



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

MISCELLANEOUS CIVIL APPLICATION NO. 65 OF 2018

CATHERINE WANGARI MAINA.....APPELLANT

VERSUS

PMM.....1ST RESPONDENT

CWM.....2ND RESPONDENT

RULING

1. The applicant craves *two* reliefs: Firstly, for *enlargement of time* to lodge an appeal; and, secondly, for *stay of execution* of the decree pending the determination of the intended appeal.
2. The applicant is aggrieved by the judgment delivered on 24th May 2018 in Civil Case 348 of 2016 at the Murang'a Chief Magistrates Court.
3. The respondents are the legal representatives of *KM* (deceased). He was aged 13 when he was run over by the applicant's motor vehicle registration number KBM 446D. The respondents sued for *negligence*.
4. The lower court found that the appellant was *wholly* liable. The respondent was awarded damages of Kshs 3,750,000 plus costs and interest.
5. The applicant's notice of motion is supported by two depositions sworn on 17th August 2018 and 13th December 2018 respectively.
6. The motion is contested. There are two replying affidavits sworn on 14th September 2018 and 19th September 2018 respectively.
7. I will commence with the application for *leave* to lodge appeal out of time. The legal parameters are well settled. This court has wide and unfettered discretion to *extend time*. The discretion must however be exercised *judiciously*.
8. Some of the factors to be considered include the length of delay; the reasons for the delay; the nature of the intended appeal; and, whether the respondent will suffer prejudice. *Leo Sila Mutiso v Rose Mwangi*, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported), *Nicholas Salat v IEBC & 7 others*, Supreme Court, Application 16 of 2014 [2014] eKLR.
9. I agree that there has been *substantial delay*. The impugned judgment was delivered on 24th May 2018. The present motion was presented over *three months* later on 3rd September 2018. But I am satisfied that the judgment was to be delivered on 22nd February 2018. It was deferred. The disputants were advised that it would be delivered *on notice*. It was finally delivered in their *absence*.
10. But it would appear that the applicant became *aware* of the decision as far back as 27th July 2018. The delay up to 17th August 2018 is not well explained.
11. On the face of it there is an *arguable appeal* on quantum of damages. Like I stated, the deceased was a *minor*. The lower court opined that the deceased was a *bright student* who aspired to be a *teacher*. The learned trial magistrate adopted a *multiplacand* of Kshs 45,000 per month.
12. Justice is a two way street. The respondents will be prejudiced from enjoying the fruits of the decree. Certainly, there will be delayed closure of the loss. But I am alive that it can be abated by an award of *thrown away costs*.

13. I will exercise my *discretion* under section 79G of the **Civil Procedure Act** in favour of the applicant. That is the justice of the case.

14. I will now turn to the prayer for *stay*. The motion is predicated upon Order 42 rules 6 of the **Civil Procedure Rules**. The court *may* grant a stay if *substantial loss* may occur; that the application has been made *timeously*; and, that the applicant furnishes *security* for the due performance of the decree that may ultimately be binding on him.

15. I have already found that there was *undue laches*. But I have also held that the appeal is *arguable*. This court ought to ensure that the appeal, if successful, is not nugatory. **Wilson v Church (No 2)** 12 Ch D [1879] 454 at 459, **Butt v Rent Restriction Tribunal** [1982] KLR 417.

16. The decree here is *substantial*: It stands at Kshs 3,750,000. I am alive that as a general proposition, the execution of a *money decree* does not constitute substantial loss. **Kenya Shell v Benjamin Karuga** [1982-88] 1 KLR 1018, **Jaribu Credit Traders Ltd v Mumias Sugar Company Ltd** High Court, Nairobi, Commercial Case 465 of 2009 [2014] eKLR.

17. The 2nd respondent has filed an *affidavit of means* sworn on 19th September 2018. He earns about Kshs 30,000 per month from informal business. It would be risky to release *half* of the decretal sum to him as urged by his learned counsel. But I will *balance* the interests of the parties. I am persuaded by the reasoning of Okwengu J (as she then was) in **Jubilee Insurance Company Ltd v Samuel Thumbe**, High Court, Nairobi, Civil Appeal 432 of 2009 [2010] eKLR.

18. I will thus grant *conditional* stay. To punish the *tardiness*, the applicant shall pay *thrown away* costs to the respondents. A small *portion* of the decretal sum shall be paid to the respondents; and, part shall be held in an *interest earning account* of both counsel in a reputable bank.

19. The upshot is that the appellant's notice of motion dated 17th August 2018 is *allowed* in the following terms-

- a) That leave is granted to lodge an appeal out of time. The intended appeal *shall* be filed and served within *fourteen days* of today's date.
- b) That the applicant shall pay to the respondents *thrown away costs* of Kshs 5,000 within *thirty days* of today's date.
- c) That there shall be a *conditional* stay of execution of the judgment dated 24th May 2018 pending the hearing and determination of the intended appeal.
- d) That the stay is granted on *condition* that the applicant pays to the respondents a sum of Kshs 500,000 within *thirty days* of today's date.
- e) The stay is granted upon the *further condition* that the applicant deposits the balance of Kshs 3,250,000 in a *joint interest earning account* of both counsel in a reputable bank within *thirty days* of today's date.
- f) In default, execution shall issue.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 5th day of March 2019.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the applicant.

Ms. Kilonzo holding brief for Mrs. Waweru for the respondents instructed by L. K. Waweru & Company Advocates.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.