



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC APPLICATION NO. 93 OF 2018

CHARLES GITONGA JEREMIAH.....1ST APPLICANT

KAMUKUNJI STORES LIMITED.....2ND APPLICANT

VERSUS

FAITH GATETI NYENYER (Suing as the Legal Representative of

the estate of the late James Muchui).....RESPONDENT

RULING

Two reliefs; Extension of time and stay of execution

1. Before me is an application filed on 21st May 2018. It is asking me to allow the applicant to file appeal out of time and to grant a stay of execution pending the hearing of the intended appeal.

Of extension of time

2. Should the applicant herein be granted leave to file an appeal out of time? I am aware right to appeal is a constitutional one. I consider it a grave matter to refuse or impede the right to appeal on the basis of delay which does not prejudice fair trial. This approach has gained root in the Constitution and is known as substantive justice. Needless to state that rejection of extension of time will mean complete blockade of access to justice. Hence, it should be denied upon thoughtful consideration. I therefore, allow the applicant leave to file its appeal within thirty (30) days of this Ruling.

Of stay of execution

3. The fact that I have allowed the applicant to file an appeal does not in itself entitle them to a stay of execution. They must satisfy the threshold of the law which is; establish a sufficient reason to warrant stay of execution. The court should consider all the circumstances of the case but being guided by **Order 42 Rule 6 of the Civil Procedure Rules**.

(2) No order for stay of execution shall be made under sub rule (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.

The applicant bears the burden of proof that stay of execution is merited.

4. In this case the applicant filed its application on 21st May 2018 seeking a stay of execution of the judgement of the trial Court dated 24th January 2018. There was a delay in coming to court. What explanation is given for this delay?

5. They aver that they had approached their insurer, UAP insurance who advised them that they had instructed their former advocates on record to lodge an appeal. According to them, it was therefore the mistake of Counsel who failed to lodge an appeal and such mistake should not be occasioned upon an innocent party.

6. The Respondent filed an affidavit dated 10th July 2018. They aver that the delay is inordinate and only intended to delay the realization of the Respondents fruits of his judgement. They aver that the application is an afterthought. That there is nothing on record to show that the former counsel was instructed to lodge an appeal.

7. The application herein has been made six (6) months after the delivery of the judgement of the trial Court. The justification of the delay is that parties were negotiating and that the prior advocate on record had been instructed to file an appeal but failed to do so. There is no correspondence to show that parties were negotiating or the advocate was instructed to, but failed to file the appeal and/or an application for extension of time without unreasonable delay. I see only attached letter from their previous advocates informing their insurer to pay the claimant/respondent herein.

8. The Supreme Court has buttressed that any delay in taking out a proceeding or action must be explained to the satisfaction of the court. In this case, the explanation is not satisfactory. Nonetheless, is there any sufficient reason to order stay of execution?

Substantial loss

9. In spite of the delay, I should balance the rights herein; that of the appellant to his appeal and that of the respondent to his judgment.

10. Nothing shows that the respondent cannot make a refund of the decretal sum. She also has a right to her judgment. The applicant is also guilty of laches in coming to court. Therefore, I will decide this case purely in the interest of justice and order the applicant to pay:

a. One half of the decretal sum to the respondent; and

b. The other half into an interest earning account in the joint names of the counsels on record within 30 days of today.

Dated, signed and delivered this 15th day of May 2019

F. GIKONYO

JUDGE

IN PRESENCE OF

M/s Gachago for respondent

Mashire for applicant – absent

F. GIKONYO

JUDGE