



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISII**

**(CORAM: A.K. NDUNGU J.)**

**MISC. APPLICATION NO. 60 OF 2020**

**TRUSILA BIKERI.....APPLICANT**

**VERSUS**

**MESHACK OMABATI ONCHWATI & WILTER KERUBO OGERO**

**(Suing as the legal Representative and Administrators of the Estate of the late**

**LUCY MONYANGI OMBATI (Deceased).....RESPONDENT**

**RULING**

1. The applicant has moved this court for stay of execution of the decree issued on 3<sup>rd</sup> March, 2020 in Ogembo CMCC No. 232 of 2017 pending the hearing and determination of the intended appeal. She has also sought leave to file and serve an appeal out of time against the judgment of the lower Court in terms of the draft memorandum of appeal annexed to her application.
2. Ogembo CMCC No. 232 of 2017 had been filed by the respondent against the applicant for general damages under the Fatal Accidents Act and the Law Reform Act together with special damages in relation to a fatal accident that had occurred on 28<sup>th</sup> June 2017. The matter culminated in the judgment delivered on 3<sup>rd</sup> March 2020 in favour of the respondents.
3. The grounds in support of the application as outlined in the body of the application and the applicant's affidavit sworn on 28<sup>th</sup> October 2020 were that the judgment before the trial court was delivered in favour of the respondent without her knowledge. She averred that she learnt about the delivery of judgment sometime in July 2020 through a letter from the Respondents' advocates.
4. The applicant claimed that the directors of M/S Directline Insurance Limited which was the insurer of the ill-fated vehicle convened a meeting and passed a resolution to appeal the decision of the trial court. However, due to the engagement of the directors, the instructions were not conveyed to their advocates on time. The instructions to appeal were issued via e-mail which was never received due to a technological glitch. On or about 25<sup>th</sup> October, 2020, the insurer followed up with the advocates on record on whether their instructions had been received and realized that they had not been received and that the time within which to appeal had lapsed.
5. The applicant, being dissatisfied with the court's judgment where she had been ordered to pay general damages and special damages of KShs. 996,000/= plus costs and interest of the suit, instructed her advocates to lodge an appeal against the issue of quantum. Since the period for filing such an appeal has lapsed she prays that this court grants her leave to appeal out of time.
6. The applicant avers that there are no orders of stay of execution in force thus exposing her to an imminent risk of execution proceedings. She claims that the decree is for a substantial amount which if paid to the Respondent, who is a man of straw and the intended appeal is successful, she will not be able to recover the amount. She claims that her intended appeal raises numerous triable issues and has high chances of success. She fears that she will suffer substantial loss and damage if the orders sought herein are not granted and further that the intended appeal will be rendered nugatory.
7. She claims that the respondent will not be prejudiced in any way if the orders sought are granted and that she is ready and willing to furnish such reasonable security as this court may deem fit.
8. The respondents, in their replying affidavit sworn on 23<sup>rd</sup> November 2020, countered that after judgment was issued in their favour, the applicant was granted 30 days stay of execution but chose not to appeal against the decision within the appropriate time. They averred that

the application was an afterthought only meant to hinder them from enjoying the fruits of their judgment. The respondents averred that the intended appeal had no chances of success.

9. If the court was inclined to grant stay of execution pending the intended appeal, the respondents urged the court to order that half of the decretal sum be paid to them while the remaining half be deposited in a joint interest earning account of both advocates on record.

10. The application was canvassed by way of written submissions which I have duly considered and will refer to in my analysis of the issues.

11. The issues arising herein are twofold, the first is whether the applicant should be granted leave to appeal out of time and the second is whether this court ought to grant stay of execution pending the hearing and determination of the appeal.

12. According to **Section 79 G of the Civil Procedure Act**, an appeal from the subordinate court to the High court ought to be filed within a period of thirty days. The provision stipulates;

*“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 from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:*

*Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”*

13. The court has wide discretion in determining whether to extend time to file an appeal. In considering such an application, the court will look into the length of delay, the reasons for delay, the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted. (See **Pauli Musili Wambua v Attorney General & 2 Others [2015]eKLR**, **Edith Gichugu Koine v Stephen Niagi Thoithi [2014] eKLR** and **Imperial Bank Limited (In Receivership) & Another v Alnashir Popat & 18 others [2018] eKLR**)

14. The decision that the applicant intends to appeal against was issued on 3<sup>rd</sup> March, 2020, more than 7 months before the instant application was filed. She was required to have filed her appeal by 3<sup>rd</sup> April 2020 but did not do so.

15. Regarding the length of delay in such applications the Court of Appeal in **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet CIVIL APPLICATION NO. 91 OF 2017 [2018] eKLR** held;

*“[12] The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”*

16. Thus, the delay of 7 months would not necessarily bar the applicant from exercise of discretion in her favour. She was however required to demonstrate that there were satisfactory reasons for the delay.

