



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISC. CIVIL APPLICATION NO. 74 OF 2019

MOMBASA MAIZE MILLERS.....1ST APPLICANT

ABBASS ATHMAN.....2ND APPLICANT

VERSUS

ELUIS KINYUA GICOVI.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Machuka for the Applicant

Mr. Wambua Kilonzo for the Respondent

RULING

What confronts this court are two applications made by the same applicant. One of the Applications is seeking a substantive order and the other one is seeking an interim one. The former application was brought in terms of Order 51 Rule 1, Order 50 Rule 6 of the Civil Procedure Rules; Section 27 and 28 of the Limitation of Actions Act Cap 22 and Sections 65, 76, 77, 79G of the Civil Procedure Act, seeking an order to file an appeal out of statutory time limit.

The latter is an application for stay of execution brought by way of Notice of Motion under Order 5, Order 22 Rule 22(1) and Order 42 Rule 6 (1) (2), 3 of the Civil Procedure Rules 2010 and under Section 1A, 1b of the Civil Procedure Act and all other enabling provisions of Law.

The Applicant is represented by M/S Machuka & Company Advocates and the Respondent by Wambua & Company Advocates.

In the former application, the applicant sought an order to appeal out of statutory limit time, on the basis that the judgement was issued by the Learned Magistrate on the 19th of November 2019 without notice to the parties. And at the time the notice was served and subsequently the demand letter by the Respondents and the time to give instructions to the Applicant's Counsel, the statutory time provided by law had ran out. In that respect, according to the Applicants in para 4 their affidavit in support of the application, the delay in commencing the action was not deliberate but for reasons beyond the applicant's control.

Further that the Applicants took action immediately after they were made aware of the judgement to file an application for stay of execution and drafted a memorandum of appeal. The Applicants are adamant that there would be no prejudice occasioned to the Respondents' if the orders sought herein are granted.

The Application was vehemently opposed the Respondent pointing out that the notice of motion dated 22nd January 2020 was brought after inordinate and inexcusable delay, lacks merits, meant to deny the respondent from enjoying fruits of litigation, an abuse of the court process and brought in bad faith.

I have looked at the application, the arguments advanced by both the applicant and the Respondent. An issue stood out in their respective contention that prior to the delivery of the impugned judgement, no notice was sent to the parties to notify then of the intention to deliver the judgement. The record of proceedings show that the impugned judgement was delivered in the absence of both parties. I find the same to be sufficient justification for the failure by the Applicants to file the intended appeal in time. I have also noted that the Respondent has not controverted the grounds laid out by the Applicant in support of its application.

In light of the foregoing, I satisfied that the proviso encapsulated in terms of Section 79G of the **Civil Procedure Act** are in this case satisfied. This court is satisfied that the Applicant has good and sufficient cause for not filing the appeal in time. The Application has also satisfied the principles that are considered in exercising the discretion on whether or not to enlarge time encapsulated in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65**.

This is a matter which calls for the application of the principle of substantial justice, rather than technicalities. In the interest of justice, I hereby grant leave to the Applicant to appeal out of time.

In the latter application, the orders sought are:

1) THAT pending the hearing and final determination of the instant Application and the intended Appeal itself, there be temporary stay of execution of the judgment and decree of the Honourable Court made on 19TH NOVEMBER 2019.

2) THAT the costs of this Application be provided for. WHICH APPLICATION is based upon the following grounds inter alia grounds to be adduced at the hearing hereof.

The grounds of the Application are that the Judgment was entered against the Defendants on 19th November 2019 in absence of both parties after they were informed by the court clerk that notices would be sent as the judgments were not ready on the date set for delivery and no notice had been sent prior to its delivery. That, the appellants are aggrieved by the judgment and decree of the Honourable Court, and wishes to appeal the same as a consequence that prompted the Applicant file this application to obtain Orders of Stay of Execution.

That it is part of the applicant's case on appeal that the Trial Court ignored the second medical filed by the Applicants and the evidence adduced by the defence leading to bad judgment being entered and it is also part of the Applicants case on Appeal that the Honourable Court did not apportion liability proportionately against the defendants and the third party one SAMUEL MUNGAI MUGUIMI who was a party of this proceedings.

Further that in view of the award made by the Honourable Court, finding making the Defendants/applicants 90 percent liable for the accident, the Applicants stands to suffer substantial loss in the event that the Orders sought herein are denied. It is also the applicant's ground that unless Orders sought herein are granted, the Respondent is likely to proceed with execution proceedings against the Judgment Debtor herein as he has already threatened so to do.

