



**REPUBLIC OF KENYA**

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

**HC CIVIL MISC. NO. 113 OF 2019**

**JALNA STORES LIMITED .....APPELLANT/APPLICANT**

**-VERSUS-**

**MWIKALI SYENGO ..... 1<sup>ST</sup> RESPONDENT**

**DAVID MASAI KING'OO .....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is the Appellant/Applicant's application (Notice of Motion) dated 24<sup>th</sup> July 2019. It seeks the following orders;

**1) That, the Honourable court be pleased to grant leave to the firm of Lumumba & Lumumba Advocates to come on record for the Applicant in place of the firm of L. M. Kambuni & Associates Advocates.**

**2) That, the Honourable court be pleased to stay execution of the judgment delivered by Honourable A. Ndung'u (SRM) in Makindu PMC No. 292 of 2013; Mwikali Syengo & David Masai King'oo (suing as the legal representative and administrators of the estate of Peter King'oo Masai (deceased) – Vs- Jalna Stores Limited on 7<sup>th</sup> February 2019 pending the hearing and determination of the intended appeal.**

**3) That, the Honourable court be pleased to grant the Applicant leave to Appeal out of time against the judgment delivered by Honourable A. Ndung'u (SRM) in Makindu PMC No. 292 of 2013; Mwikali Syengo & David Masai King'oo (suing as the legal representatives and administrators of the estate of Peter King'oo Masai (deceased) –Vs- Jalna Stores Limited on 7<sup>th</sup> February 2019.**

**4) That, the costs of the Application be provided for.**

2. It is supported by 15 grounds on its face plus a 19 paragraph supporting affidavit by Frankline Nyagah a legal officer with UAP Insurance Company Ltd the insurers of the Appellant/Applicant. The main reason for seeking leave to file appeal out of time is due to late notification of the delivery of judgment. The Applicant who was represented by the firm of M/s L. M. Kambuni & Associates says the judgment which was supposed to be delivered on 6<sup>th</sup> December 2018 was deferred to a date to be communicated vide a judgment notice.

3. Its lawyers were never served with the notice for delivery of judgment on 7<sup>th</sup> February 2019 (letter dated 28/05/2019 and received on 26/06/2019). They were only able to access a copy of the judgment on 16<sup>th</sup> July 2019, hence the delay in filing an Appeal.

4. The Applicant has explained the steps taken to have the matter dealt with including the appointment of Lumumba and Lumumba advocates to take over from M/s L. M. Kambuni & associates. It's also averred that the intended appeal has high chances of success and will be rendered nugatory if stay of execution is not granted, pending the hearing of the intended appeal.

5. On the other hand, the Respondent would not suffer any prejudice if stay is granted, while the Applicant would suffer unreparable prejudice, loss and damage. Annexed to the supporting affidavit is a copy of the draft memorandum of appeal, (FN-3).

6. The Respondents filed a replying affidavit by the 2<sup>nd</sup> Respondent David Masai King'oo. He avers that the two Respondents are the Administrators of the estate of Peter King'oo Masai. It's their case that the decree was served on the Applicant on 27<sup>th</sup> May 2019 and no tangible reason has been given for the delay in filing the present application. They consider it as a way of delaying them from enjoying the fruits of their judgment.

7. He has also averred that the Applicant has not demonstrated how it would suffer substantial and unreparable harm if the order for stay of execution is not granted. The Respondent accuses the Applicant of indolence based on no mistake or error. That the memorandum of appeal has no chances of success.

## Appellant/Applicant's Submissions

8. M/s Lumumba & Lumumba have submitted that they have exhibited a draft of the Memorandum of Appeal with a raft of grounds of grounds of appeal. To them this satisfies the court that the intended appeal is not frivolous. He referred to the cases of;

(i) **Patrick Museu Musimba –Vs- Richard N. Kalembe Ndile & 3 Others [2013] eKLR.**

(ii) **Center Star Ltd & Anor –Vs- Halima Mahmood Ali (suing in her capacity as legal representative of the estate of Hawa Hassan Mohamud & 2 Others [2018] eKLR. (Court of Appeal).**

9. They argue that the Applicant has satisfied the second condition being that the intended appeal will be rendered nugatory if the order for stay of execution is not granted. See *Centre Star Ltd (Supra)*. On the principle to be applied when stay pending appeal is sought he referred to the case of **Chris Munga N. Bichage –Vs- Richard Nyagaka Tongi & 2 Others eKLR** where the learned Judges of the court of Appeal stated;

