



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**HIGH COURT CIVIL APPEAL NO 128 OF 2017**

**CHARLES KIRUNDI MUGO.....APPELLANT**

**VERSUS**

**JOEL OYUGI OMBUYE.....RESPONDENT**

**RULING**

1. The application before me dated 3<sup>rd</sup> October, 2017 seeks two primary order being leave of the court do file the appeal out of time and stay of execution of:-

(i) Spent

(ii) **THAT** leave be granted to appeal out of time against the whole judgment and decree in **Nakuru CMCC 302 of 2008** by delivered on 23<sup>rd</sup> August 2017; and that the memorandum of Appeal dated 30<sup>th</sup> September 2017 be deemed as filed and served upon the respondent within the prescribed time; and;

(iii) **THAT** this honourable court be pleased to grant stay of execution of decree/judgment entered against the applicant on 23<sup>rd</sup> August 2017 in **Nakuru CMCC 302 of 2008** pending the hearing and determination of this application.

(iv) **THAT** this honourable court be pleased to grant stay of execution of decree/judgment entered against the applicant on 23<sup>rd</sup> August 2017 in **Nakuru CMCC 302 of 2008** pending the hearing and determination of this appeal.

2. The application is brought on grounds that the appellant wished to appeal the award on account of its being excessive. The supporting affidavit is sworn by one **Pauline Waruhiu**, the claims director at Directline insurance who are the appellant's insurers. She deposes that the judgment in the suit was delivered on 23<sup>rd</sup> August, 2017 wherein the plaintiff was awarded Kshs. 1,000,000/= in general damages for fracture of the right tibia. That they considered the award high but that by the time they were ready to file the appeal, the statutory time had lapsed.

3. The application is opposed by the respondent through grounds of opposition dated 4/18/2017 filed by their counsel **E.M Juma Ombui advocates**. They state that the application does not meet the legal threshold of **Order 42 Rule 6(2) of the Civil Procedure Rules**; that the reasons advanced for the delay were unsubstantiated; that the applicant has not demonstrated that substantial loss will be occasioned if the decretal sum is paid to the respondent; and; that the applicant has not come to court with clean hands.

4. Parties urged their respective positions through written submissions which I have carefully considered. The only issue in this application is whether the applicant has met the requirements under **Section 79 (G) of the Civil Procedure Act** and **Order 42 Rule 6(2). Section 79 G of the Civil Procedure Act** provides a time line of 30 days for filing of an appeal. The proviso is 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."

5. The appellant submits that the time ran out before instructions to appeal were taken. They had sought and obtained a temporary stay in the trial court which lapsed on 23<sup>rd</sup> September 2017. They submit that they filed the appeal for which they seek leave to be admitted out of time on 31<sup>st</sup> September 2017 only 7 days after the statutory time lapsed. They submit further that the 7 day delay was not inordinate and was caused by the company bureaucratic procedures of giving instructions. The respondent did not address the issue of delay in their submissions.

6. The power to extend time under section **79 (G) of the Civil Procedure Code** is discretionary. The court must however consider the application against well established principles. It must consider the period of delay, reason for such delay whether the respondent would suffer prejudice, and; chances of the appeal succeeding if the application is granted. See Edward **Kamau & Anor Vs. Hannah Mukui**

**Gichuki and Anor 2015 eKLR; Mwangi V Kenya Airways Ltd [2012] eKLR.**

7. It is not disputed that this application was filed 7 day out of time. I am however satisfied with the explanation for the delay given by the applicant. I do not in the circumstances of this case consider the 7 day delay to be inordinate. It is the appellant's right to appeal for the matter to be effectually determined. See **Banco Arabe Espanol vs Bank of Uganda [1999] E.A 22**. However, this right must be balanced against the right of the plaintiff to enjoy the fruits of judgment delivered in his favour. See **Lynette Nduta Njenga vs Esther Wachuka Kabue [2017] eKLR**. In the circumstances of the present case, I see no prejudice to be suffered by the respondent if the appeal is admitted out of time. I will therefore exercise discretion in favour of the applicant and allow the appeal to be filed out of time.

8. The second prayer sought by the applicant is to stay the execution of the judgment and decree in Nakuru **CMCC 302 of 2008** pending the hearing and determination of the appeal. **Under 42 Rule 2** such an applicant must show that substantial loss may result if the stay is not granted and that the application has been brought timeously. He must also be willing to provide security for due performance of such decree as may ultimately be binding. See **Halan & Anor vs Thornton & Turpin [1963] Limited [1990]KLR**.

9. I have already found that the application was brought timeously. On the issue of loss, the applicant fears that the respondent may not be in a position to repay the decretal sum if the appeal succeeded. They rely on **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike 2015 eKLR**. The respondent on the other hand argues that the process of execution cannot of itself be said to be substantial loss as execution is a lawful process. They submit that the applicant has not demonstrated that the respondent would not be in a position to refund the decretal amount. For this they rely on **James Wangalwa & Anor vs. Agnes Naliaka Cheseto [2012] eKLR**.

10. Neither the applicant nor the respondent demonstrated that the respondent was a man of straw and incapable of refunding the decretal sum if the appeal succeeded. The applicant has however, stated that the appeal in question is on quantum. Without prejudging the chances of the appeal succeeding or the means of the respondent, I am of the view that the applicant would suffer substantial loss if he were to succeed on appeal after paying out the entire decretal sum.

11. On the requirement for security, the applicant has offered to deposit half the decretal sum in a joint interest earning account and to pay half to the respondent's counsel to be held until the appeal is concluded. He relied on **APA Insurance Limited V. Michael Kinyajui Muturi [2016] eKLR**.

12. It has been held that **Order 42 Rule 2** makes security a mandatory prerequisite for stay. See **Vishram Rarji Halai & Anor vs. Thornton & Turpin (1963) Ltd, Civil Application No. 15 of 1990 (unreported)**. In the circumstances of this case the security offered by the applicant, while safeguarding the applicant's position, completely puts the fruit of judgment out of the reach of the respondent. I would vary the same.

13. In the final analysis, I allow the application on terms that:-

- (i) The applicant is allowed to file the appeal out of time and the memorandum of appeal is deemed properly filed upon payment of the requisite court fees.
- (ii) There shall be stay of execution pending the hearing and determination of the appeal.
- (iii) The stay is conditional upon:
  - (a) The applicant depositing 70% of the decretal amount in the an interest earning account in the joint names of the advocates for the applicant and respondent.
  - (b) The applicant releasing 30% of the decretal sum to the respondent.
  - (c) The stay order shall automatically lapse if the two conditions are not met within 30 days of the delivery of this ruling

Orders accordingly

**Ruling signed at Garsen on 12<sup>th</sup> day of July 2018.**

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**R. LAGAT KORIR**

**JUDGE**

**Ruling delivered dated and Counter signed at Nakuru this 2<sup>nd</sup> day of August, 2018.**

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**JANET MULWA**

**JUDGE**

**In the presence of**

.....CA

.....for applicant

.....for respondent