That the Judgment debtors have preferred an Appeal against the judgment of the Honourable Court and the Appeal shall be rendered nugatory if there is no Order staying execution pending the hearing and determination of both this application and of the intended appeal and that the Appellants are apprehensive that the Appeal if successful may be rendered nugatory particularly considering the fact that the respondent has no known source of income and therefore his ability to refund/repay the whole or part of the huge decretal sum together with costs and interest in the likely event a successful appeal, otherwise payable is not guaranteed.

That, unless the Application for stay of execution is granted, the Decree holder/is likely to proceed with execution proceedings against the Judgment Debtor and if there is no order of stay of execution granted and there is eminent danger of execution judgment herein.

That upon being notified of judgment, the Applicants have brought this application for stay of execution pending the hearing determination of this application and the intended appeal timeously and without undue delay and that the applicants believe that they have an arguable Appeal with high chances of success

The Application is supported by the Affidavit of CAREN NADA JAGUGA on behalf of the Applicant and reiterates the grounds of the Application.

The Respondent filed a replying affidavit through his Advocate, Mr. Kilonzo. In his Affidavit in reply, the Respondent depones that the Applicants have not proven in any way that the respondents shall be unable to refund the decretal sum if the appeal is successful, that the respondent is not a man of straw and he is in a position to refund the decretal sum if the appeal succeeds. He is employed and does profitable farming hence he is able to earn from the sales.

That the trial court's finding on liability and quantum is fair and reasonable hence the respondent should not be prevented from enjoying fruits of judgement. The intended appeal has no chances of success and the appeal is as a result of spite and malice. That the applicants have not also proven in any way that it's operations shall be curtailed if the decretal sum is paid out hence have not proved substantial loss.

The Respondent deponed that the application is only meant to deny the Respondent from enjoying the fruits of judgement and this shall cause prejudice. Further that no security has been tendered by the Applicant and has not proved any proof that their financial position and that of the insurance company is stable and again this application has been filed after inordinate delay. That the applicants have not shown how the appeal is likely to be rendered nugatory, that the intended appeal does not raise any triable issues and in the interest of justice, and therefore the instant application should be dismissed with costs.

I have considered the Notice of Motion, materials in support and opposing to the granting of orders of stay of execution. It is trite law that an appeal to the High Court does not per se operate as a stay of proceedings rather any person who wishes to prefer an appeal from such a decision shall institute a stay of proceedings on such sufficient cause bring shown to court.

Whilst it is a right of any litigant to lodge an appeal where a party is not satisfied with the outcome of any proceedings, it would seem that it has become fashionable to delay the enforcement of any order of the court by lodging an "appeal", and then seek an order to stay execution pending appeal. It is incumbent upon the court to exercise its inherent discretion to decide whether any legal basis does exist before the court stays the execution of its own orders.

In terms of Order 42 Rule 6, a stay of execution must be granted if sufficient cause is shown by the applicant that;

i. That substantial loss may result to the applicant, unless the order of stay is made.

ii. That the application has been made without unreasonable delay and;

iii. That security for the due performance of the decree has been given by the applicant.

In addition, an applicant seeking a stay of execution must also demonstrate that unless the application is allowed the intended appeal, or appeal, if successful would be rendered nugatory. This test is subjective to the circumstances of each case as was stated in **Reliance Bank Limited v Norlake Investments Ltd (2002) 1 EA 227**. Along with this the court must also be satisfied that the application for stay of execution must not be frivolous, vexatious or a waste of the court's time and resources.

The court shall not issue an order of stay of execution if the application which is only meant to delay the execution process filed in the lower court and that if the application was allowed, the respondent would suffer prejudice as she would be prevented from enjoying the fruits of judgement. (*See Alfred Wekesa Kizito v Nick Wafula Walela (2007)eKLR*).

Applications to the Court for stay of execution should not be seen to defeat the ends of justice. This was confirmed in **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** where the Court held:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order.”

(a) On whether the Application was filed made without unreasonable delay.

In the instant Application, the judgement of the lower court was delivered on the 19th of November 2019. In para 3 of the supporting affidavit sworn on behalf of the applicants, it is contended that the lower Court in the said judgement granted the plaintiff the sum of KShs. 793, 250/= plus costs and interest incidental to the suit without giving notice to the parties. The Applicants have also brought to the attention of the court the fact that the notice of entry of judgement doubling as notice to execute was only served on or about 6th day of December 2019, and reached the applicants' desk on 18th Day of December 2019. It is further averred that upon perusal of the judgement, the applicants felt aggrieved with the judgement and has preferred an appeal in this court.