*“.....The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”*

10. Counsel adds that the Applicant has complied with the provisions of Order 42 Rule 6 Civil Procedure Rules. It's also submitted that the Respondents may not be able to refund the amounts awarded in the event the same is paid and the appeal succeeds. He referred to the case of **Johnson Mwiruuti Mburu –Vs- Samuel Machaia Ngure HCCA No. 716 of 2003** where **Justice Nyamu** held that a Respondent's possible inability to pay the decretal amount was sufficient to justify grant of stay of execution pending appeal on the condition that the decretal sum is secured.

11. On the issue of enlargement of time he submits that Order 50 Rule 6 Civil Procedure Rules gives the courts powers to enlarge time where a limited time has been fixed for doing any act or taking proceedings. He has relied on the case of **Nicholas Kiptor Arap Korir Salat –Vs- The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** to support this submission. He asked the court to grant the leave sought since the Applicant has given sufficient circumstances explaining the delay. See **Richard Muthusi –Vs- Patrick Gituma Ngomo & Anor [2017] eKLR.**

## Respondent's Submissions

12. M/s Makau & Mulei in their submissions in opposing the application state that the considerations for granting stay pending an appeal were set out in the case of **Butt –Vs- Rent Restriction Tribunal Court of Appeal Civil Application No. Nrb 6 of 1979.** He has set them out as follows;

(i) *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.*

(ii) *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.*

(iii) *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.*

(iv) *The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

13. He submits that the cornerstone of the jurisdiction of the court under Order 42 Civil Procedure Rules is that substantial loss would result to the Applicant unless a stay of execution is granted. On what substantial loss is counsel relies on the case of **James Wangalwa & Anor – Vs- Agnes Naliaka Cheseto HC Misc. No. 42 of 2012 (2012) eKLR** where it was held;

*“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.”*

14. He argues that the Applicant has nowhere in the supporting affidavit or grounds in support demonstrated how it will be affected in any case that the application for stay is not allowed. It has not also shown the inability of the Applicant to recover the money if paid to the Respondents. He relied on the case of **Equity Bank Ltd –Vs- Taiga Adams Company Ltd (2006) eKLR** where the court stated;

*“In the application before me, the Applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent – that is execution is carried out-in the event the appeal succeeds, the Respondent would not be in a position to pay-reimburse-as he/it is a person of no means. Here, no such allegation is made much less established by the Appellant/Applicant.*

***Of even greater impact is the fact that the applicant has not offered security at all, and this is one of the mandatory tenets ..... under which the application is brought...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay.....”***

15. Counsel argues that besides proof of substantial loss the Applicant has to provide security which it has not done. It's his submission that the Applicant has not fulfilled this requirement and so the order for stay should not be granted.

16. On leave to appeal out of time, he referred to section 79G Civil Procedure Act and submitted that the Applicant has a duty to account for the said period or give a good and sufficient cause for not filing the appeal within the stipulated period. To him inadvertence and indolence on the part of the Applicant's Insurer's counsel is not such reason. Its counsel's submission that the Applicant has failed to satisfactorily explain the delay and so the leave sought should not be granted.

#### **Analysis and Determination**

17. I have considered the application, affidavit, annexures and the rival submissions. The issue for consideration is whether the Applicant has made out a case for issuance of the two main prayers sought i.e.

***(i) Leave to file appeal out of time.***

***(ii) Stay of execution of the judgment in Makindu PMCC No. 292 of 2013.***

18. The parties had by consent on 29<sup>th</sup> July 2019 agreed to have the firm of Lumumba and Lumumba come on record for the Appellant/Applicant in place of M/s L. M. Kambuni associates. The court had also granted a temporary stay of execution pending the hearing and determination of this application.

#### **Issue No. (i) leave to file appeal out of time.**

19. Section 79G of the Civil Procedure Act provides that;

***“79G; 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 a good and sufficient cause for not filing the appeal in time.”***

20. The record shows that the judgment the Applicant intends appeal against was delivered on 7<sup>th</sup> February 2019 at Makindu Magistrate's court. Section 79G Civil Procedure Act provides that any appeal ought to be filed within thirty (30) days of the judgment. The 30 days expired on 7<sup>th</sup> March 2019. The decretal sum is Kshs.1,340,500/= plus interest and costs.

