



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 364 OF 2010

PETER MULE MUTHUNGU

(Suing as administrator and personal representative

of the estate of JANE MUENI NGUI-Deceased).....PLAINTIFF/RESPONDENT

VERSUS

KENYATTA NATIONAL HOSPITAL.....DEFENDANT/APPLICANT

RULING

1. This ruling is precipitated by the Notice of Motion dated 6th April, 2020 filed by the defendant/applicant and supported by the grounds set out on its face and the facts deponed in the affidavit sworn by Calvin Nyachoti. The applicant sought for the orders hereunder:

i. Spent.

ii. THAT this Honourable Court be pleased to extend/enlarge time within which to file and serve a notice of appeal out of the prescribed time.

iii. THAT the defendant's/applicant's draft notice of appeal annexed thereto be deemed properly filed and served upon payment of court filing fees.

iv. THAT this Honourable Court be pleased to order a stay of execution and all consequential orders arising therefrom pending the hearing and determination of the application and the appeal.

v. THAT cost of the application be provided for.

2. The plaintiff/respondent filed Grounds of Opposition on 6th June, 2020 to oppose the Motion, raising the following grounds:

i. THAT the application is an afterthought made in bad faith and is an abuse of the court process.

ii. THAT the application is made in the wrong forum as it ought to have been filed at the Court of Appeal.

iii. THAT in the alternative and without prejudice to the foregoing, the defendant/applicant ought to deposit the decretal sum of Kshs.6,257,600/ together with costs of Kshs.500,000/ in a joint interest earning account in the names of the advocates on record.

3. Pursuant to the orders made by this court on 20th May, 2020 the parties filed and exchanged written submissions on the application. The applicant first submitted that its intended appeal raises triable issues which ought to be heard on merit.

4. The applicant also contends that unless the order for a stay of execution is granted, its appeal will be rendered nugatory in the event that it succeeds. The applicant relied on *inter alia*, the analysis by the Court of Appeal in the case of **Butt v Rent Restriction Tribunal [1979] eKLR** when it held that in considering an application for stay of execution, the court ought to exercise its discretion in a manner that will not render the appeal in question nugatory, if successful.

5. It is the applicant's submission that unless the order for stay of execution is granted, the applicant stands to suffer substantial loss. The applicant referred this court to the case of **Silverstein vs Chesoni [2002] 1KLR 867** whereby the court held that substantial loss is what ought to be prevented in a bid to preserve the status quo.

6. The respondent on his part argued that no explanation has been given for the delay in lodging an appeal in the Court of Appeal and that whereas the delay may not necessarily be inordinate, it remains intentional.
7. The respondent is of the submission that the mere reliance on a draft notice of appeal is no indicator as to whether an appeal is arguable or not.
8. The respondent further contends that the applicant ought to have satisfied the following principles established by the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**:
- i. 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;*
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court*
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;*
 - vi. Whether the application has been brought without undue delay; and*
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*
9. In the end, it is the submission of the respondent that the applicant's Motion is deserving of dismissal.
10. I have considered the grounds stated on the face of the motion, the facts deponed in the affidavit supporting the Motion; the Grounds of Opposition and the rival submissions together with the authorities cited.
11. A brief background of the matter is that the respondent instituted a suit against the applicant in which he sought for general damages under the Law Reform Act and the Fatal Accidents Act, special and aggravated damages plus cost of the suit and interest thereon.
12. Upon hearing the parties, this court on 28th February 2020, delivered its judgment in favour of the respondent by granting him a total sum of Kshs.6,257,600/ representing general damages, together with costs of the suit and interest on the damages awarded.
13. The applicant has conveyed his intention to lodge an appeal against the aforesaid judgment, hence the present application.
14. The foremost order being sought in the Motion is for leave to appeal against this court's decision out of time. Under **Section 7 of the Appellate Jurisdiction Act**, the High Court is given the discretion to extend the time required to either give notice of intention to appeal to the Court of Appeal or to grant leave to appeal out of time.
15. The principles to be applied in considering the subject of extension of time were considered by the Supreme Court in the above-cited case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**.
16. The first and second principles have to do with the extent of delay in filing the appeal and whether the explanation behind such delay is reasonable. Given that the intended appeal lies with the Court of Appeal, **Rule 75(2) of the Court of Appeal Rules** dictates that the notice of appeal should be filed within 14 days of the judgment to be appealed against. In the present instance, this court entered judgment in favour of the respondent as abovementioned on 28th February, 2020 which goes to show that the applicant ought to have lodged its notice of appeal within 14 days from the aforementioned date but did not.
17. Concerning the explanation for the delay, the applicant stated that the delay was occasioned by the unavailability of certified copies of the judgment and proceedings, which explanation I find to be reasonable.
18. The question as to whether the appeal is arguable, which constitutes the third principle, cannot be determined by this court since it is the preserve of the Court of Appeal.
19. On the principle to do with whether the respondent stands to be prejudiced in the circumstances, it is noted that the respondent did not bring any evidence or argument to demonstrate the manner in which he stands to be prejudiced should the time be enlarged for the applicant to file his appeal.
20. In view of the foregoing, I am convinced that my discretion will be properly exercised in enlarging the time required for filing the notice of appeal.
21. The second facet of the Motion concerns itself with the granting of an order for a stay of execution. In that case, the relevant provision is **Order 42, Rule 6(2) of the Civil Procedure Rules** which sets out the conditions to be met when it comes to an application for a stay of execution.

22. I will begin with the first condition on whether the application has been timeously filed. As earlier noted, this court delivered its judgment on 28th February, 2020 while the instant application was brought on 6th April, 2020. In my view, I think the delay cannot be said to be unreasonable. I find the application for stay to have been filed without unreasonable delay.

23. This brings me to the second condition of substantial loss. On its part, the applicant indicated that since the respondent is not a man of means, it is possible that the applicant will not be able to recover the decretal sum once the same is paid out to the respondent and the appeal succeeds.

24. It is apparent from the record that the decretal sum is substantial. It is also apparent that the respondent has not brought any evidence to prove that he is financially capable of refunding the decretal amount when required. On those grounds, I am convinced that the applicant has shown the substantial loss he stands to suffer should this court decline to grant an order for stay of execution, thereby rendering his appeal nugatory if successful.

25. On the third condition touching on the provision of security for the due performance of the decree, I note that the applicant did not offer any proposals. Suffice it to say that I considered the suggestion put forward by the respondent as earlier mentioned.

26. The upshot, therefore, is that the Motion dated 6th April 2020 is allowed in terms of orders (ii) and (iv). Consequently, this court makes the following orders:

a) The applicant is granted leave of 10 days from the date of this ruling to lodge the notice of appeal and thereafter, to serve upon the respondent a copy of the notice of appeal within 7 days from the date of lodging.

b) There shall be an order for stay of execution pending the hearing and determination of the intended appeal on the condition that the applicant deposits the entire judgement sum of ksh.6,257,600/= in an interest earning account in the joint names of the advocates and or firm of advocates appearing in this suit within 45 days from this day, failing which the stay order shall lapse.

c) Costs of the application to abide the outcome of the appeal.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 17th day of July, 2020

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant