



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISC APPLICATION CASE NO. E 41 OF 2021**

**JAPHET NOTI CHARO.....APPLICANT**

**VERSUS**

**KAZUNGU FONDO SHUTU.....RESPONDENT**

**CORAM: Hon. Justice R. Nyakundi**

**Richard O. & Co. Advocates for the Appellant**

**Mwaure & Mwaure Waihiga Advocates for the Respondent**

**RULING**

Being aggrieved with the judgement of the trial Court dated 17.2.2021, on award of damages in **Cmcc No. 27 of 2016** the applicant lodged a Notice of Motion under certificate of urgency dated 23.4.2021. It is expressed to be brought under section 95 of the Civil Procedure Act, Order 50 rule 5, Order 42 rule 6 of the Civil Procedure Rules, seeking the following substantive orders; -

- a) That the powers of the Court be invoked in a manner to grant stay of execution of the judgement pending the hearing and determination of the intended appeal.***
- b) That exercise of discretion to that effect for enlargement of time to file the intended appeal be effectuated in favour of the applicant.***

In support of the application are grounds on the face of the motion and an affidavit deposed by Japheth Charo. The Respondent opposed the application for stay of execution and extension of time in the replying affidavit sworn on 8.6.2021. This was followed with brief oral submissions by both counsels representing the respective parties to the intended appeal. In this regard, the applicant's counsel argued and submitted that they have issues raised in the draft of the Memorandum of Appeal which they intended to canvass at an opportune time on appeal.

Further Counsel for the applicant submitted that the impugned judgement was delivered without notice to the parties and the purported dispatch through their respective emails was not successful. For that reason by the time the applicant had knowledge of the judgement, it was way beyond the statutory period of thirty (30) days within which an appeal was to be preferred.

At the intended hearing on appeal counsel submitted that the applicant intends to argue on the issue of award of damages in the circumstances of the case envisaged to be excessive. On the part of the Respondent's counsel vehemently opposed the reliefs sought by the applicant by virtue of the fact that the applicant participated in the trial and thereafter judgement was sent electronically to the parties. With that counsel argued and submitted that the applicant has failed to demonstrate sufficient good cause for the inordinate delay. That in any case the applicant's draft Memorandum of appeal and subsequent appeal do not show the realistic prospect of the intended appeal succeeding. On the same vein the Respondent's counsel contends that there is no evidence if stay is not granted, the applicant would suffer substantial loss or render the appeal nugatory.

Having heard both counsels in their submissions underpinned in the Notice of Motion I consider it pertinence to rule on the two issues raised by the applicant.

**a) Stay of Execution**

The express provisions of order 42 rule 6 (1) given such applications in incidental to the appeal but which do not involve the merits of the appeal itself as prescribed by the rules.

The applications under this rule are to be considered and given due effect by the Court exercising its unfettered discretion balancing the competing rights of the parties to the appeal. The approach to be adopted by the Court for a stay of execution in respect of an impugned judgement would be in appropriate circumstances factor the following; -

***a. That the successful party is entitled to the fruits of his or her judgement obtained on the merits. That therefore means, for the Court to deprive a successful litigant from reaping the fruits there must be good reason to do so. The other guiding principles the Court employs in exercising its discretion to decline or grant stay of execution are as stated in the case of Stephen Wanjohi V Central Glass Industries Ltd (Nairobi High Court Civil Case Number 6726 of 1999 There must be; -***

***a. Sufficient cause.***

***b. No unreasonable delay in filing the application.***

***c. Substantial loss not compensable by way of damages.***

***d. Security for due performance of the decree.***

In the case of *Dr Willis Badia V Lake Steel Supplies Nairobi Civil Appeal No. 224 of 1995*, the Court emphasized that the ground of stay of execution pending appeal an applicant ought to evidentially demonstrate that he has an arguable appeal and whether the appeal if successful would be rendered nugatory.

Similarly, from the persuasive authority in *Hammond Suddad Solicitors V Agrichem International Holdings SLUHCIAP No. 30/2001*. The court went to state and, point out as following; -

***“That the evidence in support of stay needs to be full, frank and clear. Whether the Court should exercise discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other if both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the Respondent will be unable to enforce the judgement? On the other hand if a stay is refused and the appeal succeeds and the judgement enforced in the meantime what are the risks of the appellant being able to recover any monies paid from the respondent”.***

Applying the above principles from the affidavit of the applicant it contains evidence which is suggestive of the appeal if successful being rendered nugatory. Further, that if the respondents proceed with execution and enforcement of the judgement there is high risk of substantial loss which remains uncontroverted by the Respondent in their averments in the replying affidavit.

