



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL MISC. APPLICATION NO. 82 AND NO. 83 OF 2019

(CONSOLIDATED)

MAKINDU MOTORS LIMITED.....1ST APPLICANT

MWANZIA MWAKAZI.....2ND APPLICANT

-VERSUS-

JANET KANYAA MWOVA alias JANET VUNGO.....RESPONDENT

RULING

1. This matter No. 83 of 2019 was heard together with Misc. No. 82 of 2019 and court directed the order herein to apply to Misc. No. 82 of 2019.
2. The application dated 7/8/2019 under cited provisions seeks to appeal out of time from judgment and decree of Kitui CMCC No. 90 of 2015 delivered on 26/3/2019.
3. The same is supported by the grounds on notice of motion aforesaid dated 7/8/2019 namely:-

1. That the judgment in Kitui CMCC No. 90 of 2015 was delivered by Hon. F. Nekesa on 26th March 2019 and the period for appeal and the thirty (30) days stay of execution granted then expired on the 24th April, 2019.
2. That a stay of execution for thirty (30) days was granted and the same was to lapse on 24th April 2019 and the intended appeal does not operate as a stay of execution and therefore this honourable court be pleased to grant a stay of execution pending the hearing and determination of this application and the subsequent appeal.
3. That immediately the applicants learnt of the contents of the judgment and auctioneer's proclamation in Kitui CMCC No. 90 of 2015, that they approached their counsel who advised their clients on the legal implications and the best way forward.
4. That it was not until the 7th August, 2019 that the applicants' advocates received instructions to proceed and lodge an appeal on the court's decision in Kitui CMCC No. 90 of 2015 but meanwhile the time for appeal had run out.
5. That it is in the interest of justice that the applicants be allowed to appeal the judgment in Kitui CMCC No. 90 of 2015.
6. That unless an order for stay of execution is granted as prayed, the respondent will proceed to execute and auction the applicants' movable property and great loss will be occasioned upon the applicants.
7. That the decretal amount in Kitui CMCC No. 90 of 2015 was Kshs.344,260/= and the applicant may not be able to recover the same from the respondent once this application and subsequent appeal succeeds since their means of income are from the sale of the movable assets that have been attached and about to be auctioned by the respondent.
8. That the applicants are willing and ready to deposit the entire decretal sum in a joint interest earning account held in the names of the applicants and the respondent's advocate.
9. That the applicants' application be allowed to file its memorandum of appeal out of time and the same be deemed as duly

served.

10. That the respondent will not be prejudiced if the said leave is granted.

4. It is supported by the supporting affidavit of Joyce Kamau advocate for the applicants which reiterates the same grounds in the notice of motion in HCCMisc No. 82 of 2019 has similar application seeking similar order arising from judgment of Kitui CMCC No. 182 of 2015.

5. Both CMCC No. 90 of 2015 and No. 182 of 2015 arose from same accident, and involves same parties and one motor vehicle owned by the applicants thus being beard together. The grounds in support of same application are replicated in notice of motion in HCCMisc. No. 83 of 2019. The applicant Joyce Kamau is the same in a replicated affidavit sworn on 7/8/2019 reiterating same grounds in the application.

6. In opposition of the applications are grounds which are replicated in both matters namely:-

- **The application is frivolous, vexatious and an abuse of court process.**
- **The applications are incompetent, bad in law and fatally defective.**
- **They are intended to delay enjoyment of the judgment.**
- **Applications lack merit.**

7. The applicant avers that the judgment was delivered on 26/3/2019 but instructions to appeal were given on 7/8/2019 a delay of over 4 months. The applicant says that the execution would render intended appeal nugatory as the decretal amount may never be received if appeal succeeds. That the applicant is willing to deposit decretal amount in court.

8. In the case of *Mwangi vs Kenya Airways Ltd (2003) KLR* the court reiterated factors to consider when enlarging time to appeal. These are:-

- **Period of delay.**
- **Reasons for delay.**
- **Arguability of the intended appeal.**
- **The degree of prejudice respondent may suffer by execution of time.**
- **Importance of compliance with time limits to a particular litigation or issue.**
- **The effect on administration of justice or public interest if any is involved.**

9. The principle grounds or reason for delay is that after judgment was delivered the instructing clients did not get any information from the previous advocate. The applicants got information via the execution process when it was served with proclamation.

10. The applicant says it got dissatisfied with awards made by the trial court. On the first limb of the application there is no material from the applicant that it ever contacted previous advocate for over 4 months from the date judgment was delivered. Nor does the current advocate exhibit the material to confirm when applicant instructed them.

11. This court finds that the delay is inordinate and unexplained. Thus the court rejects the application and dismisses the same.

12. On the second limb for stay pending appeal, same fails as there is no appeal and even the intended appeal cannot be instituted in absence of the leave to file it out of time.

13. Thus, in sum, **the court dismisses the application for both extension of time and stay of execution pending appeal. No orders as to costs.**

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE