



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISCELLANEOUS CIVIL APPLICATION NUMBER E101 OF 2021**

**BEATRICE WARUAGE KIMURI.....APPLICANT**

**VERSUS**

**MICHAEL LAWRENCE WAFULA & ANOTHER (Suing as the Legal**

**Representative & Administrator of the estate of the late COLLINS MONYANI).....RESPONDENT**

**R U L I N G**

**BRIEF FACTS**

1. The Application dated 19<sup>th</sup> May, 2021 seeks the following orders:-

*i. Spent.*

*ii. Spent*

*iii. Spent*

*iv. THAT this Honourable court be pleased to order a stay of execution of the Judgement in Nakuru Civil Suit Number 616 of 2019 delivered on 14<sup>th</sup> January 2021 pending the hearing and determination of the Appellant's Intended Appeal.*

*v. THAT this Honourable Court be pleased to grant the Applicant/Intended Appellant leave to file a Memorandum of Appeal as per the attached draft against the decision and judgment delivered on 14<sup>th</sup> January 2021.*

*vi. THAT the insurer of the Appellant/Applicants be allowed to issue bank guarantee as security for the entire judgment sum for due performance of the judgment/decreed herein pending the hearing and determination of the Appeal.*

*vii. THAT such other additional, suitable and or alternative orders be made as are just and expedient all circumstances of the case and this Application considered.*

*viii. THAT the costs of this Application be provided for.*

2. The Application is supported by the grounds set out on its face and a Supporting Affidavit sworn by Kelvin Nguire on 19<sup>th</sup> May 2021. The deponent is a legal officer at applicant's insurer, Directline Assurance Company Limited.

3. He deponed that the lower court's judgment was delivered on 14<sup>th</sup> January 2021 without notice to the Applicant and the Applicant learnt of the same when she was served with the Notice of Entry of Judgment dated 7<sup>th</sup> May 2021 by the Respondent; that the Applicant was dissatisfied with the award on general damages and by the time they gave instructions to the Applicant's Advocates to file an Appeal, the time within which to file it had lapsed; that an extension of time to file Memorandum of Appeal and Record of Appeal out of time be granted and that they were willing to issue bank guarantee as a condition for stay pending appeal.

4. The Application is opposed by the Respondent herein through his Replying affidavit sworn on 25<sup>th</sup> June 2021. That the instant application was made in bad faith, lacks merit, is an afterthought and an abuse of the Court process; that the Judgment was entered in favour of the deceased's estate on 14<sup>th</sup> January 2021 and the Applicant had ample time to file an appeal within the prescribed law period; that the

application herein was tailored to simply delay or deny the deceased's estate the fruits of his judgment; that the annexed draft Memorandum of Appeal lacked merit, was inept and after thought with no chances of success and otherwise an abuse of the court process; that the application was suitable for dismissal with costs; that if the court was inclined to grant it to do so on the condition that the entire decretal sum plus costs be deposited in an interest earning account in the joint names of advocates on record within a defined period of time.

5. The application was determined by way of oral submissions.

### **APPLICANT'S SUBMISSIONS**

6. The Applicant submitted that it is trite law that grant of an order to admit appeal out of time is an equitable remedy that is available to a deserving party at the discretion of the court. She relied on the case of **Mwangi vs Kenya Airways Limited** which set out the matters to be considered in such an application viz;

i. *The Length of delay.*

ii. *The reason for the delay.*

iii. *Possibly, the chances of the Appeal succeeding if the application is granted*

iv. *The degree of prejudice to the respondent if the Application is granted.*

7. On the first and second issue, the Applicant contended that on 21<sup>st</sup> October 2020 when the matter was slated for Judgment delivery, the trial court directed that same would be delivered on notice and no such notice was ever served upon her until she was served with a Notice of Entry of Judgment by the respondent on 10<sup>th</sup> May 2021 advising that judgment was delivered on the 14<sup>th</sup> January 2021 and the terms of the Judgment.

8. That when they learned of the Judgment they swiftly filed the instant application to appeal out of time.

9. On the third issue, the applicant averred that her appeal against the lower's court's Judgment on quantum has high chances of success and should be determined on merit.

10. On the last issue, the applicant contended that she stands to be greatly prejudiced if this application is disallowed. That the respondent is demanding for a total of Kshs.1, 819, 89/= plus interest and has not advanced proof that he is not a man of straw capable of refunding the decretal amount should her appeal succeed.

11. The applicant averred that the respondent will suffer no prejudice as she is ready and willing to issue bank guarantee and should the Judgment be upheld on appeal, the amount plus interest shall be released to him. For this proposition, the Applicant placed reliance on the case of **NBI HCCA 354 of 2015 APA Insurance Ltd vs Michael Kinyanjui Muturi.**

12. The applicant argued that conditions for granting stay of execution pending appeal are now settled pursuant to the provisions of **Order 42 Rule 6(2) of the Civil Procedure Rules**. She relied on the case of **Halan & Another vs Thornton & Turpin (1963) Limited (1990) KLR** where the court stated as follows: -

*“The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would emerge from a refusal to grant stay and thirdly the Applicant must furnish security. The Application must of course be made without delay”*

13. The applicant submitted that they had demonstrated the above conditions for grant of stay.

14. Applicant prayed that the application be allowed and bolstered this statement by relying on the case of **Banco Arabe Espanol vs Bank Of Uganda [199]2 EA 22** where the court stated that;

*“the administration of justice should normally require that the substance of all disputes be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless lack of adherence to rules rendered the appeal process difficult and in operative. It should seem that the main purpose of litigation namely, the hearing and determination of disputes should be forested rather than hindered.”*

### **RESPONDENT'S SUBMISSIONS**

15. It was the respondent's position that pursuant to the provisions of **section 79 G of the Civil Procedure Act** every appeal should be filed within thirty (30) days and that the applicant had not advanced sufficient reasons to warrant extension of time to file an appeal. They asserted that in as much as the Judgment was delivered in the absence of the applicant, the Applicant had not demonstrated any efforts she followed in enquiring about delivery of the same so as to file an appeal within the requisite time.

16. The Respondent averred that the prayer seeking extension of time within which to appeal is discretionary and must be exercised judiciously. That discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of

justice. For this proposition the Applicant relied on the case of **Kenya Hotels & Allied Union vs Mada Holidays Limited [2021] eKLR.**

17. The Respondent contends that the Memorandum of Appeal does not raise arguable grounds, that the lower court's Judgment was regular and sound and within the jurisdiction of the court. That the intended appeal would only serve to delay the course of justice which is prejudicial to him.

18. The Respondent contended that pursuant to **order 42 Rule 6(2)(a) of the Civil Procedure Rules** the court should only grant stay orders when the Applicant successfully demonstrates he or she will suffer a substantial loss and that the Applicant has failed to do so. Further that there was unreasonable delay in filing application, five (5) months after the delivery of the lower court's judgment.

19. On security for due performance of the decree, the Respondent submitted the decretal sum plus costs be deposited in an interest earning account in the joint names of the advocates on record for the parties herein within a defined period of time.

20. He prayed that this application be dismissed with costs to him.

### **ISSUES FOR DETERMINATION**

21. Having considered the pleadings and submissions of the parties in this matter, the for determination is:-

- 1. Whether the court should exercise its discretion to grant the applicants/appellants leave to file their appeal out of time.*
- 2. Whether an order of stay of execution pending appeal should issue*

#### **1. Whether the court should exercise its discretion to grant the Applicants/appellants leave to file their appeal out of time**

22. The law governing the filing of appeals to the High court is set out in **Section 79 G of the Civil Procedure Act** which states as follows:

***“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.”***

23. From the above provision, the period limited by the law for filing of appeals is thirty (30) days but the court still has discretion to admit an appeal filed out of time if it is satisfied that the applicant has demonstrated that he had good and sufficient cause for not filing the appeal on time. The court's discretion must however, be exercised judiciously in accordance with the law and the material placed before it.

24. In this case, it's not in dispute that the period within which to file Memorandum of Appeal has lapsed. The trial court's judgment was delivered on 14<sup>th</sup> January 2021 and therefore the Applicant ought to have filed a Memorandum of Appeal on or before the 14<sup>th</sup> February 2021. Going by the proviso to **Section 79 G of the Act**, the applicant has a legal obligation to demonstrate to the satisfaction of the court that she had good and sufficient cause for not filing the appeal on time.

25. The explanation given by the applicant herein for the delay is that the lower court's judgment which was due for delivery on 21<sup>st</sup> October 2020 was to be delivered on notice and such notice was never served upon them. That the trial court proceeded to deliver the same on 14<sup>th</sup> January 2021 without their knowledge and they learnt of it when the respondent served them with the Notice of Entry of Judgment dated 7<sup>th</sup> May 2021.

