



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL APPLICATION NO. E078 OF 2021

NDUKI MWANGI.....1ST APPELLANT/APPLICANT

TELKOM (K) LIMITED.....2ND APPELLANT/APPLICANT

VERSUS

BESSY MAKANDI THURANIRA.....RESPONDENT

RULING

The Application

1. Before the Court is an application dated 12th October 2021 seeking stay of execution of the Judgment delivered on 1st September 2021 in Meru CMCC No. 134 of 2019 and leave to appeal out of time against the said Judgment.

Applicant's Case

2. The application is premised on the grounds that by the Judgment delivered on 1st September 2021, the trial Court awarded the Respondent a total of Ksh 1,060,000/=. That on 2nd September, the Applicant's Counsel informed the Applicant's insurers, APA Insurance Co. Ltd about the said Judgment. That the Applicant's Counsel have now received instructions from the Applicant's insurers to appeal against the Judgment and yet the period within which he was to file an appeal has already lapsed. That the delay to lodge the appeal was due to inadvertence on the part of the Applicant's insurer's Legal Department owing to a mix up of files and the insurer was unable to revert with instructions to appeal within the requisite 30 days period. That the delay is not inordinate and is excusable in the circumstances. That once leave is granted, the Court should grant stay of execution, failure to which the Applicant stands to suffer irreparable loss and damage. That the intended appeal has high chances of success. That the Applicant is willing to comply with any reasonable conditions of the Court on security.

3. Despite proper service, the Respondent failed to file any response to the application.

Determination

Leave to Appeal out of time

4. Appeals from a subordinate Court to the High Court ought to be filed within thirty (30) days of the decision sought to be challenged. Extension of time is a matter of discretion and the law gives this Court jurisdiction to extend time upon application. The law allows for such applications to be made even when the time for doing the act in question has already lapsed. Section 79 G of the Civil Procedure Act provides as follows: -

79G. Time for filing appeals from subordinate courts

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.

See also Order 50, Rule 6 of the Civil Procedure Rules, Section 95 of the Civil Procedure Act and Section 59 of the Interpretation and General Provisions Act.

5. The factors to be considered when determining an application seeking leave to appeal out of time include the length of delay, the reason for the delay, the chances of the appeal succeeding and the degree of prejudice to be suffered by the Respondent if the application is granted.

6. On the length of the delay, the Judgment sought to be challenged was delivered on 1st September 2021. The 30 days' window period within which the Applicant was to file a memorandum of appeal lapsed on 1st October 2021. The instant application was filed on 12th October 2021, 11 days later. An 11 days delay period cannot be said to be inordinate.

7. On the reasons for the delay, the Applicant claims that the delay was occasioned by his insurers, APA Insurance who had a mix up on the files and thus delayed to issue instructions to his Advocates to lodge an appeal. The Court notes that the Applicant has not annexed any form of correspondence to confirm his averments. The Court however acknowledges that in accident claims, it is the insurance companies that ordinarily issue instructions on behalf of the insureds and on a balance of probabilities, it is possible that the delay was occasioned by the insurers.

8. On the chances of the appeal succeeding, the Applicant has annexed a draft Memorandum of Appeal raising 4 grounds of appeal which challenge the quantum awarded for the header of loss of dependency. The Applicant urges that the award of Ksh 2,000,000/= was manifestly excessive in the circumstances of the case. The Court considers the issue of award of damages to be an arguable point of law.

9. Noting that the delay herein was not inordinate, that a reasonable explanation for the delay has been offered, that there appears to be an arguable appeal and that the Respondent has failed to demonstrate any real prejudice to be suffered should leave be granted, the Court finds that the interests of justice call for the grant of leave.

Stay of Execution

10. The test for applications for stay of execution in the High Court is set out in Order 42 Rule 6 of the Civil Procedure Rules. The conditions that an Applicant has to meet and/or demonstrate for the court to grant a stay of execution are as follows: -

a) substantial loss will result to applicant if stay is not granted; and

b) security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and

c) the application has been brought without unreasonable delay.

Substantial Loss

11. In money decrees, substantial loss is demonstrated by the apprehension that the Respondent may not be in a position to refund the decretal sums paid, should the appeal be successful. In the present case, the Applicant has not expressed any such fears and in the circumstances, the Court does not consider that he has demonstrated the likelihood of suffering substantial loss. The Court however takes note of the substantial sum of Ksh 1,060,000/= which if paid to an individual, whose source of income is unknown may result in substantial loss.

Security

12. The Applicant has indicated his willingness to offer security for the due performance of the decree. This Court considers that it would be fair to grant stay on condition that security is deposited and some reasonable amount is paid to the Respondent. The Court has also considered that the intended appeal, is squarely on quantum and since liability is not disputed, the Respondent will inevitably be awarded some amount of money, following conclusion of the appeal.

Undue Delay

13. The Court has already found above that the delay in the matter was for a period of 11 days which is not inordinate.

ORDERS

14. Accordingly, for the reasons set out above, this Court makes the following orders: -

i) Leave is hereby granted to the Applicant to file his Appeal out of time on condition that he files a Memorandum of Appeal within 7 days from the date of this order.

ii) The Court grants an order for stay of execution of the Judgment and/or Decree delivered on 1st September 2021 by Hon. E. Tsimonjero (RM) in Meru CMCC No. 134 of 2019 pending the hearing and determination of the appeal.

iii) The Applicant shall within Thirty (30) days pay to the Respondent the sum of Ksh 353,000/= being approximately 1/3 of the decretal sum.

iv) Within the said thirty (30) days in iii) above, the Applicant shall deposit the balance of the decretal sum being Ksh 707,000/= in a joint interest earning account in names of the respective Advocates for the parties.

v) In default of the payment and deposit as per orders iii) and iv) above, the stay of execution herein granted shall lapse and be of no effect.

vi) The costs of this application shall abide the outcome of the appeal.

Order accordingly

DATED AND DELIVERED ON THIS 15TH DAY OF DECEMBER, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Mithega & Kariuki Advocates for the Applicant