



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MIISC CIVIL APPLICATION NO. 71 OF 2019

PETER M.K. MUGAMBI.....1ST APPLICANT

JAMES MWONGERA MUGUONGO.....2ND APPLICANT

VERSUS

**MARY KANANU AND JOEL MUTHEE GAKUBU (Suing as the legal Representatives
of the estate of Japheth Kimabi).....RESPONDENT**

RULING

1. Other than costs, the significant orders sought by **Peter M.k. Mugambi and James Mwangera Muguongo** (*the applicants herein*) in the application dated 26th July 2019 premised on **Order 42 Rule 6 of the Civil Procedure Rules 2010 and Section 79G of the Civil Procedure Act** are;

a. Leave to file an appeal out of time; and

b. Stay of execution of the judgement and decree in Nkubu Cmcc No. 130 of 2012, pending the filing, hearing and determination of the intended appeal.

2. The application was supported by the affidavit of **Paul. M.K.Mugambi** and other grounds stated. The applicant argued that he was aggrieved by the judgement delivered on 21/3/2019 for a net award of Kshs. 1, 753,140/= in favour of the Respondents. And, in consultation with their insurers they agreed to pursue an appeal. That they had an honest belief that the insurers had transmitted instructions to counsel to file an appeal in time. But, it was not until 22/07/2019 that the applicants became aware that the appeal had not been filed after receiving threats from the Respondents that the auctioneers were in the process of executing the judgement.

3. The applicants averred that, upon receipt of these threats of execution of decree, they visited the insurance company for clarification. To their amazement, they were informed that the insurer had repudiated the Respondent's claim, hence, the applicants should pursue the appeal on their own. In these circumstances, they felt strongly, it is just that they be granted leave to appeal. They feared that, unless an order of stay of execution is issued, the auctioneers will attach and sell their assets/property, thus, causing them irreparable loss and damage.

4. The application was opposed by the Respondents through Replying affidavit dated 28th August 2019 jointly sworn by **Mary Kananu and Joel Muthee Gakubu**. They averred that the applicants have not annexed the decree and/or judgement being stayed and failure thereon is fatal to the application. That the delay in bringing the application after a period of four months has not been justifiably explained. That the applicants neither satisfied the court that they shall suffer substantial loss if the orders sought not given nor offered any security.

5. They argued further that the draft memorandum of appeal does not raise any trial issues. And, that the applicants have not proved that the Respondents are impecunious people with no known assets and/or property as to make them unable to refund the decretal sum. They noted that the applicants did not produce any evidence and/or witness to substantiate their defence in Nkubu Cmcc No, 130 of 2012.

6. The 1st Applicant filed a supplementary affidavit on 20th November 2019 stating that they have satisfied the conditions under Order 42 Rule 6 for the grant of a stay of execution and that they are capable and willing to offer any security for satisfaction of the resultant decree that may be issued against him and his co-applicant.

7. On 31/10/2019 this court directed the parties to canvass the appeal through written submissions. In their submissions the applicants reiterated the averments made in their respective affidavits and relied on the following cited cases; **Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd**[1], **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another**[2], **Edward Kananu**

& another v Hannah Mukui Gichuki & another[3].

8. The Respondent submitted that the applicants had not proved substantial loss and or the cause of delay. She relied on the following cited cases i.e. **Mukunya Mugo “A” & another v Elizabeth Mugure Mulunya[4]**, **County Executive of Kisumu v County Government of Kisumu & 8 others[5]**.

ANALYSIS AND DETERMINATION

9. Under **Section 79G of the Civil Procedure Act**: -

“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 a good and sufficient cause for not filing the appeal in time”.

10. In **County Executive of Kisumu v County Government of Kisumu & 8 others[6]** the Court made reference to **Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others[7]**, where the court held that, a Court in exercise of discretion to extend time should consider the following:

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

11. The applicants herein seek to file appeal four (4) months after the delivery of the trial court’s judgement. I have considered the reasons for delay. This seems to be inordinate delay. However, a court of law is not to react impulsively; it must consider the circumstances of each case and the explanations offered for the delay. The appellants aver that they transmitted the judgment to their insurers in honest belief that a legal counsel will be engaged to file an appeal. They then received threats of attachment of their properties by an auctioneer. This eventuality made them rush to their insurer for answers, only to be informed by the insurer that they repudiated the respondents claim and so they were left them to pursue the appeal on their own. It is their averment that they received this information on 1st July 2019 and filed the application on 6th July 2019. Despite lack of documentation to prove their assertion, I am prepared to give the applicants the benefit of doubt especially now that the insurer has told them that they have repudiated the claim and will have to handle the matter on their own. I do not wish to kill their right of appeal, accordingly, I find that the delay has been explained to the satisfaction of the court. I have also considered the prejudice to be occasioned against the Respondents and weighed it against the interest of justice. Consequently, I grant the applicants leave to file their appeal within fourteen (14) days from the date of this Ruling.

Stay of execution

12. **Order 42 Rule 6(1) of the Civil Procedure Rules, 2010** governs stay execution pending appeal. Of great value in the determination of an application for stay of execution is stated in Rule 6(2) as follows:

“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.”

Delay in filing application

13. Although the application was brought four (4) months after the delivery of the trial courts judgement, I have already found that the delay has been explained to the satisfaction of the court. For emphasis, the delay was occasioned by the applicant’s insurer’s actions of repudiating the respondents claim and not relaying the decision to the applicant. I find that the application was made without unreasonable delay.

Of substantial loss

14. Core to the discretion of court in granting stay of execution pending appeal is prevention of substantial loss from occurring upon the appellant. Substantial loss refers to loss of real value than one which is merely nominal. Here I am content to cite the case of **Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005**, (High Court of Uganda at Kampala) where it was stated that:

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal”

15. In this case, the applicants stated that they will suffer substantial loss if the decretal sum is paid to the Respondents. The Respondents averred that the applicant did not prove that they are impecunious people who cannot refund the decretal sum. Despite these averments, one important detail thing is not clear; the respondents are personal representatives of the estate of the deceased and nothing has been said about the financial status of the estate. The respondents could be speaking of their personal financial status. The court is not therefore able to determine whether the estate or the personal representatives in that capacity may or may not be able to refund the decretal sum herein. In such mix, the court is not helpless as the requirement for security should provide the way out.

Of security

16. The applicants committed themselves to abide by any form of security that the court may set for the due performance of the decree that they might ultimately be liable to. In order to balance the rights of parties herein, I order the applicants: -

a. To pay one half of the decretal amount to the Respondent within 45 days; and

b. Deposit the other half in an interest earning account in the joint names of counsels for the parties within 60 days of today.

17. The costs of the application shall abide the outcome of the appeal.

Dated, signed and delivered at Milimani this 7th day of May 2020

F. GIKONYO

JUDGE

Representation: -

1. Mithega & Kariuki Advocates for the Applicants

2. Kiautha Arithi Advocates for the Respondents.
