



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CIVIL MISC. APPLICATION NO. 8 OF 2019**

**KENYA RED CROSS.....APPLICANT**

**VERSUS**

**ISNINO DAUDI SAMOW.....RESPONDENT**

**RULING**

1. By notice of motion dated 27/6/2019 the applicant seeks prayers –

**(1) Stay of execution of decree pending hearing of the intended appeal; and**

**(2) Enlargement of time to lodge an appeal against the lower court decree in Garissa Chief Magistrate Civil Suit No. 3 of 2016.**

2. The same is based on provisions cited essentially Order 50 rule 6, Order 51 rule 1, Order 42 rule 6 (1) and (6) of the Civil Procedure Rules *inter alia*.

3. It is based on the grounds on the face of the motion and affidavits of Musyoki Kioko sworn on 27/6/2019, and of Martha Mutoro sworn on 27/6/2019.

4. The same is opposed vide replying affidavit of Isnino Daudi Samow sworn on 15/7/2019.

5. The parties have opted to canvass same application via submissions where they have set out their respective cases and the arguments.

**APPLICANT'S SUBMISSIONS:**

6. That the delay in lodging the intended appeal within the statutory period was inadvertently occasioned for the following reasons:-

i. When the judgment was delivered in this matter on 14<sup>th</sup> May 2019 the instructing client, who is the Applicant's Insurance Company gave instructions of negotiating the judgment sum as they opined that the award was huge. These negotiations ensued and the respondent proceeded to execute before the negotiations were concluded.

ii. The advocate who was previously handling this particular matter at the law firm on behalf of the applicant, one Collins Kiprono left employment of MNM Advocates LLP and he failed to bring to the attention of firm, the urgent need to file the appeal in time and update the instructing client where the negotiations had reached. This caused confusion and there was no consistent follow up on the file.

7. The applicant was aware that this Honourable Court has discretion to extend the time within which the applicant may file its appeal.

8. If the stay of execution order is not granted, the applicant stands to suffer substantial and irreparable loss.

9. The applicant is ready and willing to abide by such terms as this Honourable Court may impose on it including a deposit of the entire decretal sum with the court pending the outcome of the intended appeal.

10. The applicant has an arguable appeal with a very high probability of success.

11. The application has been filed timeously and without undue delay.

12. The basis for grant of stay pending appeal is for the applicant to demonstrate that:

*i. Substantial loss may result unless the order is made. Judgement was delivered on the 14<sup>th</sup> May 2019 awarding the respondent damages totaling to Kshs.1,500,000/= plus costs and interest. The applicant intends to file an appeal against this judgment in its totality.*

*ii. The applicant in Martha Mutoro's supporting affidavit stated that they are bound to suffer irreparable prejudice, loss and damage unless stay of execution is granted and that the respondent will not suffer any prejudice should the application be allowed. Further, the applicant is poised to suffer execution out of no fault of theirs and stand to have their property carried away and auctioned.*

*iii. The respondent has not demonstrated to this court his means to allow the court assess his financial capabilities, therefore he may not be in a position to refund the said decretal sum if the applicant's appeal succeeds.*

13. The application has been made without unreasonable delay. The applicant herein has explained the cause of the delay though not unreasonable in making this application which include among others-

- When the judgment was delivered in this matter on 14<sup>th</sup> May 2019 the instructing client, who is the Applicant's Insurance Company gave instructions of negotiating the judgment sum as they opined that the award was huge. These negotiations ensued and the respondent proceeded to execute before the negotiations were concluded.
- The advocate who was previously handling this particular matter at the law firm on behalf of the applicant, one Collins Kiprono left employment of MNM Advocates LLP and he failed to bring to the attention of firm, the urgent need to file the appeal in time and update the instructing client where the negotiations had reached. This caused confusion and there was no consistent follow up on the file.

14. Considering that judgment in the Honourable Magistrate Court was entered on the 14<sup>th</sup> May, 2019 and the present application was filed on 2<sup>nd</sup> July, 2019 it's applicant submission that there has not been an unreasonable delay on the part of the applicant who is seeking for an enlargement of time to appeal and further the reason for the delay are just and not meant to delay or frustrate the respondent in this case.

15. The applicant is ready and willing to offer such security as the court may deem fit, proper and just in the circumstances. Including depositing the decretal sum in court and/or in a joint interest earning account by the corresponding firm of advocates pending the outcome of the intended appeal. This will secure the interests of both parties without any bias.

