



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISC. CIVIL NO. 45 OF 2019**

**PAUL MUNENE MUGO.....APPLICANT**

**V E R S U S**

**FLORENCE WAKUTHII MURIITHI.....RESPONDENT**

**RULING**

1. The applicant Paul Munene brought this application seeking orders that this court be pleased to enlarge time limited for filing an appeal against the entire Judgment and subsequent decree of Hon. Y. M. Barasa, Senior Resident Magistrate delivered on 14/6/2018 vide Kerugoya Chief Magistrate Civil case No. 162'A' of 2016. That the court be pleased to stay the execution of the said Judgment and subsequent decree and further proceedings in Kerugoya C.M. CC No. 162A/2016 pending the hearing and determination of this application and the intended appeal.

2. The application is grounded on the following grounds –

(a) That on 14/6/2018, the Hon. Y. M. Barasa – S.R.M delivered his Judgment in Kerugoya C.M.C.C No. 162'A' of 2016 where he find the applicant to be 100% liable for the Applicant and awarded the Respondent a total sum of Kshs 937,980/= in both General and Special damages plus costs and interest of the suit.

(b) That the applicant was aggrieved and applied for certified copies of proceedings and Judgment on 21/6/2018.

(c) That due to pressure of work, the certified copies of judgment and proceedings were only supplied to the applicant on 21/6/2019 within which period time of Appeal had expired.

(d) The respondent in the meantime has taken out execution proceedings and has applied for arrest and committal of the applicant to civil jail for settlement of decretal sum amounting to Kshs 1,102,012/= todate and same is listed for hearing on 26/6/2019.

(e) The applicant stands to suffer grave injustice if time limited for filing is not enlarged and stay of execution orders granted.

(f) There is sufficient cause for this application to be allowed as the applicant ought not to be condemned for a mistake that it do not occasioned.

(g) The delay was occasioned by delay on the part of the lower court in supplying applicant with certified copies of proceedings and Judgment.

(h) The applicant has an arguable appeal with high chances of success and will suffer substantial loss if orders herein not granted.

(i) The application has been brought in good faith and without delay and the Respondent shall suffer no prejudice.

3. It is also supported by the affidavit of the applicant wherein he depones that in the Judgment in C.M.CC 162A/2016 the court found him 100% liable and ordered him to pay Kshs 937,980/- in general and special damages to the respondent. He was dissatisfied with the Judgment and instructed his Advocate to lodge an appeal. He was however not supplied with certified copies of proceedings until 21/6/19. The delay in filing the appeal was due to pressure of work on the part of the court which was unable to supply him with proceedings in good time. The applicant states that the appeal has high chances of success and is arguable.

4. The applicant further states that he will suffer substantial loss as the respondent has commenced execution proceedings and has applied for his committal to Civil jail.

**Respondents case:-**

She filed a replying affidavit sworn on 28/6/19 and deposes that when the court gave the date for judgment the applicant's counsel was represented in court. The applicant and his advocate were not present when the Judgment was delivered. The trial Magistrate issued copies of the typed Judgment on the same date. Costs were taxed by consent on 17/10/18. That by 24/6/18 the Eleven (11) pages of the proceedings had been typed but the applicant picked the proceedings one year later.

5. She further states that though a certificate of delay was issued the applicant was the author of his own misfortune. The applicant has not been vigilant and has not shown how he will suffer substantial loss. That he will be prejudiced as the application is meant to deny him the fruits of Judgment.

6. He further submits that if the application is allowed the applicant be ordered to deposit the decretal sum of Kshs 1,102,012.00/-. He prays that the application be dismissed.

7. The applicant filed a supplementary affidavit which reiterates his earlier affidavit.

8. The background of this application is that the respondent sued the applicant in the lower court seeking special and general damages for personal injuries sustained in a road traffic accident involving the applicant's motor vehicle. Judgment was delivered on 14/6/18 and found the applicant 100% liable and awarded damages totaling Kshs 937,980/=. It is against that Judgment that he has preferred this appeal. He applied for proceedings but they were not supplied in time. This necessitated this application.

9. The applicant submits that the application has merits as the court has jurisdiction and unfettered discretion to allow the application. He relies on the case of **Leo Sila Mutiso –v- Rose Hellen Wanguri Mwangi C.A 251/1997** where the court held that:-

***“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionally. It is also well settled that, in general the matter which this court takes into account in deciding whether to grant an extension of time are the length of delay, reason for delay, chances of appeal succeeding, degree of prejudice to the respondent. However the list is not exhaustive and each case is considered on the basis of its own facts and peculiar circumstances.”***

10. It is further submitted the conditions which the applicant has to satisfy are whether substantial loss may result if stay is not ordered, the application has been brought without unreasonable delay, that such security as the court orders has been given. That the application is brought under **Order 42 rule 6(1) & (2)**.