The reasons advanced by the applicant for failure to file an appeal within time can be appreciated from the affidavit on grounds of delivery of judgement via email which was never received by the applicant. That as soon as he acknowledged existence of the impugned judgement, he went ahead to seek leave of the Court herein for stay of execution orders and extension of time to file an appeal.

In my view therefore there exists credible material in support of sufficient good cause as explained on undue delay to file the application under order 42 rule 6 and section 79 (G) of the Civil Procedure Act on enlargement of time.

In addition, the information provided to the Court is of a nature to draw an inference on substantial loss as well as the appeal if successful to be rendered nugatory. In keeping with the duty of the Court under this rule on stay of execution, the requirement of granting security, is one which arises consistently. It is usually for the protection of the successful litigant, in possession of a valid judgement of the Court.

In this County deposit of security for due performance of the decree serves the objective of preserving the rights of both parties to the appeal. In light of the above conditions deposit of security for due performance of the decree ought to be satisfactorily considered so as not to prejudice the Respondent. In the instant case they are special circumstances which positions the court to decide differently in matters to do with security for due performance of the decree pending the hearing and determination of the appeal. I must reiterate that the applicant is aggrieved with the issue on liability and quantum awarded by the trial court.

Be that as it may it does not preclude him from satisfying the criteria on security. Given the circumstances of the case and to ameliorate any hardship that may be encountered to raise the decretal sum there is some substance to exercise discretion for the applicant to deposit a less amount than the quantum in the judgement. The Court has taken into account that this was a family conflict involving the dead but not buried. The significant award in the trial court judgement is confined to the remains of late **Kirimo Fondo**. Stay of execution pending an appeal is purposed to preserve the subject matter in a dispute so as to give effect to the principle on equality of arms and to condition the whole of the judgment so as not render it nugatory. The Court considers the applicant as having met the threshold under Order 42 rule 6 (1) of the Civil Procedure Rules.

#### **Extension of Time**

In relation to enlargement of time I bear in mind the principles in *Nicholas Kiptoo Arap Korir Salat V IENBC & 7 Others [2014] eKLR* that the Court has unfettered discretion to grant extension of time under such conditions as the Court deems proper. Some of the considerations the Supreme Court laid out in this Case consist of the following; -

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.**
- 3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis.**
- 4. Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.**
- 5. Whether there will be any prejudice suffered by the Respondent of the extension is granted.**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether uncertain cases, like election petition, public interests should be a consideration for extending time.**

I have examined the application and affidavit in support by the applicant and the rejoinder by the Respondent. With regard as to whether the application has been made without unreasonable delay, the record shows that judgement of the trial court was delivered electronically. Nevertheless, the applicant has denied receipt of the dispatched judgement via email. There is no corresponding leave to counter check the delivery as the judgement to the last known email of the applicant's counsel.

In summary the applicant averments remain unchallenged in absence of notice of the delivery of judgement by the trial Court. That leaves the position of the applicant clear on the length of time and the explanation given occasioning the delay to warrant extension of time.

For the reasons set out in this Ruling I accordingly allow the applicant's Notice of Motion with enforceable orders as follows; -

- 1. That the applicant has leave of this Court for an extension of time to file the intended appeal. The Draft Memorandum be deemed as duly filed within time. The applicant has 30 days period within which to file and serve the Record of Appeal.**
- 2. Corollary, to that is grant of stay of execution pending the hearing and determination of the intended appeal, save that security for due performance of the decree in the sum of Kshs.600,000/- be deposited with the Deputy Registrar, High Court or in the alternative the joint names of both counsels in an interest earning account in a reputable financial institution within 45 days from today.**
- 3. In default of security the stay order lapses and the appeal can be pursued in absence of stay of execution. The costs of this application to be borne by the applicant. It is so ordered.**

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 14<sup>TH</sup> DAY OF JUNE, 2021.**

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**R. NYAKUNDI**

**JUDGE**

**NB:** In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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