



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC CIVIL APPLICATION NO. 115 OF 2018

ESTON MWIRIGI NDEGE 1ST APPLICANT

PAUL KIRIMI KITHINJI 2ND APPLICANT

-V-

JOSEPH MACHARIA KAWIRA RESPONDENT

RULING

1. Before me is a Motion on notice dated 16th August, 2018 brought under **section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules**. The applicants seek enlargement of time within which to appeal against the judgment and decree in **GITHONGO SRMCC NO. 10 OF 2016 JOSEPH MACHERIA KAWIRA V ESTON MWIRIGI & ANOTHER** and a stay of execution pending the hearing and determination of the intended appeal.

2. The grounds upon which the Motion is grounded are set out on the body of the Motion and in the affidavit of Eston Mwirigi Ndege sworn on 16th August, 2018. These are that; judgment in the said suit was delivered on 30th November 2017; that the applicants, who were the defendants in that suit, were aggrieved by the said judgment; that they intended to lodge an appeal but the time for lodging the appeal had already expired. That all through, they had been under honest belief that their insurer would settle the claim only to be notified on 8th August 2018, that the Insurance Company had repudiated liability.

3. The respondent opposed the application vide his replying affidavit sworn on 11th September, 2018. He deposed that there had been inordinate delay in bringing the application; that the failure by the applicant's insurer to settle the claim did not allow the applicants to appeal; that the applicants should bring a declaratory suit against their insurer instead.

4. It was submitted for the applicants that; They had all along believed that their insurer APA Insurance was to settle the judgment. That it only on 8th August 2018, when the insurer wrote to them informing them that it had repudiated liability over the accident that resulted in the judgment. It was further submitted that the respondent had not demonstrated that he would be prejudiced if the orders sought are granted, while the applicants properties risked being attached and sold in execution of the decree.

5. On the other hand, it was submitted for the respondent that the judgment that the applicants seek to appeal against was delivered on 29th November, 2017. That the applicants had not challenged the same within the statutory period of 30 days. That the application was an afterthought after the applicant's insurer had failed them. That there was therefore no sufficient cause for not filling the appeal on time. As regards stay of execution, it was contended that the applicants had not met the requirements of **order 42 of the Civil Procedure Rules**.

6. I have carefully considered the affidavits on record, the rival submissions and the authorities relied on. In **Nicholas Kiptoo Arap Korir Salat v. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, the Supreme Court held: -

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;

2. *a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
3. *whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;*
4. *where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;*
5. *whether there will be any prejudice suffered by the respondents, if extension is granted;*
6. *whether the application has been brought without undue delay; and*
7. *whether in certain cases, like election petitions, public interest should be a consideration for extending time”*

7. It is trite law that the decision as to whether to extend time or not is purely at the discretion of the court. In the present case, it is not disputed that the impugned decision was delivered about 10 months ago. The applicants contended that failure to appeal on time was occasioned by their honest believe that their insurer would pay. That the insurer only repudiated liability long after the period which they were to lodge an appeal had lapsed.

8. From the circumstances of this case, it is not unexpected that someone who is insured will have a legitimate expectation that his/her insurer will meet a claim made against him/her. That such expectation may be dashed for reasons that may be beyond such an insured. In this regard, in the interests of justice I am satisfied that although the delay herein was inordinate, it is nevertheless excusable. The same has been explained to the satisfaction of the court and I am inclined to exercise my discretion in favour of the applicants.

9. With regard to the prayer for stay of execution, the circumstances under which the court will grant stay of execution pending appeal are clearly set out in **Order 42 Rule 6 of the Civil Procedure Rules**. These are that the application should be made timeously; the applicant must demonstrate that he would suffer substantial loss if the stay is not granted and the applicant must give security for the performance of the decree.

10. In **Butt v Rent Restriction Tribunal [1982] KLR 417**, the Court of Appeal held: -

- “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 appellant 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.”***

11. On the first limb, the application was not made timeously as the same was filed 10 months after delivery of the judgment. The delay has however, been explained to the satisfaction of the court. That is why the court has granted extension of time within which to lodge an appeal against the impugned decision.

12. As regards the second limb, *the applicants alleged that they have been served with warrants of attachment in execution of the decree. There is therefore a real danger that their properties may be sold in execution of the decree.*

13. It must always be remembered that, in an application for stay of execution, there are two competing interests which a court seeks to safeguard. These are, the judgment-debtor’s right of appeal not being rendered nugatory and the decree-holder’s right to enjoy his fruits of the judgment. For that reason, it is incumbent upon an applicant for an order of stay of execution to demonstrate that if the stay sought is not granted, his appeal if successful will be rendered nugatory. In monetary decrees, this is demonstrated by such an applicant stating on oath that if the money is paid over to the decree-holder, it is unlikely that the same will be refunded if the appeal succeeds.

14. In the present case, there was no allegation that if the execution is levied, the applicants will suffer any substantial loss. It was not even implied. I do not think it is within the jurisdiction of the court to suspect or infer that substantial loss will be suffered if stay is not ordered. It is for an applicant to positively state so. In this case, there was no such allegation and on my part, I will not infer any.

15. What the applicants stated was that their properties will be sold. They never addressed *the fact that payment of approximately kshs.800,000/= which is sought to be executed against, will be unrecoverable if the appeal succeeds.*

16. I am therefore not satisfied that the applicants have satisfied the second requirement under **Order 42 Rule of the Civil Procedure Rules**.

17. With regard to the 3rd limb namely; provision of security, the Applicants submitted that they were willing to abide by any reasonable conditions for due performance of the decree. I am satisfied that the 3rd requirement has been met.

18. Accordingly, although the applicants met two of the conditions under **Order 42 Rule 6 of the Civil Procedure Rules**, they failed to meet the most important of all, that they will suffer substantial loss if stay is not granted. They have therefore failed to meet the requisite threshold to enable this court exercise its discretion in their favor.

19. Accordingly, I find the Notice of Motion dated 16th August, 2018 to be partially merited. The applicants are allowed to file and serve their Memorandum of Appeal within 14 days. Since they stand to suffer no substantial loss, the prayer for stay of execution is declined.

20. I award costs of the application to the respondent.

DATED and DELIVERED at Meru this 20th day of November, 2018.

A. MABEYA

JUDGE