



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

MISCELLANEOUS CIVIL APPLICATION NO 39 OF 2021

JOASH OGECHI.....APPLICANT

VERSUS

HESBON NYAKUNDI.....RESPONDENT

RULING

1. By a Notice of Motion dated 30th July 2021 the applicant sought stay of orders of the judgment dated 23rd June 2021 in Kisii CMCC No 557 of 2020 (MCCC 558 of 2020) and any consequential orders therefrom pending the hearing of instant application. The applicant further sought extension of time within which to appeal against the judgment and decree of the trial court.
2. The application is based on provisions of **section 1A, 1B, 3, 3A and 79G** of the Civil Procedure Act and Order 50 Rules 6 and 8 and Order 51 Rule 1 of the Civil Procedure Rules.
3. It is grounded on the facts that the applicant came to learn of the court's decision on 25th July 2021 when he passed by the offices of the advocates appointed by the applicant's insurers to defend the suit herein when the same updated the applicant on the status of the suit herein.
4. The applicant is dissatisfied with the quantum of damages that was awarded by the subordinate court but the statutory time by which an appeal can be lodged has since passed. He claims that the delay in filing is attributed to his insurers who failed to notify him of the judgment who have declined to settle the claim. He explained in the supporting affidavit that the claim was not settled because the insurer had discovered that there was material misrepresentation on the part of the respondent and that the respondent had failed to avail crucial supporting documents which made the insurer to believe that the claim was fraudulent.
5. The applicant contends that he should not be inhibited from pursuing the appeal due to the mistake occasioned by his insurer, that is, the failure to appeal the decision or settle the claim.
6. The applicant claims that the intended appeal raises salient issues of facts and has an overwhelming chance of success. It was stated that the respondent would not suffer any prejudice if the orders sought are granted and that the applicant is willing to deposit the entire decretal sum in court or fixed term joint interest earning account as security of the due performance of the decree herein.
7. The respondent opposed the application vides his replying affidavit filed in court on 10th August 2021.
8. The respondent's position was that the judgment was delivered in his favour and the applicant granted stay of execution of 30 days from the date of the judgment delivery. It was averred that that 30 days lapsed without the applicant taking any further action. He further averred that he served the applicant with all the material documents and that the appellant had an opportunity to cross examine the respondent. The claim that there was therefore concealment of material facts and documents are therefore unfounded and ambiguous
9. The respondent contend that the insurer cannot decline to settle the claim on account of misrepresentation of facts as the policy documents clearly show that the suit motor vehicle KCX 956L was licensed to carry fare paying passengers as the respondent. He further claimed that no repudiation claim had been filed.
10. According to the respondent the draft Memorandum of Appeal does not raise any triable points of law and facts and should be struck out.
11. The respondent averred that he stands to suffer substantial loss if the instant application is allowed. In any event the respondent deposed that he was a person of means that that no loss would be occasioned if half of the decretal sum plus costs before the subordinate court were paid in a joint interest earning account pending the hearing and determination of the appeal.

SUBMISSIONS

12. The applicant submitted that the purpose of stay for execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant are safeguarded, and the appeal if successful, is not rendered nugatory. He cited the case of **Kennedy Omondi v Charles New Nyamote (2018) eKLR**.

13. He opposed the proposal that half of the decretal amount be deposited into the respondent's account. He argued that the respondent is a person of no known income and if any part of the decretal sum is paid out to him, then the respondent shall not make a refund when demanded hence making the same irrecoverable.

14. The respondent on the other hand submitted that the applicant had not satisfied the conditions for the grant of stay of execution. The respondent maintained that the applicant should deposit half of the decretal sum plus lower court's costs to the Respondent's advocate client's account and the other half be deposited in a joint interest earning account pending the outcome of the appeal.

15. It was further submitted that the reasons for the delay provided by the applicant are not as cogent as to convince the court to grant orders for extension of time within which to file an appeal. He cited the following cases in support of his arguments: of **Karny Zaharya & Anor v Shalom Levi (2018) eKLR**; **Abdul Azzi Ngoma v Mungai Mathayo [1976] KLR 61, 62**; and **Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR**.

DETERMINATION

16. I have considered the applications, grounds, affidavits, submissions and authorities cited.

17. The respondent argues that the applicant was granted 30 days stay of execution and therefore ought to have filed his appeal against the decision of the trial magistrate within the statutory time frames.

18. The applicant on the other hand claims that that his insurer had appointed advocates who failed to communicate the outcome of the case. He therefore contends that the failure to lodge the appeal within the time limit was occasioned by mistake on the part of his insurer.

