have any chance of success.

11. It is also submitted that in all possibilities, the party to suffer prejudice are the Respondents for having lost their daughter owing to the carelessness and negligent acts of the intended Appellant. As such, it is the Respondents' case that continued delay in the realizing of the fruits of a successful Judgment is unfair to them.

Analysis and Determination

12. I have carefully considered the application, the affidavits sworn in support and in rebuttal of the same, the submissions by both parties as well as the authorities they have relied on. In my humble view, there are only two issues which arise for determination, They are:-

a) Whether the court should exercise its discretion to grant the applicant leave to file his Appeal out of time; and

b) Whether an order of stay of execution pending Appeal should issue.

*a) Whether leave to file the Appeal out of time should be **Granted**.*

13. The law as I understand it is, that, under **Section 79G** of the **Civil Procedure Act**, a party may be granted leave to file an appeal out of time if he satisfies the court that he has a good reason for not filing the appeal within the time provided for by law. Whether or not to extend time for filing an appeal is therefore an exercise of the court's discretion which

should be based on reasons, and not on whims or caprice.

14. In the case of **Thuita Mwangi vs Kenya Airways Ltd [2003] eKLR**, the Court of Appeal reiterated the conditions that are to be considered in deciding whether or not to grant an extension of time to file an appeal. These are *the length of the delay, the reason for the delay, possibly, the chances of success of the appeal if the application is granted, and finally, the degree of prejudice that the Respondent would suffer if the application is granted.*

15. Applying the above principles in the instant case, I have established from the pleadings that, the decision that the Applicant seeks to appeal against was delivered on 11th September, 2019. The application for leave to appeal out of time was filed on 10th February, 2020. The period between the delivery of the Judgment and the filing of the instant application is about four (4) months and therefore the Appellant is about three (3) months out of time for filing the Appeal.

16. The Applicant has explained that delay as inadvertent and that it was occasioned by the Applicant's insurer in giving instructions to appeal when the period within which an Appeal should have been filed had lapsed. However, the Applicant has not availed any evidence to indicate when the instructions to appeal were eventually issued nor has any of the parties annexed a copy of the Judgment for

my perusal. In my view, the reason the applicant has advanced for the delay is not persuasive since he has not satisfied the court by providing any evidence to support the same.

17. However, I have considered the draft memorandum of appeal as annexed to the application. I note that the Applicant intends to appeal against the finding on quantum of the trial court since parties had recorded consent on liability. The Respondents on the other hand were suggestive that the orders sought could be granted only if the Applicant shows goodwill by paying to the Respondents two-thirds of decretal sum.

18. In my view, the Respondents' suggestion would be fair to both parties and so that justice is seen to be done, I am inclined to allow the application however on some conditions since I see no prejudice that will be occasioned to the Plaintiff/Respondent.

19. In doing so, I will endeavor to balance the competing interests of the Applicant to appeal and those of the Respondents to enjoying fruits of Judgment made in their favour. I find further recourse under **Sections 1A, 1B, & 3** of the **Civil Procedure Act** as well as **Article 159** of the **Constitution** which embody among other tenets of justice, that justice should not only be done but be seen to be done.

20. In the instant case, my view is striking a balance between the parties by allowing the Applicant to proceed with the Appeal while at the same time protecting the Respondents' right to enjoy fruits of a successful Judgment so that justice is seen to have been done to both sides.

21. I also take note of the fact that the intended appeal is being taken out by the Appellant's Insurer and since they have the obligation to settle the claims against the Insured, it would only be fair to allow them proceed with the appeal having been dissatisfied with the amount awarded to the Respondents herein.

22. As regards the prayer for stay of execution, **Order 42 Rule 6(1)** of the **Civil Procedure Rules, 2010** stipulates the conditions in which the stay may be granted. It provides that an Applicant in an application for stay must satisfy the court that he/she stands to suffer substantial loss if stay is not granted and that the application has been filed without unreasonable delay. The Applicant must also show that he was willing to offer such security as may be ordered by the court.

23. On the issue of substantial loss, the Applicant argued that if the decretal sum is paid to the Respondents, it might be difficult, if not impossible to recover the decretal sum in case the Appeal is successful. According to the Applicant, the Respondents are not able to refund the decretal sum. To that fear of the difficulty to recover the decretal sum should the Appeal succeed, the Respondents have not rebutted the same by providing financial statements showing their ability to repay. In the decision in the case of **Kenya Shell Ltd -vs- Kibiru [1956] KLR 410**, the Court of Appeal pointed out that if an Applicant alleges difficulties in recovery of decretal sum, it rests on the respondent to show that he/she would be able to effect a refund. The Respondents having not done so, I am satisfied that Applicants are likely to suffer substantial loss.

24. As regards the requirement of deposit of security, I adopt the analysis I have made herein above, (See paragraph 17) of balancing the rights of both parties herein. I further reiterate that the grant of stay of execution pending appeal is discretionary and should be exercised in manner that balances the interest of the Applicants with those of the Respondent.

25. The upshot of my finding therefore is that, the application dated **10th February, 2020** is hereby allowed and the following orders hereby issue;

a) The Applicant be and is hereby granted Leave to file the intended Appeal out of time.

b) The Applicant is directed to file the intended Appeal within 45 days from the date hereof.

c) The Applicant is further directed to pay half the decretal sum to the Plaintiff and deposit the other half as directed in paragraph 24 above within 30 days from the date hereof and in default, the stay orders granted shall lapse

unless they are otherwise enlarged by the court.

d) The Respondents are awarded costs of this application.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 13TH DAY OF MAY , 2021.

D. O. CHEPKWONY

JUDGE