17. The applicant attributed her failure to file the application in time on the delay by her insurer’s directors to convey instructions to its advocates to file the appeal. She also claims that the advocate did not receive the instructions via e-mail due to a technological glitch.

18. For their part, the respondents submitted that there were strict timelines for lodging appeals and the court could not wait for parties to convene meetings and pass resolutions on appeals when they so wished. They also questioned the delay by the insurer to make an inquiry on whether the appeal had been filed. The respondents argued that despite being aware of the judgment and the Bill of Costs served upon them in July 2020 the applicant’s advocates had failed to file the appeal, 7 months down the line. They also observed that the applicant had not furnished any annexures in support of their reasons for delay and were of the view that the applicant had no valid reasons for exercise of the court’s discretion in her favour.

19. The averment by the applicant that they were unaware of the delivery of the decision she intended to appeal against was not challenged by the respondents in their response to the application. The applicant averred that her advocates only got to learn about the delivery of the judgment sometime in July 2020.

20. The timelines provided by the law ensure certainty in the judicial process. The courts have however taken the position that an appellant will not be driven out of the seat of justice for an excusable mistake made by his advocate.

21. As aptly held by Apaloo JA in **Philip Keipto Chemwolo & Another v Augustine Kubende Civil Appeal 103 of 1984 [1986]eKLR**;

*“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit ... the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”*

22. Although there was a lengthy delay in filing the appeal or moving the court to file an appeal out of time, this court finds that the delay was excusable. This court also takes cognizance of the fact that the time for filing the appeal lapsed as the country plunged into the health crisis that followed the Covid-19 pandemic. The situation only worsened as the year progressed and it could well be that the applicant’s insurer and her advocate got caught up in uncertainties of the time.

23. The applicant annexed a copy of the draft memorandum of appeal to her application which shows that she intends to challenge the trial court's assessment of quantum on the basis that the award was inordinately high and was based on a misapprehension of the evidence in some material respect.

24. Since the parties agree that the suit before the trial court was a claim for damages based on the fatal accident, which was decided in favour of the respondent, the failure by the applicant to annex a copy of the trial court's decision to her application is not fatal. It is not necessary for this court to interrogate the decision of the trial court at this stage. The draft memorandum raises legitimate issues that are likely to succeed on appeal. The applicant therefore satisfies the conditions for exercise of the court's discretion in her favour for extension of time to appeal.

25. Regarding the second issue, **Order 42 Rule 6** of the **Civil Procedure Rules** provides as follows on the conditions for grant of stay of execution pending appeal;

***Stay in case of appeal [Order 42, rule 6.]***

*(1) 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 ultimately be binding on him has been given by the applicant.*

26. The conditions to be drawn from the above provision for grant of stay of execution are that first, substantial loss is likely to occur if the application is not granted, second, the application has been made without unreasonable delay and lastly, security for the due performance of the decree as may be ultimately binding on the applicant.

27. This court has found that the delay in filing the application was excusable.

28. As to whether substantial loss may result if the application is not granted, the respondents contend that the applicant has not provided proof to satisfy this condition. They submit that the applicant is merely seeking sympathy to hoodwink the court into granting the orders sought in her favour.

29. They rely on the case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR** where the court held that the fact that the process of execution had been put in motion, did not of itself, amount to substantial loss because execution is a lawful process.

30. In her application, the applicant averred that the respondents are persons of straw and will be unable to refund the decretal sum if they are allowed to execute and the intended appeal succeeds. The decree in this case is a money decree. Therefore, the financial status of the applicant and the respondent is an important factor in determining whether substantial loss is likely to occur. (See **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi HCCA No. 1561 of 2007**)

31. In the case of **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike Civil Application No. Nai. 238 of 2005 [2006] eKLR** the Court of Appeal held;

*“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”*

32. The respondents did not counter the applicant's claim that they would be financially incapable of refunding the decretal sum if the appeal succeeded. The applicant's willingness to provide security is a shows that the application is not merely intended to deny the respondents the fruits of judgment. Accordingly, this court finds that the applicant has brought herself within the threshold for grant of stay of execution. The stay shall however be conditional on payment of security as the respondents' right to enjoy the fruits of their judgment must also be taken into account.

33. Consequently, the application herein is successful but on conditions as follows;

a) A stay of execution is granted on condition that the applicant shall release half the decretal amount to the Respondents' counsel within 30 days from the date of the delivery of this ruling. The other half of the decretal amount shall be deposited in an interest earning account in the joint names of the advocates for the Applicant and the Respondents within 30 days from the date of this ruling.

b) Leave to appeal out of time is granted.

c) The intended appeal be lodged within the next 30 days in default of which the leave shall lapse.

d) Costs of this application to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED AT KISII THIS 8TH DAY OF JULY 2021.**

**A. K. NDUNG'U**

**JUDGE**