



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

MISCELLANEOUS CIVIL APPLICATION NO. 97 OF 2019

MAGUNA ANDU WHOLESALERS (K) LIMITED.....APPLICANT

VERSUS

SIMON NJUGUNA MWAURA & 3 OTHERS.....RESPONDENTS

RULING

1. The applicant's prayers are two-pronged: Firstly, that the time for filing of the appeal be *enlarged*; and, secondly, for *stay of execution* of the decree pending the determination of the appeal.
2. The notice of motion is dated 21st August 2019. The intended appeal is against the judgment dated 7th May 2019 in *Murang'a Chief Magistrates Civil Suit No. 406 of 2013*. The respondent has commenced execution of the decree of Kshs 8,971,870. The decree is for damages arising out of a fatal road accident.
3. The essence of the motion is that unless leave is granted, the appeal will be lost. There is a deposition sworn by *Joseph Ndonga*, in which he blames the delay on the mistakes of his lawyer's court clerk. He avers that the latter received the judgment notice but failed to diarize the date. He states that the applicant only became aware of the judgment when execution started. The applicant has since deposited the decretal sum in court pursuant to the conditional order of the High Court dated 28th August 2019.
4. The motion is opposed through grounds of opposition dated 16th October 2019 and a replying affidavit of *Simon Njaura* sworn on 15th October 2019. The deponent casts doubt on the story of the clerk who failed to diarize the judgment date. He deposes that failure by the clerk to swear an affidavit is telling. He avers that there has been undue delay and that the intended appeal is hopeless.
5. The respondent contends further that there is no evidence of substantial loss and that no sufficient grounds have been laid to warrant the stay. In his view, the present motion is an abuse of court process and a stratagem to deny the decree-holder his fruits.
6. The applicant and 1st respondent filed written submissions on 22nd December 2020 and 11th February 2021 respectively. When learned counsel for the parties appeared before me on 11th May 2021, they informed the Court that they would rely entirely on those submissions.
7. I will commence with the prayer for extension of time. The legal parameters are well settled: This court has wide and unfettered *discretion* to extend time. The discretion must however be exercised *judiciously*. Some of the factors to be considered include the length of delay, the reasons for the delay, the nature of the intended appeal and whether the respondent will suffer prejudice if the court extends the time. See *Leo Sila Mutiso v Rose Mwangi*, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported), *Nicholas Salat v IEBC & 7 others*, Supreme Court, Application 16 of 2014 [2014] eKLR.
8. I agree with the respondent that there was substantial delay of over three months between the date of decree on 7th May 2019 and the presentation of this motion on 21st August 2019.
9. Nothing would also have been easier than getting the offending clerk to depose to the alleged mistakes. I have seen the judgment notice served upon the applicant's counsel. It bears the firm's stamp of 26th April 2019. I do not find the explanation that the court clerk failed to diarize the date truly convincing. But there remains a *possibility* that there was a *mistake*.
10. So can justice still be done without dismissing the intended appeal? The answer is in the affirmative for four main reasons: Firstly, there is an arguable appeal on whether the lower court applied the correct principles in assessing the damages for *lost years*. I must emphasize however that this does *not* mean that the appeal will succeed. For reasons that will become evident, it would be *prejudicial* to comment at length on the merits of the intended appeal

11. Secondly, the applicant has demonstrated good faith by depositing the decretal sum of Kshs 8,971,870. I am alive that this offers little relief to the decree holder particularly because it is not generating any interest.

12. Thirdly, I am inclined to pay heed to the *overriding objective* to do justice to the parties. See generally **Article 159** of the **Constitution**. See also **Harit Sheth v Shamas Charania**, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.

13. Fourthly, the applicant has exhibited a copy of the proclamation by Thames Traders Auctioneers. Unless time is extended, the intended appeal may be rendered nugatory. I say that carefully as this is a money decree. Justice is however a two-way street. The prejudice to the decree holder can be mitigated by thrown away costs and directions on fast-tracking the intended appeal.

14. Granted those circumstances, I will exercise my *discretion* under section 79G of the **Civil Procedure Act** and extend the time for filing of the appeal. The memorandum of appeal must now be filed and served within 14 days of today's date. However, the leave is also *conditional* upon the applicant paying the 1st respondent thrown away costs of Kshs 30,000 within 14 days of today's date.

15. I will now turn to the prayer for stay of execution. The present motion is largely predicated upon Order 42 rules 6 of the **Civil Procedure Rules**. The court *may* grant a stay if *substantial loss* may occur; that the application has been made *without delay*; and, that the applicant furnishes *security* for the due performance of the decree that may ultimately be binding on him.

16. I have already found that there was delay in presenting the motion. And I have punished the applicant with the thrown away costs.

17. I have found that there is an arguable appeal. This court ought to see that the appeal, if successful is not nugatory. **Wilson v Church** (No 2) 12 Ch. D [1879] 454 at 459, **Butt v Rent Restriction Tribunal** [1982] KLR 417.

18. I have also said that the applicant has demonstrated some good faith by depositing the sum of Kshs 8,971,870 in court as security for performance of the decree. I remain alive that as a general proposition, the execution of a *money decree* does *not* constitute substantial loss. **Kenya Shell v Benjamin Karuga** [1982-88] 1 KLR 1018.

19. But to ensure that the respondent is not left holding the short end of the stick, I will attach some conditions to ensure that the appellant stays wide awake.

20. My final orders are as follows:

a. That leave be and is hereby granted to the applicant to lodge an appeal out of time. The memorandum of appeal *must* be filed and served within 14 days of today's date.

b. The leave is *conditional* upon the applicant paying the 1st respondent thrown away costs of Kshs 30,000 within 14 days of today's date.

c. That there shall be a stay of execution of the decree pending the hearing and determination of this appeal upon the *condition* that the applicant maintains the deposit of Kshs 8,971,870 in court as security for due performance of the decree.

d. In default of the conditions in a), b) and c) above, the leave shall automatically lapse and execution shall issue.

e. That in the interests of justice, the appellant shall cause the record of appeal to be lodged not more than *ninety days* from the date of presentation of the memorandum of appeal; and, shall also ensure that the appeal is presented to the judge in chambers for admission or directions within a *further thirty days*.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 8TH DAY OF JULY 2021

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the applicant.

Ms. Waititu holding brief for Mr. Kihara for the 1st respondent instructed by C. N. Kihara & Company Advocates.

Ms. Dorcas Waichuhi & Susan Waiganjo, Court Assistants.