It is the applicants' position that at the time their legal officer received the Respondent's demand letter and upon consultation with the Applicant's management to give instructions to the Applicants Counsel to file an appeal, the statutory time provided by law had run out. The applicants maintains that the delay in commencing the action was not deliberate but for reasons beyond the applicant's control as parties were not made aware of the judgement in time. To cure this, the Applicant filed a second notice of motion application seeking an order to extend the time within which to file the appeal out of statutory limit and that leave to operate as leave to appeal out of time.

The Counsel for the Respondent opposes the application on grounds that the application was brought after inordinate and inexcusable delay, lacks merits, it is meant to deny the respondent from enjoying fruits of litigation, an abuse of the court process and brought in bad faith.

I have noted that the Applicants' assertion to the effect that the judgement was delivered in the absence of the parties without notice having been disseminated to them was not controverted by the Respondent. Further, prima facie, the record also demonstrate that none of the parties were present when the impugned judgement was delivered.

I'm inclined to find the same as being genuine and in my view that is a sufficient ground for the grant of leave to appeal out of time. In the circumstances, the applicant cannot be said to be guilty of laches since the conditions under which they failed to meet the statutory time limit for appeal was undoubtedly beyond their control. By the same token, one cannot be able to conclude that this application was made with undue delay.

(b) Whether substantial loss may result to the applicant, unless the order of stay is made.

The applicants avers in para 4 & 11 of the affidavit in support that the lower made an award of KShs. 793, 250/= to the Respondent which is excessive and without a legal basis and that the applicant runs the risk of not being able to recover the sum if the appeal is successful. However, during the hearing the Applicants requested to partially release the decretal amount to the tune of KShs. 400, 000/=.

The Respondent on the other hand argued in para 6 of his affidavit in reply, that the applicants have not demonstrated in any manner that its operations shall be halted if the decretal sum is paid out hence have not proved substantial loss. Further that, there would be no loss suffered given the financial prowess of the Respondent who is employed and involved in profitable farming activities.

The purpose of stay is to preserve status quo. The Court ought to be careful and determine if the monetary decree is enforced, there is a possibility of recovery if the appeal is successful. It is the Respondent to show that if he is paid the money the decree, he will be in position to refund it in case the result of the appeal is against them.

In the instant application, I find para 8 of the affidavit in support is a genuine concern by the Applicants and the respondent has not sufficiently allied the concern. Indeed there is a likelihood that if the appeal successful may be rendered nugatory particularly considering the fact that this is an accident claim paid out to a victim of total negligent. The court makes a presumption that the colossal amount of money may be paid to some victims may not be able to pay it back.

The foregoing is further exacerbated by the fact that the Respondent's source of income is unknown and his ability to refund the whole or

part of the decretal sum together with costs and interest is the event that the appeal is successful, the payment of it is not guaranteed. In my view, the Respondent should have been able to demonstrate by way of evidence that he has an income from a known source and that the source is available on demand or on short notice. In the premises, this court finds that the applicant runs the risk of not being able to recover the money if the appeal is successful.

In this matter, the interests of justice would be served if execution of the award is temporarily stayed and eventualities cushioned by the provision of security for the due performance of the appeal award as may be binding on the applicant in any event.

(c) Whether security for the due performance of the decree has been given by the applicant.

On the question of security, which is a mandatory requirement, the applicant submitted during trial that they are ready and willing to furnish security to the tune of Kshs. 400, 000/= as deemed just and equitable.

In light of the foregoing, court will grant this application for stay of execution on the following conditions:

- 1. The essential requirements is that Kshs.400,000 be deducted by the Deputy Registrar High Court out of the decretal sum deposited and the same be due and payable to the respondents counsel within 15 days from today's dated.***
- 2. That the balance of the decretal sum being the disputed awarded on appeal be deposited with the Deputy Registrar pending the hearing and determination of the appeal within the same 15 days outlined above.***
- 3. That leave be and is hereby granted to the applicant to file the intended appeal forthwith. By dint of this order the draft memorandum of appeal be deemed as duly filed within time.***
- 4. The applicant do comply with Order 42 of the Civil Procedure Rules by filing and serving the record of appeal within 30 days from today's date.***
- 5. That stay of execution of the judgement appealed from is granted to preserve the subject matter so as not to render the appeal nugatory.***
- 6. There was a special circumstances of this matter, that the property of the applicant was already under proclamation and attachment on instructions of the respondent. By this application, the proclamation and attachment is hereby lifted on condition that the applicant do meet the entire costs, subject to taxation by the Deputy Registrar.***
- 7. Costs of this application to abide the appeal`***

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF FEBRUARY, 2020.

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R. NYAKUNDI

JUDGE