11. The respondent relies on the list of authorities which he filed and the replying affidavit.

12. I have considered the application. The issues which arises are:-

**a) Enlargement of time for filing an appeal.**

**b) Stay of execution.**

**a) Enlargement of time for filing an appeal.**

The time for filing appeal is stipulated under **Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya**. It provides:-

***“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.”***

The section limits the time within which to file an appeal from the sub-ordinate court to the High Court to 30 days from the date of the decree or order appealed against. The proviso however gives the court discretion to enlarge time if the appellant satisfies the court that he had a good and sufficient cause. It gives court discretion to enlarge time where a party has shown good cause. This is what was held in the case of **Odero Owuor & Another –v- Rose Hellen Wanguri Mwangi** cited above. The court emphasized that the court has power to extend time for good and sufficient cause.

14. The court will therefore not extend time as a matter of cause but on party satisfying the court that he has a good and sufficient cause for the delay in filing the appeal as provided under the law. The Court of Appeal in **Paul Musili Wambua –v- Attorney General & 2 Others** stated that the decision of court on whether or not to extend the time for filing an appeal exercises unfettered discretion. That however in the exercise of the discretion the court must act upon reasons not based on whims and caprice. It considered the grounds which the court has to take into account in deciding whether to extend time. These are length of delay, chances of appeal succeeding and degree of prejudice to the respondent if the applications are granted. So the question is whether the applicant has established these grounds.

15. On the issue of reasons of delay, the applicant states that he was supplied with the proceedings late. I find that this ground has been established as the applicant has annexed the certificate of delay PMM-3- showing that though he applied for the proceedings on 21/6/18 and paid a deposit, they were not supplied due to pressure of work and were only supplied on 21/6/19. Upon being supplied, the Memorandum of Appeal was filed on 25/6/19. The delay was not of the applicant's making. The delay has been explained. The applicant needed the proceedings and the Judgment to enable him file the appeal and since they were not supplied in time he should not be made to suffer for a

mistake which was not of his own making. I find that the applicant has sufficiently explained the delay.

16. On the issue of whether the appeal has chances of success, the memorandum of appeal has raised the ground that the driver of the vehicle who was blamed for the accident was not a party in the suit, that the evidence was not considered. The finding was not supported by the evidence and that the award of damages was exorbitant. These are substantive grounds and the appeal is not frivolous. The appeal is arguable. This is all what the court has to determine at this stage as the court may at some point determine the merits of the appeal. I should avoid making conclusive determination at this stage so that the parties are not prejudiced.

17. The 3rd consideration is whether the respondent will suffer prejudice. In his replying affidavit the appellant avers that the court may order the applicant to deposit the decretal sum in court or in an interest earning account. The respondent must be taken to be stating that if the decretal sum is deposited the prejudice will be mitigated pending the determination of the appeal. There will be no prejudice if the extension of time is ordered.

18. I find that the applicant has adduced sufficient reasons to warrant this court to order extension of time.

19. The second issue for determination is stay of execution. **Order 42 rule 6(2) of the Civil Procedure Rules** provides for the conditions precedent to the granting of stay of execution pending appeal.

These are:-

- 1) Substantial loss which may result is stay is not granted.**
- 2) The application has been filed without unreasonable delay.**
- 3) Security as the court may order for the due performance of the decree or order.**

20. A party is therefore not entitled to an order of stay as a matter of course or that he will get the order automatically upon application he must satisfy the court that if stay is not ordered, he will suffer substantial loss.

21. The applicant in his supplementary affidavit depones that the respondent's income is unknown and she is a woman of straw and hence there is no possibility that he will recover the decretal sum from her if appeal succeeds. This shifted the burden to the respondent to prove that he has means to reimburse the decretal sum if she executes the judgment and the appeal succeeds. The decretal sum is a colossal sum of money. If stay is not ordered and the appeal succeeds, since the ability of the respondent to reimburse is unknown, substantial loss may result to the applicant.

22. The appeal has been filed without unreasonable delay and it is for this court to order the suitable security for the due performance of the decree.

23. I find that the applicant has made out a case for this court to order stay of execution.

24. I find that the application has merits. I order as follows:-

- 1. The time for filing appeal is extended.**
- 2. The appeal be filed within 30 days from today.**
- 3. There will be stay of execution pending the hearing and determination of the appeal.**
- 4. The applicant to provide security by depositing the taxed costs of Kshs 124,602/= in court within 14 days.**
- 5. Costs shall be in the cause.**

**Dated at Kerugoya this 17<sup>th</sup> Day of October, 2019.**

**L. W. GITARI**

**JUDGE**