REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 369 OF 2017

1. THOMAS MUTHIANI MASILA &

2. MARGARET MBAIKA MWONGA

(Suing as Personal representatives of the estate of

BONIFACE MUTHIANI MWONGA

(deceased)**.....PLAINTIFFS/RESPONDENTS**

VERSUS

MUVILA RAPHAEL.....1st DEFENDANT/APPLICANT

RAPHAEL MUINDA.....2nd DEFENDANT/APPLICANT

RULING

1. By a notice of motion dated 7th November, 2017 and filed on 9th November, 2017, the applicants sought orders for:-

i. ***Extension of time and leave to lodge a memorandum of appeal out of time.***

ii. Stay of execution of judgment and decree in Machakos Chief Magistrates Court Civil Suit 1087 of 2013 pending the hearing and determination of this application.

iii. ***Stay of execution of judgment and decree in Machakos Chief Magistrates Court Civil Suit 1087 of 2013 pending the hearing and determination of the intended appeal.***

iv. ***Costs be in the cause.***

2. The Applicants' application was based on the grounds that they have an arguable appeal, that their application was brought without undue delay and that it is necessary for the ends of justice for the orders sought to be granted.

3. The Respondents opposed the application on the grounds that it does not meet the prerequisites of an application of this nature, that it is intended only to deny them the fruits of their judgment and therefore should be dismissed.

4. Counsels for applicants and the respondent agreed to canvas the application by way of written submissions.

5. The Applicants' submitted that in accordance with Section 3A of the Civil Procedure Act the court has discretion to grant the orders sought. They also submitted that they have an arguable appeal and relied on the case of **Kenya Revenue Authority vs Sidney Keitany Changole & 3 Others (2015) eKLR** in support of their argument that an applicant needs to establish one arguable point in order for their application to be allowed. The applicants also submitted that they are entitled to an order of stay of execution because they have satisfied the conditions provided for in Order 42 Rule 6 of the Civil Procedure Rules. The applicants seek to rely on the case of **Tabro Transporters Ltd vs Absalom Dova Lumbasi (2012) eKLR.**

6. The respondents in opposition to the application submit that the applicants have failed to meet the legal threshold to warrant the grant of the leave sought. They relied on the case of **African Airlines International Ltd v Eastern Southern African Trade and Development Bank (2003) KLR** in analyzing the factors to be considered when granting the said leave. The Respondents further submitted that the

applicants are not entitled to stay pending appeal and vilified the affidavits sworn by an advocate and a Deputy Claims Manager for the said affidavits contain contested matters that the deponents lack personal knowledge of. They relied on the case of **Mutua Kilonzo vs Kioko David Machakos HCCA 62 of 2008** where the court held that the impugned affidavits would not assist the court to convince it of the financial loss likely to be suffered.

Determination

7. I have considered the Application and the rival affidavits plus the submissions by learned Counsels. Three issues fall for determination, namely; whether the Applicants deserve to be granted leave to have their appeal filed out of time occasioned by their failure to file within the statutory period, whether the applicant has satisfied the court on conditions for grant of stay of execution of decree pending appeal and what additional orders should this court make.

8. As regards the first issue, the question to ponder "***what is the purpose of leave in an appeal***?" The importance of obtaining leave in an appeal is well captured in Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which prescribes the period for filing of appeals from decrees or orders of the lower court to the High Court to be 30 days from date of the decision or order. However, the proviso to the said Section 79G permits the admission of an appeal out of the statutory period of 30 days where there is sufficient or good cause shown as to why there was delay in such filing.

9. The grant or refusal of leave, involves an exercise of judicial discretion as per Section 3A of the Civil Procedure Act and in this respect the Respondent has quoted the case of **African Airlines International Ltd v Eastern Southern African Trade and Development Bank (2003) KLR** where the court listed three conditions which the court ought to take into account in deciding whether or not to grant extension of time to appeal namely:

(a) The length of delay

(b) The reason for the delay.

