



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL MISC. APPLICATION NO. 32 OF 2018

TITUS MUKOLWE MWENGEA.....APPLICANT

VERSUS

NDUNDA MULU.....RESPONDENT

RULING

1. **Titus Mukolwe Mwengea**, the Applicant approached this Court by way of Notice of Motion seeking leave to appeal out of time against the Judgment of **Hon. Z. J. Nyakundi** in **Mutomo Senior Principal Magistrate's Court Civil Suit No. 78 of 2016** that was delivered on **11th April, 2018**; and stay of execution of the Judgment and decree in the matter pending hearing and determination of the intended Appeal.

2. The application is premised on grounds that time within which the Appeal was to be filed lapsed; the Applicant stands to suffer substantial and irreparable loss and damage as there is a likelihood that he will be unable to recover the decretal sum awarded herein which will make the intended Appeal that is arguable rendered nugatory; and the Respondent will not suffer any prejudice that cannot be compensated by way of costs.

3. **Pauline Waruhiu**, the Claims Manager of Directline Assurance Company Limited the insurers of motor-vehicle Registration No. **KBX 499E** that was involved in the accident swore an affidavit in support of the application where she deposed that before their advocates acquired a copy of the Judgment to seek further instructions from them time within which they could appeal lapsed. That the intended Appeal is merited, arguable and it raises pertinent points of law therefore has overwhelming chance of success. That the Respondent did not disclose nor furnish the Court with any documentary evidence to prove his financial standing therefore the Applicant will suffer substantial loss following an award of **Kshs. 250,000/=** in general damages and **Kshs. 5,500/=** in special damages.

4. In response the Respondent deposed a Replying Affidavit where he deposed that the application is not made in good faith as its aim is to delay payments in this matter and derail him from enjoying fruits of their Judgment and is incompetent as the affidavit in support was sworn by a person not a party to proceedings but in event that the application is allowed, the Applicant be ordered to pay half the decretal sum and the balance be deposited in a joint account.

5. Following directions given the application was to be canvassed by way of written submissions. Parties were granted time within which to file submissions but only the Applicant filed submissions that I have duly considered.

6. The discretion to enlarge time within which an Appeal can be filed is derived from the provisions of **Section 79G** of the **Civil Procedure Act** that provides thus:

“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.”

The duty was therefore upon the Applicant to satisfy the Court of plausible cause that deterred him from filing the Appeal within the period stipulated by statute. The Appellant has attached a draft memorandum of Appeal where it is argued that the assessment of damages was erroneous as it was not proved. The explanation given as to why the Appeal was not filed within time was that there was delay in acquiring the copy of the Judgment for purposes of getting further instructions. In exercising the discretion to grant such an order it behooves the Court to act judiciously and this would require the Court not to lock out a party especially so when the application is brought soon after lapse of the statutory time. In the case of **Patel vs. E. A. Cargo Handling Services LTD (1974) EA 75** it was stated that:

“There are no limits or restrictions on the Judge's discretion except that if he does vary the Judgment he does so on such terms

as may be just The main concern of the court is to do justice to the parties; and the court will not impose conditions on itself to fetter the wide discretion given to it by the Rules.”

7. Considering the unfettered discretion conferred upon me I do take into consideration the fact that the Applicant delayed for approximately 18 days after lapse of the statutory period lapse within which an Appeal was to be filed. Justice would call upon the Applicant being heard as opposed to being condemned unheard on Appeal and this being a money decree which will be paid if due, no prejudice will be suffered.

8. Regarding stay of execution the principles of granting the orders is provided for in **Order 42 Rule (6)** of the **Civil Procedure Rules** that states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

9. This is an application that was made without unreasonable delay. The nature of loss the Applicant alleges will suffer if the sum paid is not repaid in case the Appeal succeeds is in monetary terms. It is further argued that no evidence was adduced to establish the claim.

10. The claim is a monetary one where the Court should hesitate granting the order sought for the reason that it can be repaid. This was well put in the case of **Ujagar Singh vs. Runda Coffee Estates Limited (1966) EA 263** as follows:

“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”

It has not been stated if the Respondent has any assets that would enable him repay the sum in case of the Appeal succeeding and the Applicant has expressed their willingness to provide security for due performance therefore I order as follows:

i) The Applicant is granted leave to appeal out of time within 14 days from the date hereof.

ii) There be a stay of execution on condition that the Applicant deposits the entire decretal amount, **Kshs. 365,696/=** in a joint account held by both parties' Counsels in a reputable financial institution within 14 days. In default execution to proceed.

11. It is so ordered.

Dated, Signed and Delivered at Kitui this 15th day of January, 2019.

L. N. MUTENDE

JUDGE