26. It is not clear from the record how the Respondent got to know about the Judgment date. However, it's uncontroverted that the court issued directions on 21<sup>st</sup> October 2020 that judgment was to be delivered on notice. No evidence has been placed before this court to demonstrate that the applicant was indeed served with the Notice of Delivery of Judgment for the 14<sup>th</sup> January 2021.

27. This application was filed on 21<sup>st</sup> May 2021, fourteen (14) days after the service of the Judgment upon the applicant. This is evidence that had the applicant been aware of the judgment date and been present when it was delivered the applicant would have filed their appeal promptly. In **Alibhai Musajee vs Shariff Mohammed Al-Bet Civil Appeal No. 283 of 1998**, the Court of Appeal held that whereas the **Civil Procedure Act** allows for extension of time for filing appeal, if good and sufficient cause shown, failure to act does not constitute a good or sufficient cause.

28. The applicant has demonstrated the reason for the delay. There is no reason why the application should not be allowed.

#### **2. Whether an order of stay of execution pending appeal should issue.**

29. Grant of stay of execution pending appeal is provided for under **Order 42 Rule 6 of the Civil Procedure Rules**. The relevant part of which states as follows:

***“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from***

except appeal case of 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.

(3) ...

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) ...

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

30. Numerous authorities abound on the requirements of **Order 42 rule 6 of the Civil Procedure Rules**, and the conditions for granting stay of execution pending appeal. In the case of **Butt vs Rent Restriction Tribunal (1982) eKLR 417**, the court held as follows:

*“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

*2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.*

*3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.*

*4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*

*5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”*

31. In determining whether or not to grant the prayer the court ought to keep in mind the purpose of that order as was stated in **RWW vs EKW [2019] eKLR**, that;

*“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.*

*Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”*

32. The applicant has to demonstrated that it will suffer substantial loss. In this matter the amount involved is nearly Kshs. 2 million.

33. In **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR**, the court held in this regard:

*“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the*

*status quo because such loss would render the appeal nugatory.”*

34. In this regard the applicant simply argues on the sum involved and the fact that the respondent has not demonstrated that should he be paid and the appeal succeeds he will be able to refund the money. Be that as it may the duty of the court is, as far as possible, to balance the interests of the parties. This would require, safeguarding the interests of the decree holder to the decretal sum, but also ensuring that should the appeal succeed, it will not be rendered nugatory by earlier payment to a party who is unable to repay the decretal sum upon the success of the appeal.

35. In the case of National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another [2006] eKLR the Court of Appeal expressed itself as follows:

*“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a 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 — see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”*

36. It is unascertainable from the court record that the respondent will be in a position to repay the decretal sum should the appeal be successful.

The applicant has demonstrated that the application was filed as soon as he learnt of the judgment. the issue of unreasonable delay cannot arise in the circumstances of this case. With respect to security for costs the Applicant is offering to furnish security in the form of a Bank guarantee or comply with any of the conditions the Court may impose as security. The respondent on their part proposed that decretal sum plus costs be deposited in an interest earning account in the joint names of parties’ advocates herein within a defined period of time.

37. In Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another [2018] eKLR, it was stated that:

*“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”*

38. The issue of security is discretionary and it is the duty of the Court to determine the same upon allowing an order of stay of execution to ensure the due performance of the obligations by the applicant as to costs and to satisfy the decree.

39. In Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates Justice Gikonyo the Court stated that:

*“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”*

40. Having considered the circumstances of this case the application for stay of execution pending appeal is allowed.

Accordingly the following orders do issue:

**(i) The Applicant be and is hereby granted leave to file and serve the Memorandum of Appeal within fourteen (14) days hereof and the Record of Appeal within sixty (60) days thereafter.**

**(ii) There be stay of execution of the decree in Nakuru CMCC 616 of 2019 pending the hearing and determination of the appeal herein.**

**(iii) They do deposit 50% of the decretal sum in a joint interest earning account in the names of the advocates for the parties herein, and issue a bank guarantee for the remainder 50% of the decretal sum together with interest. This to be done within 30 days hereof.**

**(iv) In default of compliance with the above orders under (i) and (iii) above the order of stay to lapse.**

**(v) Costs to abide the outcome of the appeal.**

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF DECEMBER, 2021.**

**Mumbua T Matheka**

**Judge**

**In the presence of:-**

Edna CA

Ms Baraza for Applicant

Mr. Saringi for the Respondent N/A