



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC. MISC. CIVIL APPLICATION NO. E067 OF 2021

KHETIAH DRAPERS LIMITED.....APPLICANT

VERSUS

COLLETAH WAYUA M.....1ST RESPONDENT

EVERLINE MUMO..... 2ND RESPONDENT

(Suing as the legal representatives of the Estate of JOHN NDUNA KING'OO

RULING

1. Before me is an application brought by way of Notice of Motion brought under section 3, 3A and 75 (1)(h) of the Civil Procedure Act (cap.21) as well as Order 42 Rule 6, Order 43 Rule 1, and Order 50 Rule 6, Order 51 Rule 1, 3 and 4 of the Civil Procedure Rules 2010.

2. The application has seven (7) prayers, some of which have been spent as follows –

1) (spent)

2) (Spent)

3) *Let the defendants/applicants be granted leave to appeal outside time, which appeal is premised on the grounds as set out in the annexed memorandum of appeal.*

4) *There be a stay of execution of the judgment of the court delivered on 27/5/2021 pending the hearing and determination of the intended appeal.*

5) *Any other relief that the honourable court deems fit and appropriate to grant.*

6) *Costs be in the cause.*

3. The application has grounds on the face of the Notice of Motion that the defendants/applicants were condemned in an award of Kshs.1,352,550.00/= less 30% contribution, that judgment was delivered in their absence without notice and that the insurers being dissatisfied with the judgment had conceived an intention to appeal, and that it had taken time to apply for and obtain typed proceedings herein.

4. The application was filed with a supporting affidavit sworn on 9/8/2021 by Mohanlal Durlabhram Khetia the applicant and owner of motor vehicle KCD 579D/ZF0501, which amplifies the grounds of the application. Annexed to the affidavit is a copy of the proposed Memorandum Of Appeal.

5. The application is opposed through a replying affidavit sworn on 10/9/2021 by Colleta Wayua Musinga one of the respondents in which it was deposed that on the scheduled date for judgment the applicant's counsel deliberately chose not to attend court, and that thereafter counsel for both parties entered into written correspondence to the process of payment due and that it was not until 10/8/2021 that the applicant's counsel rushed to court to seek stay of execution orders.

6. The application was canvassed by way of filing written submissions. I have perused and considered the submissions filed both the appellants' counsel Mwangangi Nzisa & Associates and the respondents' counsel Mutunga & Muindi Company.

7. This is an application for leave to appeal out of time, and also an application for stay of execution of judgment or decree pending appeal. Both these requests call upon the exercise of this court's discretionary powers. In this regard, the court has wide latitude or discretion, but the exercise of such discretion has to be based on sound legal principles, and not on whims or caprice.

8. With regard to the request for leave to appeal out of time, section 75G of the Civil Procedure Act, provides as follows –

79G. 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 required 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 satisfied the court that he had good and sufficient cause for not filing the appeal in time”

9. That their request for extension of time to appeal, the applicants have explained that the insurers are not satisfied with the judgment and have asked them to appeal, though late. I note that though the applicant's counsel have alleged lack of notice for the date of delivery of the judgment that allegation has not been supported by any tangible evidence.

10. Considering the circumstances of this matter and in order to satisfy the requirements under Article 195(2) of the Constitution of Kenya 2010, for dispensation of substantive justice, and since judgment was delivered on 27/5/2021 which was less than four months to the time the present application was filed, I will grant the applicants leave to appeal out of time as I find no excessive delay in filing the application. In any case, I do not think that the respondent will suffer prejudice.

11. With regard to the request for stay of execution of judgment or decree pending the hearing of the appeal, I note that Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows –

6(2) No order of 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.

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.

12. In my above decision to grant leave to appeal out of time, I found that there has indeed been delay, but it is excusable. I apply the same reasoning with regard to the issue of delay in the request for stay of execution of judgment or decree.

13. Will the applicant suffer substantial loss if the stay of execution orders sought are not granted? In this money decree and without any information on the financial means of the respondent, in my view, if no stay orders are granted and the whole decretal amount paid, the applicant will stand to suffer substantial loss in case the appeal succeeds and they cannot recover the money paid. However, since the intended appeal is on quantum of damages, I will grant stay of execution but subject to payment of part of the decretal sum.

14. With regard to the requirement for provision of security by the applicant, in my view, the payment of part of the decretal sum to the respondent by the applicant will serve as adequate security.

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

1) Leave to appeal out of time is granted. The applicant will file his appeal within 14 days from today.

2) Stay of execution of judgment or decree is hereby granted pending determination of appeal, provided that the appeal is filed within 14 days, and part of the decretal sum Kshs.400,000/= is paid by the applicant to the respondent through counsel for the respondent within 30 days from today.

3) In default of either (1) or (2) above or both, the stay of execution orders herein granted will automatically lapse.

4) I award the costs of this application to the respondent.

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

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GEORGE DULU

JUDGE