16. In Mohammed Salim t/a Choice Butchery vs *Nasserpuria Memon Jamat [2013] eKLR*, where the court stated thus, ".....The fact that the respondent has substantial means to compensate the appellant if the appeal is successful is not the only consideration in this sort of application. The loss that the appellant may suffer may not be quantifiable." See also *Hosea Kiplagat vs John Allan Okemwa [2012] eKLR*.

17. The issue of adequacy of security was dealt with by the Court of Appeal in *Nduhiu Gitahi vs Warugongo [1988] KLR 621; 1KAR 100; [1988-92] 2 KAR 100* where the Court of Appeal expressed itself as follows:

**"The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial."**

18. The delay in filing a memorandum of appeal was occasioned by the following reasons:-

*i. When the judgment was delivered in this matter on 14<sup>th</sup> May 2019 the instructing client, who is the Applicant's Insurance Company gave instructions of negotiating the judgment sum as they opined that the award was huge. These negotiations ensued and the respondent proceeded to execute before the negotiations were concluded.*

*ii. The advocate who was previously handling this particular matter at the law firm on behalf of the applicant, one Collins Kiprono left employment of MNM Advocates LLP and he failed to bring to the attention of firm, the urgent need to file the appeal in time and update the instructing client where the negotiations had reached. This caused confusion and there was no consistent follow up on the file.*

19. These are mistakes of counsels, and pray that the same should not be visited upon the applicant who is innocent litigant.

20. The thrust of the applicant's intended appeal herein is that it is aggrieved by the judgement of the Honourable Court delivered on the 14<sup>th</sup> May, 2019 awarding the respondent damages totaling to the sum of Kshs.1,500,000/=. The applicant argues that the award given was not commensurate to the evidence, which was intended for the court's evaluation. The court ought to have apportioned lesser quantum owing to the respondent's contribution; evidence on record together with the applicant's filed submissions.

## **RESPONDENT'S SUBMISSIONS**

21. The respondent submitted that the cause of action arose from a motor vehicle accident that occurred on 19<sup>th</sup> September 2011 when the applicant's motor vehicle struck the deceased along Mwingi-Garissa road thereby causing fatal injuries to her. The said motor vehicle registration number KAQ 138J was driven by the applicant's driver/agent carelessly and/or negligently to cause it to hit the deceased.
22. The respondent, as the representative of the deceased, filed a plaint against the applicant for negligent driving and causing the death of the deceased and sought from the trial court general and special damages.
23. The applicant herein entered appearance and filed defence wherein it denied that an accident occurred and instead blamed the deceased for causing the accident.
24. Upon examining the evidence on record, the trial court found the respondent herein to have proven her case on a balance of probability and found the applicant fully liable.
25. Judgment was entered against the applicant and the respondent was awarded a total of Kshs.1,500,000/= for damages together with costs and interests.
26. The applicant was granted a statutory thirty (30) days stay of execution which period expired without the applicant lodging an appeal against the judgment.
27. The applicant has filed the present application seeking stay of execution and leave to appeal out of time against the judgment.
28. The respondent filed a replying affidavit dated 15<sup>th</sup> July, 2019 opposing the applicant's application.
29. The respondent relies on the court's discretionary powers and urges this honourable court to dismiss the present application and the orders sought herein.
30. The present application is merely a delaying and diversionary approach being used by the applicant to delay the execution of the judgment of the trial court. It is totally devoid of merit to grant the orders sought.
31. The general principle of law is that the successful litigant in possession of a valid court judgement is entitled to the fruits of judgment unless there exist exceptional circumstances to deny him or her that right. A successful litigant ought to have access to the consequences of a judicial finding.
32. The grounds sighted in the present application for stay of execution serve as an overwhelming hindrance for the orders sought to be granted. For the orders to be granted, the following factors must be addressed and satisfied accordingly.
33. Substantial loss is qualitative in nature and does not represent any particular mathematical formula. It means any loss, great or small, that is of real worth or value as distinguished from a loss that is merely nominal.
34. The fact that the process of execution has been put in motion by the respondent, or is likely to proceed, by itself, does not and should not amount to substantial loss occasioned upon the applicant.
35. Further, the applicant is a renowned and a resourceful organization in Kenya and thus should be reasonably expected to be in a position of being fully capable of to pay the decretal amount.
36. In a sworn affidavit, the applicant has demonstrated the capability of paying the judgement sum by offering the same as a security deposit pending the outcome of the intended appeal.
37. In *Nairobi Civil Appeal NO. 107 of 2015 Masisi Mwita vs Damaris Wanjiku Njeri* quoted Honourable **Gikonyo J** in the case of *James Wangalwa & Anor vs Agnes Naliaka Cheseto (High Court Misc. No. 42 of 2012)* where it was held *inter alia* that:
- “...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.... The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail..... Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”**
38. For an application for stay pending appeal to merit granting of the orders sought, it must be shown to have been made speedily without any hint of delay.
39. The question that arises is whether this application has been filed after unreasonable delay.
40. The undisputed facts of the case are that judgment was entered against the applicant on 14<sup>th</sup> May 2019 and subsequently a statutory thirty (30) days stay of execution was granted to the applicant to file an appeal. The said judgment was delivered in presence of both parties.
41. Subsequently, the statutory thirty (30) days stay period lapsed without any attempt whatsoever being made by the applicant herein to file