(c) Whether there is an arguable appeal

10. In short, permission will be granted only where the court is satisfied that the papers disclose that there is a valid reason for delay as well as an arguable appeal that merits full investigation at a full hearing and this is the acid test this application must be subjected to at this stage.

11. On delay, it was submitted by the Applicants counsel that judgement was delivered on 30th August, 2017 and they took time to find a copy of typed judgment. They have not demonstrated that they made any efforts to obtain the said copy. The Respondent submits that the Applicants counsel were in court on the date of the judgment and have annexed a copy of the judgment that is part of the court record. Indeed during the delivery of the judgement, the Applicant's Advocate was in attendance.

12. It follows that the Applicants are not being serious, and do not deserve the leave sought. On this ground alone, the Applicants' application for leave to file an appeal out of time premised on the facts discussed above fails since they have not explained as to why they did not take proactive steps to lodge appeal within the stipulated period.

13. On the arguability of the appeal, the Applicants have gone ahead to say that they have an arguable appeal, however they have not annexed the draft memorandum of appeal. It is thus difficult for the court to determine whether or not the Applicants have an arguable appeal.

14. However, it is always in the interest of justice to respect the right of parties to be heard since that right is sacrosanct and should be given an opportunity to ventilate their respective cases. The Applicant herein is ready and willing to furnish security.

15. The second issue that I need to address is on whether the Applicant has satisfied the court on conditions for grant of stay of execution of decree pending appeal. This is governed by the provisions of Order 42 rule 6(2) of the Civil Procedure Rules, and the requirements to be satisfied are that substantial loss may result to the applicant, the application has been brought without unreasonable delay and that the Applicant has furnished security for the performance of the decree.

16. The Applicant's pleadings merely indicate that they are likely to suffer irreparable loss but do not indicate the nature of loss, hence the court is unable to find that the applicants are likely to suffer irreparable/substantial loss. On the flip side, it is the respondents who are likely to suffer because they have obtained a judgment and it follows that they would need to realize the fruits thereof. I would need to ensure that justice is accorded to them as well.

17. On the aspect of unreasonable delay, the Applicants have submitted that they filed this application late and have claimed that they were waiting for copy of judgement. The judgement was delivered on 31/08/2017 and the present Application filed on 11/12/2017 which is about four (4) months. I find the same not unreasonable and that the same should be allowed in the interest of justice subject to the Respondents concerns being considered as well.

18. The applicants have pleaded and submitted that they are ready and willing to furnish security. The respondents are agreeable to a release of ½ of the decretal sum to them and the balance to be deposited in a joint interest earning account in the names of both advocates. This would then take care of the interests of the parties as they canvas the appeal.

19. In **Mohammed Salim T/A Choice Butchery –Vs- Nasserpuria Memon Jamat (2013) eKLR**, where the court upheld the decision of **M/S Portreitz Maternity –Vs-James Karanga Kabia Civil Appeal No. 63 Of 1997** and stated that:-

> ***"That right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favor. There must be a just cause for depriving the plaintiff of that right ……."***

20. Applying the above test, I find that the Applicant has not properly convinced this court that it should be given a chance to mount their appeal but due to their willingness to offer security, they deserve to be given that opportunity. The Applicants' readiness to deposit security merits them being given an opportunity of ventilating their appeal. The respondents' concerns shall be taken care of by an order of deposit of half the decretal sums while the remainder is to be held in a joint interest-earning account.

21. Accordingly, the Applicants' Application dated 7th November, 2017 is allowed on the following terms:-

> ***1. Appeal be filed and served within 14 days from the date hereof.***
>
> ***2. The Applicant is granted an order of stay on condition that Kshs. 335,625/= is paid to the Respondents and the balance of the decretal sums be deposited into an interest earning account in the joint names of both Advocates within 30 days from date hereof and in default execution shall issue.***
>
> ***3. Costs of the application to abide in the appeal.***

Signed, Dated and delivered at Machakos this 6th day of November, 2018.

D.K. KEMEI

JUDGE