



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL MISC. APPLICATION NO. 18 OF 2018

ENTONOX ENTERPRISES LIMITED.....APPLICANT

VERSUS

GRACE MUINDO KATHOKA (Suing on behalf of MUTEMI KYULI – (Deceased)....RESPONDENT

RULING

1. The Applicant approached this Court by way of Notice of Motion seeking leave to file an Appeal out of time against the Judgment and Decree entered against it on the 27th day of **September, 2017** at the Senior Principal Magistrate’s Court, Mwingi; and stay of execution of the said Judgment and Decree pending hearing and determination of the intended Appeal.

2. The application is premised on grounds that the 30 days within which an Appeal was to be filed have since lapsed; the Applicants are aggrieved by the Judgment on liability and quantum; upon delivery of Judgment the matter proceeded to taxation of the Bill of Costs on **1st November, 2017** in the absence of the Applicant’s Advocates. The Notice of Taxation was received on the **13th November, 2017** when it was scheduled to be heard on the **15th November, 2017**.

3. That the Applicants stand to suffer substantial and irreparable loss should the Respondents execute as they will not recover the decretal sum should the Appeal succeed; the Appeal shall be rendered nugatory.

4. The delay was occasioned in the process of trying to obtain the Judgment delivered therefore was not deliberate as they were not able to advise their clients. They have a strong and arguable Appeal with a high Chance of succeeding.

5. In response, **Grace Muindo Kathoka** the Respondent, swore an affidavit where she deposed that after the Judgment was delivered on the **27th September, 2017** the Defendant was granted stay of execution for 30 days but did not take any step, file an Appeal or pay any money to her as a show of good faith. On the **19th October, 2017** after expiry of the 30 days the Applicant applied for Judgment. A letter for assessment of costs was served upon the Applicant for action. The Notice of Taxation of costs was served upon the Applicant but he did not follow up. The decree and certificate issued on the **7th December, 2017** were served upon the Defendant.

6. Further, he averred that failure to take any step to lodge the Appeal is an implication to decline to settle the decree of the Court. That there is no loss and/or damage that the Applicant will suffer that cannot be compensated by way of monetary terms. The intended Appeal is a way of subverting justice by delaying her to enjoy fruits of her rightful obtained Judgment.

7. That the delay to file the Appeal is inordinate and not justifiable and in event the Court is inclined to grant orders sought it should order that the decretal sum of **Kshs. 366,131/=** be deposited in her advocate’s account. That she is a business woman and if the Appeal succeeds she has the ability to repay the sum.

8. The application was canvassed by way of written submissions that I have considered alongside authorities cited.

9. Time within which an Appeal from the subordinate Court should be filed is provided for in **Section 79G** of the **Civil Procedure Act**. The proviso thereto is for enlargement of time within which to file the Appeal. It states as follows:

“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.”

10. From the reading of the proviso, the powers accorded to the Court to enlarge the time is discretionary but the Applicant must demonstrate existence of a plausible cause for not acting as expected. In the case of **Edith Gichugu Thaiti (2014) eKLR** the Court of Appeal stated as follows in a case where the Court has to enlarge time:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but not limited to, the period of delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance amongst others.”

11. In doing this the Court must also be minded of a just decision to both parties.

12. Judgment in the matter was delivered on the **27th September, 2017**, and according to the Respondent it was in the presence of the Respondent’s Counsel where the Court was moved to grant a 30 days’ stay of execution. This period was not utilized. A Notice of Taxation was subsequently served upon the Respondent’s Counsel. It is admitted that the notice given was short but the fact of disregarding it is not explained. The Court is faulted for delay in furnishing the Applicant with the Judgment. The Respondent argues that the Judgment was read on the **27th September, 2017** but the Applicant waited until the **6th February, 2018** when the application was filed. This was more than three (3) months later.

13. Looking at the prejudice that the Applicant may suffer it is argued that Dependants of the Deceased were not particularized in the plaint which raises the question whether or not the Respondent was the Deceased’s Dependant. This therefore calls for the Applicant to be granted the opportunity to be heard on Appeal.

14. Principles of granting a stay of execution are set out in **Order 42 Rule 6** of the **Criminal Procedure Rules. Rule 6(1)** and **6(2)** provide thus:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.”

15. The Applicant would therefore be required to prove on a balance of probabilities that:

i) Substantial loss may result to the Applicant unless the order is made.

ii) The application is made without unreasonable delay, and;

iii) Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.

16. In the case of **Butt vs. Rent Restriction Tribunal, Civil Appeal No. NAI 6 of 1979** the Court of Appeal stated that:

“The power of the court to grant or refuse an application of stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal, if successful from being nugatory.”

17. It is urged by the Applicant that the Respondent’s means are unknown and it is highly unlikely that the Respondent may not be capable of refunding the decretal amount in the event that the Appeal succeeds therefore they stand to be prejudiced by suffering substantial loss.

18. The Respondent bore the evidential burden of demonstrating that she is not a person of straw hence was capable of refunding the money should the Appeal succeed. **(See Kenya Posts & Telecommunications Corporation vs. Paul Gichanga Ndarua Civil Application No. Nai 367 of 2001).**

19. This was not done therefore the Court does not know if the refund of the decretal sum will be done if the Appeal succeeds.

20. The Respondents have expressed their willingness to abide with the Court’s conditions.

21. In the premises I make orders as follows:

i) The Applicant is granted leave to file the Appeal out of time within 7 days.

ii) Stay of execution is granted on condition that the Applicant deposits in Court the entire decretal sum within **seven (7)** days from the date of the Ruling.

iii) Costs of the application to abide the outcome of the Appeal.

22. It is so ordered.

Dated, Signed and Delivered at Kitui this 19th day of September, 2018.

L. N. MUTENDE

JUDGE