19. The law that guides this court on enlargement of time is **section 79 G and 95 of the Civil Procedure Act. Section 79 G of the Civil Procedure Act** provides:

“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 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 has good and sufficient cause for not filing the appeal in time.”

Section 95 provides thus: -

“95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

20. The decision of granting leave to appeal or not to appeal out of time is discretionary and must be exercised after considering the evidence adduced before the court and sound legal principles. In **Mutiso v Mwangi [1997] KLR 630** the court held as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

21. The application herein was filed 7 days after the order for stay granted had lapsed. In **Jaber Mohsen Ali & another v Priscillah Boit & another E & L NO. 200 OF 2012 [2014] eKLR** the court stated:

“...The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter...”

22. I have considered that the applicant argued he was not aware of the trial court's decision and learnt of the judgment when he visited his insurer's advocate on 25th July 2021. The applicant was informed that his insurer was not keen on settling the claim and thus essentially not interested in pursuing the appeal. I note that the applicant filed this instant application within 5 days after upon learning of the impugned judgment and the decision of his insurer. I therefore find that his application is timely and was filed without unreasonable delay.

23. The next issue is whether the draft memorandum of appeal is arguable or frivolous. In **Kenya Commercial Bank Ltd v Nicholas Ombija [2009] eKLR** the court defined as arguable appeal as follows:

“An “arguable” appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court.”

24. The applicant has attached in his application the draft memorandum of appeal and urged this court that his appeal only challenges quantum of damages. I have carefully considered the contents of the draft memorandum of appeal, I find that applicant should be given an opportunity to be heard on his appeal to which the respondent will have a chance of reply. In my view the Respondent will not suffer any prejudice if the court enlarges time to file the appeal.

25. I now turn to the issue of stay of execution. The principles guiding the grant of a stay of execution pending appeal are well founded under **Order 42 rule 6(2)** of the **Civil Procedure Rules** states:

“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. From the above provision, it is clear that the court must be satisfied that there is **“sufficient cause”** to grant a Stay. The three (3) prerequisite conditions set out in the said **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** cannot be severed. The key word is **“and.”** It connotes that all three (3) conditions must be met simultaneously.

27. Having considered the issue of delay, I shall now turn to consider whether the applicant has proved that he will suffer substantial loss. Lenaola, J (as he then was) in **Mutua Kilonzo v Kioko David Machakos - HCCC No 62 of 2008** where he expressed himself as hereunder:

“To my mind, the Applicant has failed to establish what loss he will suffer if the decree is executed. I say this with respect because Lilian Munyiri aforesaid is an officer at Gateway Company Ltd and has not stated that she personally knows the means of the Respondent. She merely states that from evidence at the trial he is a man of straw. How that conclusion is reached and based on what evidence, I cannot tell. It is now a catchphrase that every Respondent in an application for stay of execution is called a man of no means. That is all fine if there is evidence to back up that position. If for example, the job done or other means of living are clearly deponed (sic) to, then it is easy to fathom what means the Respondent has. Ringera, J in Lalji Bhimji put is succinctly when he stated thus;

‘...he (the Applicant) must persuade the court that the decree holder is a man of straw from whom it will be nigh to impossible or at least very difficult to obtain back the decretal amount in the event the intended appeal succeeding. Such persuasion must spring from affidavits or evidence on record.’

...

Let this also be a warning that as far as possible, executives in Insurance Companies and advocates for parties should unless absolutely necessary or clearly from the record desist from swearing affidavits on contested matters and for which they have no personal knowledge.”

28. The applicant in his application has merely stated that he would suffer substantial loss merely because his appeal would be rendered nugatory if the order of stay of execution is not granted. He has not demonstrated the inability of the Respondent to repay the decretal amount if and when this court finds in favour of the applicant in the event the appeal is lodged herein. Although the applicant has not clearly demonstrated that he would suffer substantial, I shall grant an order of stay in the interest of justice given that the draft memorandum of appeal contains arguable issues. In **John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another [2016] eKLR** the court expressed itself thus:

“There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.”

29. The applicant averred that he is ready to deposit the entire decretal amount in a joint interest earning account held by advocates of both parties. In that regard, noting that the appellant is only challenging quantum, I grant an order of stay of execution pending the hearing of the intended appeal on condition that the applicant pays half of the decretal sum to the respondent and deposits the balance in a joint interest earning account in the names of the advocates for the respective parties. The memorandum of appeal shall be filed within 14 days. The costs of this application will be in the appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 17TH DAY OF NOVEMBER, 2021.

R. E. OUGO

JUDGE

In the presence of:

Mr. O.M. Otieno

For the Applicant

Mr. Angasa

For the Respondent

Ms Rael

Court Assistant