



**REPUBLIC OF KENYA**

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

**(Coram: Odunga, J)**

**MISC. APPLICATION NO. 40 OF 2021**

**GEORGE KAHURA.....APPLIANT**

**-VERSUS-**

**SMM (A minor suing through**

**his mother and next friend JMN..... RESPONDENT**

**RULING**

1. By a Motion on Notice dated 15<sup>th</sup> March, 2021, the applicant herein seeks the following orders:

1) SPENT.

2) **THAT** this honourable court be pleased to extend time and grant leave to the applicants to lodge and appeal and file a memorandum of appeal out of time against the judgement and decree of the Honourable D. Orimba, Senior Principal Magistrate, Kangundo entered against the Applicant on 3<sup>rd</sup> February, 2021

3) SPENT

4) **THAT** this honourable court be pleased to stay execution of the said judgement pending the hearing and determination of the application and the intended appeal herein.

5) SPENT

6) **THAT** the costs of this Application be in the cause.

2. The affidavit in support of the said application was sworn by **Pauline Waruhiu**, the General Claims Manager, Directline Assurance Company Limited, the insurers of motor vehicle registration no. KBM 535 at whose instance Civil Suit No. 112 of 2018 in Kangundo was defended.

3. According to the Applicant, on 3<sup>rd</sup> February, 2021, judgement was delivered against the applicant in the said suit in which the Applicant was held 100% liable and was ordered to pay the Respondent a total sum of Kshs 109,550/-. Aggrieved by the said decision the Applicant's insurers instructed the advocates to appeal against the same but efforts to obtain instructions from the applicant were a bit strenuous since the insured's directors had gone out of the country on business issues. Pursuant thereto, there as a delay in issuing instructions to the advocates to ode the appeal, which intended appeal, it was averred, is merited, arguable and raises pertinent points of law hence has overwhelming chances of success particularly on liability.

4. It was averred that the delay, though regretted, the applicant had nothing to do with it and hence ought not to be penalised.

5. The Applicant disclosed its willingness to furnish the court with a bank security.

6. In opposing the application, the Respondent filed the following grounds of opposition:

1. **THAT** the Defendant's/Appellant's application is;

- a. Frivolous, incompetent and vexatious.
- b. Bad in law.
- c. Incurably defective.
- d. An abuse of the court process.
- e. An afterthought and brought in bad faith.
- f. Brought after inordinate delay.

2. **THAT** the application herein is brought with unclean hands as it was only brought after proclamation was done and not before yet the judgment herein was delivered on 3<sup>rd</sup> February 2021, which is almost (2) two months ago yet the Defendant had never made any single effort to settle the claim.

3. **THAT** the sole purpose of this application as can clearly be seen from the timing is to frustrate the process of execution as it was only triggered by proclamation done by the plaintiff's auctioneers.

4. **THAT** the defendant/ applicant has not given any good and convincing reasons why the application should be allowed.

5. **THAT** the defendant/ applicant had never bothered to file an application for stay of execution until the plaintiff executed.

6. **THAT** the application is an afterthought and brought in bad faith.

7. **THAT** the purported appeal is incompetent, frivolous and not arguable.

8. **THAT** this application is already overtaken by events as the Applicant has already paid Kshs 178,790/= leaving a balance of Kshs. 26,604/= plus costs of this application for Kshs. 20,000/=.

9. **THAT** this application lacks merit and is an abuse of the court process.

7. In his submissions, the Applicant reiterated the contents of the supporting affidavit and contended that unless the stay is granted, the applicant stands to suffer irreparable loss as the sum involved is Kshs 178,790/- which has already been remitted to the Plaintiff's advocates.

8. It was submitted that to deny the applicant its constitutional right of appeal would amount to denying his right to access justice and the right to fair hearing.

9. According to the Applicant, the Respondent still insists that the warrants of attachment are still in force despite having been paid the full amount. It was averred that in absence of an affidavit of means, it may be construed that the Respondent is not possessed of the means and is therefore not in a position to reimburse the decretal sum should the appeal succeed.

10. It was submitted that since the delay was only 12 days, the same was not inordinate and was sufficiently explained by the applicants.

11. The Court was therefore urged to grant the prayers sought.

12. On behalf of the Respondent, it was submitted that the application is an abuse of the court process and was solely brought to frustrate the process of execution as it was only triggered by the Respondent's proclamation.

13. According to the Respondent, this application was brought in bad faith and is an abuse of the Court process, the Applicant had already issued a cheque for Kshs. 178,790/- on 5<sup>th</sup> March 2021 the day when proclamation was done leaving only a balance of Kshs. 26,604/= as per the warrants of attachment. In the Respondent's view, this is an admission of the Respondent's claim and there is nothing now left to appeal on.

14. The Court was therefore urged to dismiss the Applicant's application and order the Applicant to pay the remaining balance of Kshs. 26,604/=, interest on the same plus costs of the application before this Court.

#### **Determination**

15. I have considered the application, the respective affidavits and the submissions filed as well as the authorities relied upon.

16. From the submissions filed, it would seem that the Respondent has already paid a substantial part of the decretal sum leaving only Kshs. 26,604/=, interest on the same plus costs of this application, according to the Respondent. That a substantial sum has been settled is not disputed. As to whether there is any sum due and if so how much is a matter that ought to be dealt with by the trial court pursuant to section 34(1) of the **Civil Procedure Act** which provides that:

*All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.*

17. It is therefore no longer necessary to deal with the limb of the application seeking stay. For avoidance of doubt that limb would have in any case been unsuccessful as there was no attempt at all by the Applicant to factually prove that the Applicant stands to suffer any loss let alone, substantial one as is required by the law. Such an averment must always be in the supporting affidavit disclosing the basis upon which it is made.

18. As regards the extension of time, the only serious objection by the Respondent is that since the decretal sum had been paid this application is an abuse of the process of the Court as it is an afterthought. With due respect to the Respondent, the mere fact that the Applicant settles the decretal sum does not necessarily bar him from pursuing his undoubted right of appeal. In other words, the right of appeal is not lost merely by the fact of the settlement of the decretal sum. A not too dissimilar issue arose before the Court of Appeal in **Machakos District Co-Operative Ltd. vs. Nzuki Kiilu Civil Application No. Nai 17 of 1997** where it was argued that since the decretal sum had been paid, the right of appeal had been lost. The Court (**Shah, JA**) however had no hesitation in holding that the fact that the decretal sum has been paid does not deprive a party of the right of appeal.

19. The same position was adopted by **Waki, JA** in **Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005** where he held that:

**“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant’s counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”**

20. I have on my part considered the supporting affidavit, and I find that the applicant has sufficiently explained the reason for the delay which delay is not inordinate in the circumstances and I did not hear the Respondents contend that if the application is allowed they will suffer such prejudice that cannot be compensated by an award of costs. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See **Waljee’s (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.**

21. In the premises while I disallow the stay sought I hereby extend the time within which the intended appeal is to be lodged with a further period of 7 days from the date herein in default of which the said prayer shall be deemed to have been dismissed.

22. The Respondent will have the costs of this application and it is so ordered.

23. This order shall apply to High Court Miscellaneous Application Nos. 41, 42 and 43 of 2021.

**READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 1ST DAY OF JULY, 2021.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Morara for the Applicant**

**CA Geoffrey**