an appeal for an enlargement of the statutory stay period.

42. In the aftermath of this delay, the present application was filed on 2<sup>nd</sup> July 2019, nearly two (2) months after delivery of the judgment. This constitutes unreasonably long delay by the applicant to move this honourable court to extend the stay any further.

43. As stated above, the present application was brought nearly two (2) months after delivery of the judgment. Both parties were present in court for the delivery of the judgment by the trial court and therefore they were both aware of the contents of the judgment and the consequences of the extraction and subsequent execution of the decree.

44. The thirty (30) days stay period is a statutory one that the court deems fit and adequate enough to accommodate the filing and hearing of any application or intended appeal made by either party aggrieved by the judgment. During this period parties are expected to be prudent and diligent enough to act swiftly in protecting their interests and exercising their judicial right of appeal before the window closes.

45. A two (2) months period of inactivity by the applicant to appeal or apply for an extension of stay of execution cannot be said to be timeous and is simply inexcusable and shows complete lack of diligence.

46. He urged this honourable court to consider the fact that the respondent suffered the painful loss of the deceased. She is the successful litigant and has waited long enough for execution of the decree. She should not be made to suffer any longer for the imprudence of the applicant.

47. A law firm's practices ought to be professional and accountable and it should be held to subjective standards of reasonableness as would be expected of any other professional body.

48. It has been stated that MNM Advocates simply let the employee exit the company in such a casual manner. This is a clear implication of blatant negligence and lack of foresight on their part.

49. It is plain and clear under Order 42 rule 6(2) (a) of the Civil Procedure Rules, 2010 that a party will not have to wait until negotiations for an out-of-court settlement come to a conclusion before the application for stay is filed. See *Eldoret Environment & Land Case No. 200 of 2012 – Jaber Mohsen Ali & Anor vs Priscillah Boit & Anor*.

50. In *Nairobi High Court Civil Case No. 576 of 2012 – Winfred Nyawira Maina vs Peterson Onyiego Gichana* it was held that:

**“”...(the applicant) must bring his application without reasonable delay....a prudent and diligent suitor should have been awakened by the applications by the respondent to levy execution on his immovable property and apply without delay to have the execution stayed.”**

51. It can be discerned from the judgment and the applicant's memorandum of appeal that the intended appeal has a very low chance of success. The trial court exercised fairness in fully addressing all the issues before it fit and justified based on the circumstances and facts of the case.

#### **ISSUES ,ANALYSIS AND DETERMINATION**

52. After going through the record, pleadings , and parties submissions , I find the issues are ;whether the applicant has met the threshold set by the provisions of Order 50 rule 6, Order 51 rule 1, and Order 42 rule 6 (1) and (6) of the Civil Procedure for grant of reliefs sought? If the answer is in affirmative, what are the conditions? What is the order as to costs?

53. On extension of to appeal, our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in **MWANGI V KENYA AIRWAYS LTD [2003] KLR**. They include the following:

***a. The period of delay;***

***b. The reason for the delay;***

***c. The agreeability of the appeal;***

***d. The degree of prejudice which could be suffered by the Respondent is 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.***

54. The delay of instituting the instant application is not contested which is about 2 months. The delay in filing a memorandum of appeal was occasioned by the following reasons:-

55. When the judgment was delivered in this matter on 14th May 2019 the instructing client, who is the Applicant's Insurance Company gave instructions of negotiating the judgment sum as they opined that the award was huge. These negotiations ensued and the respondent

proceeded to execute before the negotiations were concluded.