21. The Applicant in his explanation for the delay says its advocate was never served with a notice for delivery of judgment on 7<sup>th</sup> February 2019. That it was not until 26<sup>th</sup> June 2019 that they received a notification of the judgment from L. M. Kambuni & Associates (FN-Z). There is no evidence to rebut the assertion that the Applicant's former advocates were not served with any notice for delivery of judgement on 7<sup>th</sup> February 2019. That confirmation could have been gotten from the court. All the same, I find that there was laxity on the part of the Applicant and its advocate in checking from the court the position of the judgment.

22. I however note that the Respondents were well aware of the delivery of the judgement. There is nothing that stopped them from notifying the Applicant of the delivery of the judgement in good time. If they did, there is no evidence on record to confirm that once notified by L. M. Kambuni advocate the Applicant took steps of getting the judgment. Instead it decided to change advocates with instructions to have the judgment challenged.

23. This was between 26<sup>th</sup> June 2019 and 24<sup>th</sup> July 2019 when this application was filed. I am satisfied that the Applicant acted reasonably fast upon notification of the judgment. It's right to appeal cannot therefore be curtailed after such efforts. I am therefore persuaded that this is a fit case for this court to exercise discretion under Order 50 Rule 6 Civil Procedure Rules and enlarge time.

#### **Issue No. (ii) stay of execution of the judgment in Makindu PMCC no. 292 of 2013.**

24. Under Order 42 Rule 6(2) Civil Procedure Rules the principles guiding the grant of stay of execution pending appeal are;

***(a) Whether the application was made without unreasonable delay.***

***(b) Whether substantial loss will result to the applicant if the order is not made.***

***(c) Whether security has been provided.***

25. When dealing with the issue of grant of leave to file appeal out of time I dealt with delay which I found not to be unreasonable given the

circumstances as presented by the Applicant. I therefore make the same finding on the issue of whether the application was made within reasonable time.

26. The Applicant has stated that its appeal has high chances of success, and that if stay is not granted, it will suffer irreparable loss as it may never recover the money, in the event of a successful appeal. It therefore relies on the case of **Johnson Mwiruuti Mburu (supra)** and submits that the Respondents will not be able to repay any money paid.

27. The Respondents relying on the **Equity Bank Ltd case (supra)** submit that the Applicant has not established any substantial loss to be incurred if stay of execution is not granted. In their replying affidavit at paragraph 11 they state as follows;

***“That further we are not men of straw that we would not be able to return the decretal sum if the court allows the appeal and quashes the judgement of the lower court.”***

28. The Applicant in the supporting affidavit at paragraph 13 stated thus;

***“That the Applicant stands to suffer substantial and irreparable harm if orders for stay of execution and enlargement of time are not issued urgently, as they may never recover the decretal sum.”***

29. I find that the Applicant did not specifically state that the Respondents are men of straw or paupers. A general fear of non-recovery of the decretal sum was expressed. In spite of that the Respondent simply denied being men of straw and that was all which is not sufficient.

30. On the success or not of the appeal, I will not say much on it, as that will be going to the merits of the appeal. All I can see from the judgment is that the deceased was a passenger in the subject vehicle, and liability was apportioned by the court with the deceased bearing 30%. The Applicant is challenging the awards made in terms of quantum on the various heads. This cannot therefore be said to be a vexatious, appeal.

31. From the affidavits, and submissions it is clear that the Applicant has not offered any security for payment of the decretal sum. Security for payment is one of the conditions for grant of stay of execution, under Order 42 Rule 6 Civil Procedure Rules.

32. After considering all the circumstances of the case, I find that the Applicant should be given an opportunity to file its intended appeal which should be filed within 14 days.

33. There shall be stay of execution of the judgment on the following conditions;

***(i) The Applicant will pay the Respondents a sum of Kshs.500,000/= through their advocates within 21 days.***

***(ii) The balance of the decretal sum to be secured through a bank guarantee within 30 days.***

***(iii) Costs to the Respondents.***

***(iv) In the event of breach of any of the conditions above the order of stay of execution and the filing of appeal shall be vacated.***

Orders accordingly.

**Delivered, Signed & Dated this 20<sup>th</sup> day of November, 2019 in Open Court at Makueni.**

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**Hon. H. I. Ong’udi**

**Judge**