



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL MISC. APPLICATION NO. 67 OF 2019

BETWEEN

SHADRACK MASAVI.....APPLICANT

VERSUS

JOSHUA KAVIU KILUKUTHI (Suing as the Administrator to the

Estate of late MUSENYA KAVIU – Deceased).....RESPONDENT

R U L I N G

1. **Shadrack Masavi**, the Applicant, approached this Court by way of Notice of Motion seeking leave to appeal against the Judgment in **Kitui CMCC No. 355 of 2017** delivered on the **13th March, 2019** by **Hon. F. Nekesa, RM** and stay of execution of the stated Judgment and Decree (together with all consequential orders).

2. The Application is premised on grounds that; the decretal sum is **Kshs. 1,979,813/=**; the Judgment was scheduled to be delivered on the **13th March, 2019**, the representative of the Applicant's Counsel went to Court and directions were given that it would be delivered on the **17th April, 2019** only for the same to be delivered later in the day in the absence of the Applicant's representative. As a result, the Applicant came to learn of the Judgment having been delivered when they received a letter on **29th March, 2019** from the Respondent informing them of the same. Efforts to get copies of the Judgment to understand the reasoning of the Court has been a challenge hence the delay in lodging the Appeal. By the time the Applicant got a copy of the Judgment time to appeal had lapsed. If the Appeal is successful, the decretal sum may not be recovered from the Respondent as it is substantial therefore the Applicant is ready and willing to abide by any conditions to be set including depositing an insurance bond or bank guarantee as security for the due realization of the Judgment from the order for stay sought and that the Respondent shall not suffer any prejudice if the order sought is granted as the decretal sum attracts interest.

3. The Respondent representing the Estate of the Deceased on his part urged that the Application is aimed at delaying payment in this matter to derail them from enjoying the fruits of the Judgment. That the Deceased was survived by seven (7) children and a husband who do not have anyone to support them or anything to survive on. He requested the Court to order the Applicant to pay half the decretal sum and the balance to be deposited in a joint account.

4. The Application was disposed off by way of written submissions that I have taken into consideration.

5. An Appeal ought to be lodged within thirty (30) days from the date of judgment. In event of a delay an explanation to the satisfaction of the Court must be rendered. This is stipulated in **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.”

6. Principles to be considered by the Court in exercising the discretion to extend time within which a party can appeal were stated by the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR** thus:

“The underlying principles that a court should consider in exercise of such a discretion are as follows;

- 1. Extension of time is not a right to a party. It is an equitable remedy available for 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; and*
- 7. ...”*

7. The period of delay herein is approximately 27 days. The reason given was that the Applicant was made to believe that the Judgment would be delivered at a later date but it turned out that it was delivered later in the day and the fact was not made known to the Applicant. This being a monetary decree it is unlikely that the Respondent will suffer prejudice.

8. With regard to stay of execution the principles governing the same are provided in **Order 42 Rule 6** of the **Civil Procedure Rules**. The Application ought to be brought without undue delay; the Court must be satisfied that substantial loss will not result to the Applicant unless stay of execution is ordered and security as the Court may order for the due performance of the decree should be given by the Applicant.

9. In taking into consideration the principles aforesaid, I must also remember that the successful party should not be denied the fruits of Judgment. (**Also see Machira T/A Machira and Co. Advocates vs. East African Standard (2003) eKLR**).

10. I have found that the delay was approximately 27 days. This was not inordinate delay.

11. The kind of loss alluded to in the affidavit in support of the Application is that the Applicant will not be able to recover the decretal sum from the Respondent if the Appeal is successful as the value of the Respondent remains undisclosed.

12. In the Replying Affidavit it is averred that money expended on the Deceased's last expense was borrowed and to date the debt has not been settled. This is proof that the financial status of the Respondent is questionable therefore in case the Appeal succeeds, sums, if any, paid may not be refunded.

13. Looking at the draft Memorandum of Appeal the total sum awarded is estimated at **Kshs. 2,500,000/=** which is stated to be inordinately high considering the age of the Deceased and an alleged erroneous dependency ratio.

14. Taking all these factors into consideration I grant orders thus:

(i) The Applicant be and is hereby granted leave to Appeal out of time within **fourteen (14) Days**.

(ii) There be stay of execution pending hearing and determination of the Appeal on condition that the Applicant pays the Respondent (Estate of the Deceased) **Kshs. 1,000,000** within **fourteen (14) days** and the balance shall be deposited in a joint earning account to be held at a reputable financial institution in the names of both Advocates within fourteen (14) days.

(iii) In default, stay orders shall lapse.

(iv) Costs of the Application shall abide the outcome of the Appeal.

15. It is so ordered.

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

L. N. MUTENDE

JUDGE