



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCC. MISC APPL NO. E020 OF 2020

JAMES KAMAU NJENGA.....APPLICANT

-VERSUS-

DAVID MUTUA KITHEKA.....RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated 23rd November 2020 filed by James Kamau Njenga through counsel M/s Kimondo Gachoka & company advocates.

2. The application was brought under section 3A, 79G, and 95 of the Civil Procedure Act (cap.21) and Order 22 Rule 22, Order 42 Rule 6, Order 50 Rules 6 and Order 51 Rule 1 and 3 of the Civil Procedure Rules, and has five (5) prayers, some of which have been spent as follows

1) (spent)

2) That this court be pleased to grant leave to the applicant to appeal out of time against the judgment of the honourable magistrate Mayamba C.A in Kilungu PMCC No. 268 of 2019 and judgment delivered on 25th September 2020.

3) (spent)

4) That the honourable court be pleased to stay execution of the judgment and decree in Kilungu PMCC No. 268 of 2019 pending the hearing and determination of the intended appeal herein.

3. The application has grounds on the face of the Notice of Motion that the 30 days within which appeal is to be filed have lapsed, that the applicant is aggrieved by the quantum of damages awarded in the judgment of the trial court, and that the applicant is likely to suffer irreparable and substantial loss due to the likelihood that the applicant will be unable to recover the decretal amount from the respondent, if stay is not granted.

4. The application was filed with a supporting affidavit sworn by Kelvin Ngure the Legal Counsel of Directline Assurance Company Ltd the insurers of motor vehicle KCH 072Q, in which it was deponed that the advocate who handled the case left the firm without proper handover leading to the delay, that though the time allowed to file appeal had lapsed the intended appeal is merited and arguable, and that the respondent will not suffer prejudice if the orders sought are granted. The affidavit annexes a draft unsigned Memorandum of Appeal.

5. The application is opposed through a replying affidavit sworn by the respondent David Mutua Kitheka on 28th January 2021 in which it was deponed that no plausible reason had been given why the appeal was not filed within time, that the applicant has not satisfied the requirements for grant of stay of execution orders pending appeal, that as the intended appeal merely seeks to challenge quantum of damages, the applicant should pay the respondent half of the decretal amount. The affidavit annexes a copy of a demand letter dated 20/9/2020 addressed to counsel for the applicant, for payment of the decretal sum and costs.

6. The application proceeded by way of filing written submissions. I have perused and considered the written submissions filed by the applicant's counsel Kimondo Gachoka and company, as well as those filed by counsel for the respondent M/s Waiganjo Wachira & company.

7. This is an application for extension of time to appeal out of time, as well as an application for stay of execution of judgment or decree pending appeal.

8. I will deal first with the request to appeal out of time. With regard to the delay in filing the appeal, the applicant has blamed the advocate who handled the matter who is said to have left the firm of lawyers without proper handover. I will give the applicant the benefit of the doubt in that respect as Article 159(2) of the Constitution of Kenya 2010 enjoins courts to be more inclined to render substantive justice rather than determining matters on technicalities. I will thus allow the application to give the applicant a chance to file and canvass their appeal, as section 79G of the Civil Procedure Act (cap.21) confers on this court, powers to extend time to appeal.

9. With regard to the request for stay of execution of decree pending appeal, the parameters to be taken into account by the court in determining such an application are contained in Order 42 Rule 6(2) of the Civil Procedure Rules, which provides as follows –

6(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.

10. The applicant has admitted to a delay in filing the appeal and thus also to filing this application for stay. Reasons for the delay were given and the delay in my view is not excessive. I find that the delay herein is not unreasonable, though admittedly there was a delay.

11. With the applicant suffer substantial loss if the stay of execution orders sought are not granted? This is a money decree for an amount already determined by the trial court. The appeal also is on quantum of damages. I thus find that the applicant may stand to suffer substantial loss if stay is not granted. However, since the appeal is on quantum of damages, the respondent in my view, will suffer prejudice if no amount of the award is paid to him in the meantime. I will thus grant stay, but will order that part of the decretal amount be paid to the respondent.

12. With regard to provision of security by the appellant, in my view, the part of the decretal amount to be paid to the respondent by the applicant herein will satisfy the requirement of provision of security by the applicant.

13. Consequently, and for the above reasons, I order as follows –

i. The applicant is granted 14 days from today to file appeal.

ii. Stay of execution of decree or judgment is granted pending determination of appeal, provided the applicant pays the respondent part of the decretal amount Kshs.70,000/= within 30 days from today.

iii. In default of either (i) or (ii) above, the stay orders herein granted will automatically lapse.

iv. The applicant will pay the respondent the costs of this application.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 7TH DAY OF DECEMBER, 2021 IN OPEN COURT AT MAKUENI.

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George Dulu

Judge