



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APPLICATION NO. E206 OF 2021

ALEXANDER KINYUA AUGUSTINO.....1ST APPLICANT

JUDY NJERI THUKU.....2ND APPLICANT

VERSUS

PAULINE MUTEMBEI.....1ST RESPONDENT

ALIBIRATA CLARUNCI STEPHEN.....2ND RESPONDENT

RULING

1. The applicants filed the notice of motion dated 3rd May 2021 seeking the following orders:

a) & b) Spent

c) THAT pending the hearing and determination of the intended Appeal, this honourable court be pleased to stay execution of the Ruling and Order 4 of Honourable Mr. D.O Mbeja. P.M in Milimani Civil Suit No. 3168 of 2017, delivered on 3rd March 2021.

d) THAT this honourable court be pleased to grant leave to the defendants/applicants to appeal out of time against the Ruling and Order of Mr. D.O Mbeja. P.M in Milimani Civil Suit No. 3168 of 2017 delivered r on March 2021.

e) THAT the cost of this Application be provided for.

2. The application is premised on the grounds on the face of the application plus the supporting affidavit sworn by the 1st applicant on 3rd May 2021. The main grounds are that the applicants were not aware of the delivery of the ruling on 3rd March 2021 as there was no notice issued after previous deferments of the same. They only learnt of the delivery of the said ruling on 30th March 2021 vide a letter (AKA 1) to their advocates by the respondents' advocates.

3. By that time the 30 days period for filing appeal was about to lapse. Their advocate engaged the respondents' advocate and finally this application was filed on 6th May 2021.

4. They therefore seek for leave to appeal out of time and stay of execution. They have annexed a memorandum of appeal to the application ("AKA 5") plus the order issued on 3rd March 2021 allowing for execution. They are disputing the decretal sum stated as Kshs. 1,840,391/=. They claim to have been paying Kshs. 50,000/= per month to the respondents.

5. A replying affidavit was sworn by the 2nd respondent on 31st May 2021 opposing the application. He depones that the applicants have engaged in endless applications and appeals in a bid to frustrate them from enjoying the fruits of their judgement. He suggests that the respondents offer security for the decretal amount for any stay orders to be granted.

6. He has denied receiving any money from the applicants besides a total of Kshs. 100,000/= received on 21st January 2021 and 24th February 2021. This amount has been owing since the year 2016.

7. The application was canvassed by way of written submissions. The applicants' submissions by Mr. Muhia are dated 12th July 2021. He has explained the reason for the delay in filing appeal and referred to annexed documents (AKA 1, 3); plus the impugned ruling (AKA 2);

memorandum of appeal (AKA 5). He submits that the respondents do not stand to be greatly prejudiced since they are receiving a monthly payment of Kshs. 50,000/= from the applicants.

8. Referring to Order 42 Rule 6 of the civil procedure rules counsel submitted that issuance of an order of stay of execution is discretionary. On this he referred to the cases of:

i) **Kenya Power and Righting Co. Ltd Vs Rose Anyango and another [2020] eKLR**

ii) **J.N.M v P.M [2018] eKLR.**

9. He further submitted that if execution is not stayed the applicants would be committed to civil jail and this would affect their families. He contends that the application was made without unreasonable delay.

10. Submissions by the respondents are dated 21st July 2021. Mr. Nyamweya submits that the alleged lack of knowledge of the delivery of the ruling is due to the unending delays by the applicants. He claims that the ruling was deferred from 19th February 2021 to 3rd March, 2021 due to a fumigation exercise at the court.

11. Counsel has further submitted that the applicants have failed to demonstrate that they are willing to pay into the court security if stay of execution is granted pending the hearing and determination of the appeal. He referred to the case of **Gianfranco Manenthi & another vs Africa Merchant Assurance Company Limited [2019] eKLR** in support of this submission.

12. He contends that the applicants had failed to show that the appeal would be rendered nugatory if the stay of execution order is not granted. That the applicants had not placed before the court their financial position and how it would be affected. See **Bemuta Agencies Limited v another [2020] eKLR.**

13. Counsel has argued that the applicants' appeal in the draft memo of appeal does not raise any arguable grounds. He contends that both the intended appeal and application lack merit. He asks the court if inclined to grant the stay of execution to make it conditional.

Analysis and determination

14. I have duly considered the application, grounds, affidavits, both submissions and cited case law. This court has to determine whether the applicants have met the threshold for:

i) extension of time to file appeal out of time.

ii) stay of execution pending the intended appeal.

15. The impugned ruling was delivered on 3rd March 2021. The bone of contention is whether the applicants were aware of the date the ruling would be delivered having been deferred once or twice. The contents of the letters "AKA 1 & 2 seem to confirm that the applicants were not aware of the delivered ruling until when they received the letter dated 30th March 2021 from the applicants' counsel (AKA 1).

16. The record of the lower court is not yet before this court for it to satisfy itself of the happenings before the trial court. This application was finally filed on 6th May 2021 and placed before the duty Judge on 10th May 2021. Considering that 30th March 2021 is the date the applicants were made aware of the ruling, they should have filed their application on or before 30th April 2021. They were therefore late by six (6) days which I find not to be inordinate. See **Mwangi Vs Kenya Airways Limited [2003] KLR.**

17. Order 42 Rule 6 (2) of the Civil Procedure Rules provides:

"(2) No order for stay of execution shall be made under sub rule (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."

18. From the documents filed, the claim in issue is a monetary decree. The applicants claim to be paying Kshs. 50,000/= per month to the respondents while the parties have disputed that. The extracted order of the trial court (AKA 4) shows that the court ordered as follows:

"THAT the decree be executed as no sufficient cause has been shown by the Judgment debtors to the satisfaction of the court why execution of the decree should not issue all circumstances considered."

19. On arguability of the appeal I have looked at the draft memorandum of appeal filed. This court is not in a position to know what the applicants told the trial court in response to the notice to show cause (NTSC). The draft memorandum of appeal has raised seven (7) grounds of appeal which are almost repetitive. Looking at them I would not dismiss them as being in-arguable. The applicants are not at this point expected to show that their intended appeal has high chances of success. I find the intended appeal to be ab initio arguable.

20. The applicants still seek to be allowed to pay Kshs. 50,000/= per month until payment in full They have however not convinced the court of the payments so far made. They have also told this court of their intension to sell a parcel of land to enable them pay off the decretal sum. It is not clear how soon this will be done.

21. The respondents say they have been waiting for this payment since 2016. They do not mind the applicants being granted stay of execution as long as there is security.

22. I find that the current application was made without undue delay. Owing to the long period of non- clearance of this decretal sum it is only fair that the applicants provide security for performance. I therefore allow the application dated 3rd May 2021 on the following conditions:

i) The applicant is granted leave to file appeal within 21 days from the date of this ruling.

ii) There shall be stay of execution pending the hearing of the intended appeal on condition that the applicants pay the respondents Kshs. 500,000/= through their advocates within 60 days. Failure to comply will automatically vacate the order staying execution.

DELIVERED ONLINE, SIGNED AND DATED THIS 7TH DAY OF OCTOBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE