



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

MISC. CIVIL APPLICATION CASE NO.32 OF 2019

JOSEPH KIRONYOAPPLICANT

-VERSUS -

LUCY WATHINIA KOMU.....RESPONDENT

(Suing as the administratrix of the estate of

JOHN KINUTHIA MWAURA.....(DECEASED)

R U L I N G

1. By way of Notice of Motion, **Joseph Kironyo**, the Applicant, seeks leave of the court to file an appeal out of time against the judgment in Kitui **CMCC No. 383 of 2017** delivered on the **28/11/2018** and stay of execution of the judgement and decree pending hearing and determination of the appeal.

2. The application is premised on grounds that:-

It will be in the interest of justice for the orders granted to be stayed so that the appellant can have the opportunity of appealing against the judgment; the delay in filing the appeal was inadvertent on the applicant's part and was occasioned by an advertent omission on the part of the applicant to instruct an advocate to file an appeal, a delay that was not inordinate; the appeal has good chances of success and will be rendered nugatory if a stay of execution is not granted; he will suffer substantial loss and he is willing to furnish security that the court may order for the due performance of the decree.

3. **Lucy Wathigia Komu** the administratrix of the estate of **John Kinuthia Mwaura** (deceased) and respondent herein opposed the application. She deponed an affidavit where she averred that she filed the suit against the respondent among other three defendants. She was awarded **Kshs.2,760,701.40** an award that she felt was small as the trial Magistrate adopted a multiplier of 8 years when the deceased was 45 years old at the time of his demise but she accepted the verdict since the dependents of the deceased were in dire need of funds.

4. That on the **30th November 2018**, the advocates on record for the applicant indulged her advocates for stay of execution for thirty (30) days, a request that was acceptable. On 14/12/2018 following a new agreement, the applicant's advocates wrote to the respondent's advocates proposing amendment to the draft decree and even requested for bank account details for purposes of the insurers paying the judgement debt as the question of costs and interests was being deliberated upon. The contention was the decretal sum to be scaled down by Kshs. 272, 000/= which was not acceptable.

5. That the application for time to file the appeal is an afterthought as the letter requesting for typed proceedings was written on the 25th January, 2019. And inadvertence and omission is not a good and sufficient cause within the meaning of the provision to **Section 79 G of the Civil Procedure Act**.

6. In the alternative, she prayed for payment of at least $\frac{3}{4}$ of the decretal sum pending hearing and determination of the appeal and she also sought leave to file a cross appeal in the circumstances.

7. In a further affidavit the applicants admitted the fact of his advocates having engaged the respondents advocates and having sought bank details as stated but argued that it was before his advocates received instructions to appeal and failure to file the appeal within time was not deliberate but was occasioned by inadvertence.

8. The application was canvassed by way of written submissions that were taken into consideration.

9. Extension of time within which to lodge an appeal is provided for in **Section 79G of the Civil Procedure Act that stipulates 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”.

Principles of extension of time to file an appeal were enunciated in the case of **Nicholas Kiptoo Korir Arap Salat Vs. IEBC and 7 others (2014) eKLR** where the Supreme Court rendered itself thus,

We derive the following as the underlying principles that a court should consider in exercise of such direction:

- 1. Extension of time is not a right of party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court**
- 3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court**
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted.**
- 6. Whether the application has been brought without undue delay”.**

10. The judgment herein was delivered on the **25th November, 2018**. The applicant had thirty (30) days within which to appeal. The instant application having been filed on the **28/1/2019** the delay of **31 days** cannot be stated to have been inordinate. The explanation given by the applicant is that the delay in filing the appeal was occasioned by the insurer who did not give necessary instructions soon after the judgement was delivered. It is noted that each case must be decided according to its circumstances.

Since the delay emanated from the insurer, it will be unjust for the applicant to suffer unfavorable repercussions as a result of the conduct of the insurer. In the circumstances in exercise of the discretion I am seized of. I do grant the applicant leave to appeal out office within 21 days.

11. With regard to stay of execution, the principles of staying execution are stated in **Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010** that provide thus:-

“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 formal application) 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.”

12. I have afore found that the delay in the circumstances was not inordinate.

13. In the case of **Butt -vs- Rent Restriction Tribunal (1982) KLR 417** the court of appeal stated that:-

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special**

circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

14. The main contention of the applicant is that the appeal is likely to succeed because the sum awarded in damages is manifestly excessive. There is however an indication of counsel for the applicant having been amenable to settling the matter following the decision of the court. It is presumed that counsel would ordinarily act upon instructions of the client. This being the case, if some of the decretal sum is paid to the respondent, no substantial loss will be suffered.

15. In the premises, I order as follows:-

(i) There be a stay of execution of the judgment in Kitui CMCC No. 383 of 2017 delivered on the 28/11/2018 and the subsequent decree pending hearing and determination of the appeal on condition that the Applicant pays the Respondent half the decretal sum within 21 days of the ruling hereof.

(ii) The balance of decretal sum shall be deposited in a joint interest earning account of both parties, advocates, and in default the order shall stand vacated.

iii. Costs of the application shall be borne by the Applicant in any event.

16. It is so ordered.

Dated, Signed and delivered at Kitui this 19th day of September, 2019

L.N. MUTENDE

JUDGE