56. The advocate who was previously handling this particular matter at the law firm on behalf of the applicant, one Collins Kiprono left employment of MNM Advocates LLP and he failed to bring to the attention of firm, the urgent need to file the appeal in time and update the instructing client where the negotiations had reached. This caused confusion and there was no consistent follow up on the file.

57. These are mistakes of counsels, and pray that the same should not be visited upon the applicant who is innocent litigant.

58. The respondent has not seriously contested the issue of leave to file appeal herein thus court finds merit in the same.

59. On whether the stay pending appeal should be granted,

60. The basis for grant of stay pending appeal is for the applicant to demonstrate that:

61. Substantial loss may result unless the order is made. Judgement was delivered on the 14th May 2019 awarding the respondent damages totaling to Kshs.1,500,000/= plus costs and interest. The applicant intends to file an appeal against this judgment in its totality.

62. The applicant in Martha Mutoro's supporting affidavit stated that they are bound to suffer irreparable prejudice, loss and damage unless stay of execution is granted and that the respondent will not suffer any prejudice should the application be allowed. Further, the applicant is poised to suffer execution out of no fault of theirs and stand to have their property carried away and auctioned.

63. The respondent has not demonstrated to this court his means to allow the court assess his financial capabilities, therefore he may not be in a position to refund the said decretal sum if the applicant's appeal succeeds.

64. The application has been made without unreasonable delay. The applicant herein has explained the cause of the delay though not unreasonable in making this application which include among others-

65. When the judgment was delivered in this matter on 14th May 2019 the instructing client, who is the Applicant's Insurance Company gave instructions of negotiating the judgment sum as they opined that the award was huge. These negotiations ensued and the respondent proceeded to execute before the negotiations were concluded.

66. The advocate who was previously handling this particular matter at the law firm on behalf of the applicant, one Collins Kiprono left employment of MNM Advocates LLP and he failed to bring to the attention of firm, the urgent need to file the appeal in time and update the instructing client where the negotiations had reached. This caused confusion and there was no consistent follow up on the file.

67. This is an application that invokes the discretionary powers of the court. Of course discretionary powers must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

***“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.”***

68. The Court of Appeal in **BUTT V RENT RESTRICTION TRIBUNAL [1982] KLR 417** gave guidance on how a court should exercise discretion and held 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 appellants 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.”***

69. The above cited case captures the applicable principles in deciding whether or not to grant a stay of execution pending appeal.

70. I do not buy into the argument by the Respondent that the Court of Appeal decisions are inapplicable to applications for stay of execution pending appeal before the High Court. A perusal of the decisions of both courts show that the principles to be applied when considering an application for stay of execution pending appeal are the same.

71. In the Court of Appeal decision in the case of **NATIONAL INDUSTRIAL CREDIT BANK LIMITED (SUPRA) AS FOLLOWED BY THE HIGH COURT IN STANLEY KARANJA WAINAINA (SUPRA)** it was held that:

***“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”***

72. In the case at hand, the Respondent has not disclosed any source of income that he would use to refund the Applicant the decretal amount should the appeal succeed. Indeed the Respondent’s averment that he is in dire need of money to continue with treatment for the serious injuries received in the accident can only confirm that he will not be able to refund the decretal sum were the Applicant’s appeal to succeed.

73. The Applicant has thus established that it will suffer substantial loss if the intended execution is not stayed. It also follows that if the Respondent executes the judgement and the Applicant’s appeal succeeds, then not only will the Applicant suffer substantial loss but the appeal will also be rendered nugatory.

74. The applicant is ready and willing to offer such security as the court may deem fit, proper and just in the circumstances. Including depositing the decretal sum in court and/or in a joint interest earning account by the corresponding firm of advocates pending the outcome of the intended appeal. This will secure the interests of both parties without any bias.

75. Thus court makes the following orders ‘

**i. The applicant shall file and serve appeal within 14 days.**

**ii. The applicant shall pay respondent ksh 500,000 and deposit ksh 1 million in joint earning interest account of parties’ advocates within 30 days being a condition for stay pending appeal.**

**iii. In default of the above the application will stand dismissed and execution to issue.**

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2019.**

.....

**C. KARIUKI**

**JUDGE**