



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. 507 OF 2016

EPHANTUS KERU MAINA.....1ST APPLICANT

NGANGA PETER.....2ND APPLICANT

VERSUS

ELIJAH THIONG'O KARAYA.....RESPONDENT

RULING

1. The Notice of Motion dated 19th September, 2016 was taken out by the Applicants herein pursuant to Order 42 Rule 6, Order 22 Rule 22, Order 51 Rule 1 of the Civil Procedure Rules and Sections 3, 3A and 79G of the Civil Procedure Act in which they sought for the following orders inter alia:

i. Spent

ii. Spent

iii. That there be stay of execution pending the hearing and determination of the intended Appeal.

iv. That the time for filing the Appeal be extended.

v. That the Applicants be granted leave to file appeal out of time in respect of CMCC No. 3574 of 2013 at Nairobi Commercial Courts Elijah Thiongo Karaya v Ephantus Keru Maina and Nganga Peter.

vi. That cost be in the cause.

2. The Motion is supported by the affidavit of Susan W. Murage. The respondent opposed the motion by replying in the replying affidavit of Elijah Thiong'o Karaya. The parties agreed to dispense with the application vide written submissions.

3. A brief background of this dispute is that it arises out of a motor vehicle accident. Its compensatory suit was vide CMCC No. 3574 of 2013. The action was heard by Hon. D. Mburu, learned Resident Magistrate who found both parties to have contributed to the accident and apportioned liability in the ratio 70%: 30% in favour of the Plaintiff (herein the Respondent). Judgment was entered on 22nd July, 2016 in the amount of Kshs. 700,000 as being general damages and Kshs. 24,503 as being special damages less 30% contribution on the part of the Plaintiff. The Defendants (herein the Applicants) being dissatisfied with the judgment intend to file an appeal hence this application. They have sought for stay of execution pending the hearing and determination of the intended appeal and leave to file the appeal out of time.

4. The Applicants in their submissions argued that they intended to appeal against the award on general damages. They have cited on section 59 of the Interpretation and General Provisions Act and; sections 79G and 95 of the

Civil Procedure Act. They have urged this court to extend time to lodge the appeal out of time. The advocates argued they received instructions to lodge an appeal after the time for filing the same had lapsed. They averred that the delay was not inordinate and have indicated their willingness to offer security for due performance of the decree.

5. The Respondent in his submissions argued that the Applicants did not provide sufficient reason for failing to file their appeal within time given that judgment was delivered on 22nd July, 2018 thus citing unreasonable delay. He argued that the appeal was untenable as it had not yet been filed and relied on the case of **Gerald M'Limbine v Joseph Kangangi** in which Emukule J, as he then was, held that for an appeal to be admitted out of time, it had to first be filed and then leave from court sought. He argued that the Applicants failed to indicate that they stood to suffer substantial loss and prejudice in the event the order for stay is denied. He argued that the Applicants had not stated that they would provide security in due performance of the decree.

6. This court has been beseeched to determine the twin issues:

i. Whether to extend time for appeal to be filed out of time

ii. Whether to grant a stay of execution

7. On the issue of extending time for the appeal to be filed out of Time this court is given the discretion under Section 79G of the Civil Procedure Act which gives this court unfettered discretion to extend time for an appeal to be lodged out of time. However, the provision under section 79G of the Civil Procedure Act provides as follows:

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 good and sufficient cause for not filing the appeal in time.

8. The Applicants have failed to provide good reasons why they failed to lodge an appeal within the time set by law. They had the onus of providing the court with a satisfactory explanation for the delay in lodging the appeal late. The explanation provided was not adequate as it failed to provide this court with a satisfactory cause for the delay which is deemed to have been inordinate and hence inexcusable.

9. The issue on stay of execution is predicated on there being an appeal. Since the prayer for lodging an appeal out of time has failed, this prayer also fails.

10. For the foregoing reasons, the application is found to be without merit. It is dismissed with each party to bear its own costs.

Dated, Signed and Delivered in open court this 9th day of November, 2018.

J.K. SERGON

JUDGE

In the presence of:

..... For the Applicants

..... For the Respondent