REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC. CIVIL APPLICATION NO. 459 OF 2018

SAMUEL NJENGA.....1ST APPLICANT

KANGANGI EUTHYCHUS.....2ND APPLICANT

VERSUS

KALTUMA HARED & ISMAIL MOHAMMED ADEN (Suing as Administrators

of the Estate of the late **Omar Mohammed Aden-**Deceased**.....RESPONDENTS**

RULING

1. This is an application dated 20th December 2018 by the Applicants who are cited in the title of the notice of motion and supporting affidavit as the respondents. The application is by way of notice of motion under Section 3A, 79G and 95 of the Civil Procedure Act and Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules seeking two main prayers, firstly leave to enlarge time within which to file an appeal from a judgement and decree entered against them and delivered on 9.10.2018 in **Kangundo PMCC No. 174 of 2015** by the Honorable Martha Opanga, Senior Resident Magistrate and secondly stay of execution of judgement and decree in **Kangundo PMCC No. 174 of 2015** pending the hearing and determination of the intended appeal.

2. The Application is supported by an Affidavit of Kelvin Ngure, the General Claims Manager at Direct Line Assurance Company Limited, who are the insurers of the Motor Vehicle KBJ 186S, the subject vehicle in **Kangundo PMCC No. 174 of 2015**. The judgement was delivered on 9.10.2018. The Applicants did not lodge this Application until 20.12.2018 which was more than thirty-one days after the lapse of the time allowed to lodge appeals.

3. The Deponent deposes that the delay was due the fact that the efforts to obtain a copy of the record of proceedings had been futile and admit delay in issuing instructions to the firm of Kairu & McCourt Advocates to lodge an appeal against the judgement in the trial court that is expressed as being dissatisfactory to the applicant. The applicant has not annexed a Draft Memorandum of Appeal. However there is a memorandum of appeal that is stapled to the application and appears to have been sneaked in for there is no indication of payment of court fees. The applicant avers in the supporting affidavit that the intended appeal is meritorious and has overwhelming chances of success.

4. The Application is opposed vide replying affidavit deponed on 30th January, 2019 by Ismail Mohammed Aden who is one of the plaintiffs and co-administrators of the estate of the deceased. The Deponent finds that the application is premature for no execution has commenced as no decree has been applied for and therefore the same is an abuse of court process. He points out that no authority has been demonstrated by the deponent to depone on behalf of the applicants. Secondly, that the applicant had not satisfied the conditions for grant of stay of the orders sought; to wit substantial loss, no explanation for the delay and no undertaking for security. The deponent pointed out that the memorandum of appeal in paragraph one indicates that the appellants intend to appeal to Kitui High Court and that the appeal has no overwhelming chances of success. Prayer 3 was granted at the interim and when the application came up for *interpartes* hearing, the court directed that the same be canvassed by way of written submissions.

5. The applicant's counsel have not filed submissions.

6. The Respondent in opposing the application framed two issues for determination namely: whether the applicant is entitled to an order of stay and secondly, whether the honorable court may exercise its discretion to extend time within which to lodge an appeal. On the first issue, Learned counsel cited the provisions of order 42 Rule 6 of the Civil Procedure Rules that give the considerations for grant of stay, to wit; substantial loss to the applicant, no undue delay in making the application and security for costs given by the applicant. On the first requirement, counsel submitted that the applicants have not demonstrated any loss that could be occasioned to them. They cited the case of **James Wangalwa & Another v Agnes Naliaka Cheseto (2012) eKLR**. On the second requirement, counsel submitted that the applicants have no explanation in bringing the application 71 days after the delivery of the judgement. On the third requirement, counsel submitted that there is no commitment from the applicants on security for costs and because the applicants are of unknown financial means, there ought to

be a balancing act in the interests of justice for the applicants to deposit half of the decretal amount in a joint interest-earning account in the names of both advocates; counsel cited the case of **Edward Kamau & Another v Hannah Mukui Gichuki & Another (2015) eKLR** and concluded that the applicants have not satisfied the requirements under Order 42 Rule 6 of the Civil Procedure Rules for grant of an order of stay.

7. On the 2nd issue, counsel submitted that the applicants are non-deserving of discretion and they cited the case of **Paul Musili Wambua v Attorney General & 2 Others (2015) eKLR** where the court listed the requirements for exercise of discretion as the length of delay, the reasons for delay, the chances of the appeal succeeding and the degree of prejudice that the respondent is likely to suffer if the application is granted. Counsel submitted that the 71 days delay is unexplained and therefore the application ought to be dismissed and the interim orders vacated.

8. The issues for determination are whether the application is meritorious, whether the Applicants may be granted an extension of time to lodge their appeal and whether the court may grant orders for stay of execution.

9. Section 79G of the Civil Procedure Act is the law applicable in deciding whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

> **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**.

10. The Respondent opposed the application on the grounds that the Application is defective as the affidavit is deponed by a person who has not indicated authority to do so on behalf of the applicants. This being an application that seeks leave, the averment by the respondent is not material and thus I am unable to agree with the Respondent.

11. The power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis and while not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour. This was stated in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC and 7 Others (2015) eKLR.**

12. The Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR** listed the factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time, they include the following:

> **a. The period of delay;**
>
> **b. The reason for the delay;**
>
> **c. The arguability of the appeal;**
>
> **d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;**
>
> **e. The importance of compliance with time limits to the particular litigation or issue; and**
>
> **f. The effect if any on the administration of justice or public interest if any is involved.**

I will now consider the Applicants' application for extension of time against these factors.

13. The Application was brought almost two and a half months after time had run out and the applicant has not explained satisfactorily the reason for the delay. However I find that this delay is not inordinate in the circumstances.

14. Looking at the Draft Memorandum of Appeal that has neither been filed, nor annexed to the application and neither has any court fees been paid to include it as part of the record, I am unable to rely on the same for in the case of **Mombasa Cement Limited v Speaker, National Assembly & Another (2018) eKLR**, Justice Mativo observed that payment of court fees is a jurisdictional prerequisite to commencement of an action and struck out the petition for failure to pay court fees. Nevertheless Section 96 of the Civil Procedure Act provides for **power to make up deficiency of court fees.** It states that :

> **"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance**"

15. If for arguments sake I were to consider the memorandum, I would not be able to say that the intended appeal is in-arguable for all one is required to demonstrate is the arguability of the appeal. The Applicants would have easily met that standard. However for the aforementioned reasons I am unable to accept the said draft memorandum for the same is not properly on record and I find that the applicants have not discharged the burden of proving the arguability of the appeal.

16. The applicants have not demonstrated to court willingness to furnish the requisite security for performance of the decree. I am alive to the apprehensions that the respondent has. However in light of the fact that the respondent has indicated willingness to accept half of the decretal amount as security to satisfy the decretal sum, the said sum shall balance the adverse effects that granting the order have on the respondents.

17. Consequently, I will grant prayer 2 in the Applicants Notice of Motion subject to payment of court fees and that the applicant to file and serve the memorandum of appeal within fourteen(14) days from the date of this ruling.

18. Next, I will address the issue of stay of execution and Order 42 Rule 6 of the Civil Procedure Rules is the law applicable in deciding whether the prayer is merited.

19. The case of **Antoine Ndiaye v African Virtual University [2015] eKLR** gave the guiding principles for stay orders, in semblance with Order 42 Rule 6 of the Civil Procedure Rules; to wit,

a. The Application was brought without undue delay

b. Substantial loss occasioned to the applicant if the order is not granted

c. Security for performance

20. I have looked at the application herein, and with regard to the condition of undue delay, as analyzed above, the delay is not inordinate. With regard to the issue of substantial loss, I am unable to find the substantial loss that the applicant shall suffer save that his sacred right to be heard on appeal will be extinguished if the order is not granted. On the issue of security for performance, the respondent has indicated willingness to accept deposit of half of the decretal sum as security and therefore I am satisfied the rights of both parties have been balanced. Therefore the basic requirements for grant of this order have been met.

21. In the result the Applicant's application dated 20/12/2018 is allowed in the following terms:

a. The Applicant is granted leave to file and serve Memorandum of Appeal within 14 days from the date hereof.

b. An order of stay of execution of the judgement and decree of the lower court upon the Applicant depositing half the decretal sum with the Respondent while the remainder be deposited in a joint interest earning account in names of both Advocates within thirty (30) days from the date hereof failing which the order of stay shall lapse.

c. The costs of the application do abide in the Appeal.

It is so ordered.

Dated and delivered at Machakos this 18th day of July, 2019.

D.K. KEMEI

JUDGE