



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL MISC. APPL. NO. E107 OF 2021

REGINA NJERI GITAU.....1ST APPLICANT

SAMUEL NDUNGU NGIGI.....2ND APPLICANT

VERSUS

RONALD REAGAN OMONDI OBAR.....RESPONDENT

RULING

- 1) The applicant herein took out the motion dated 6th March 2021 whereof they sought for two main orders: First an order for extension of time to appeal out of time and secondly an order for stay of execution of the decree pending appeal.
- 2) The applicants filed the affidavit sworn by Purity Wambui Waikwa in support of the motion. When served with the application, the respondent filed a replying affidavit he swore to oppose the motion.
- 3) The applicants stated that the trial court delivered judgment in the sum of ksh.206,410/= representing general and special damages against them and in favour of the respondent. They aver that they are aggrieved by the judgment and intend to appeal but time to appeal has lapsed hence the need to seek for leave.
- 4) It is deponed by the applicants' advocate that she had challenges in contacting the client to obtain instructions and only managed to get in touch after time to appeal had lapsed. The applicants aver that the application was filed without unreasonable delay.
- 5) It is also argued that unless the order for stay is granted the applicants will suffer irreparable loss in that the respondent is not in a financial position to refund the decretal sum if the appeal turns successful. The applicants proposed to deposit the decretal sum in an interest earning account in the joint names of the advocates as security for the due performance of the decree.
- 6) The respondent opposed the motion arguing that there was unreasonable delay in filing the application. The respondent also argued that the applicants have not demonstrated the substantial loss they would suffer if the order for stay is not granted.
- 7) The respondent urged this court to make an order directing the applicants to pay 2/3 of the decretal amount and to deposit the balance in an interest earning account in the joint names of the advocates appearing in this appeal.
- 8) I have considered the grounds stated on the face of the motion plus the facts deponed in the rival affidavits. The principles to be considered in determining such an application are set out under Section 79G of the Civil Procedure Act and Order 42 rule 6 of the Civil Procedure Rules. As regards the prayer for leave to appeal out of time, the court is given unfettered discretion to grant the order if the applicant provides a good and sufficient reason.
- 9) In this matter, the applicants' advocate stated that it took time for her to contact her clients and that she only managed to contact the applicants after the time fixed to appeal had lapsed. The respondent did not controvert this averment but he instead complained that the application was filed after unreasonable delay. The record shows that judgment sought to be impugned was delivered on 27th January 2021 and the instant application was filed on or about 10th March 2021. There was a delay of slightly over a month from the date of judgment. I find the delay not unreasonable. I am convinced that the applicants have given plausible reasons to justify the delay.
- 10) I am therefore satisfied that the ground advanced by the applicants' advocate is good and sufficient hence the applicants are entitled to an extension of time to appeal.

11) As regards the application for stay, the applicants must show first, that the application was filed without unreasonable delay. I have already stated that the application was filed without unreasonable delay. The second principle is that an applicant must show that unless the order for stay is granted he would suffer substantial loss. The applicants have stated that if the decretal sum is paid to the respondent he will not be in a position to make a refund should the appeal turn successful.

12) The respondent did not deem it fit to controvert this assertion. I am convinced that the grounds/reason advanced by the applicants proves that they would suffer substantial loss if they are denied the order for stay.

13) The third and final principle is that there must be a provision for security for the due performance of the decree. I have considered the proposals made by both parties. However, I am satisfied that the proposal made by the respondent is reasonable.

14) In the end, the motion dated 6th March 2021 is found to be meritorious. Consequently, the same is allowed giving rise to issuance of the following orders;

i. The applicants are granted leave of 10 days to file an appeal out of time.

ii. An order for stay of execution of the decree of the trial court pending appeal is granted on condition that the applicants deposit the decretal sum in an interest earning account in joint names of the advocates within 30 days from the date of this ruling. In default, the application for stay will be treated as having been refused. Costs of the motion to abide the outcome of the intended appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 9th day of September, 2021.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent