REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. APPLICATION NO. 55 OF 2017

JOSEPH G. NJOKA.....1ST APPLICANT

ALEX B. MIANO.....2ND APPLICANT

PETER MWAI.....3RD APPLICANT

FRANCIS K. KARABA.....4TH APPLICANT

LAWRENCE W. GITHINJI.....5TH APPLICANT

HANNAH W. NJAGI..... 6TH APPLICANT

V E R S U S

ROSE MUTITU GACHOKI..... RESPONDENT

RULING

The applicants filed an application dated 24/10/2017 seeking the following;

1. **Stay of execution of the decree dated 10/03/2014 pending hearing and determination of the proposed appeal.**
2. **Stay of proceedings in SRMCC No. 428 of 2005 pending hearing and determination of the application.**
3. **Stay of proceedings in SRMCC 428/05 pending hearing and determination of the appeal.**
4. **They be granted leave to appeal out of time against the judgment delivered on 12/01/2009.**
5. **That the Notice of Appeal and Memorandum of Appeal annexed there to be deemed as duly filed.**

Applicants' case

Judgment was delivered on 12/01/2009 and by which time the plaintiff had passed away on 31/12/2008. The appellants were aggrieved but could not commence appeal until substitution of the deceased plaintiff was done. They were advised to file an application for judicial review on the basis that the judgment was a nullity since substitution had not been effected. However the same was dismissed on 15/06/2009. On 14/02/2014, an order for substitution was issued thus granting them an opportunity to file an appeal. They immediately instructed their advocates to file application seeking leave to file appeal out of time which was done on 20/02/2014.

However, they became aware that the principal partner in the law firm did not hold a practicing certificate and the respondent filed an application to strike out the application and the same was dismissed. The respondent proceeded to take out Notice to show cause which was coming up for directions on 27/10/2017.

Respondent's case

In response, the respondent stated that she is the wife of the deceased. That the application is based on non-disclosure of material facts and is meant to further delay the realization of the fruits of judgment. That the applicants are not entitled to stay of execution as they have not satisfied mandatory provisions of **Order 42 Rule 6 (1) (2) (a) and (b) of the Civil Procedure Rules**. That they have not disclosed when they applied for proceedings if at all they did and concealed from court that upon dismissal of ex-parte judicial review application they

already had proceedings of the lower court. Therefore, they are unable to account for the delay between 15/10/2009 when the application was dismissed and 20/02/2014.

That they concealed that they were served with notice of intention to execute on 22/01/2014. That the allegation that the cause of action being defamation did not survive the deceased could only apply if the deceased died before prosecuting his case. That the applicant knew she was the legal representative way back in 2009 but did not apply for leave until 2014 and no explanation has been given.

The court vide its ruling on 24/10/2017 ordered that there be stay of execution pending hearing and determination of the application and proposed appeal and stay of proceedings in **SRMCC No. 428 of 2005** pending hearing and determination of the application.

On 14/12/17 the court gave direction that the application be disposed off by way of written submissions.

Parties filed submissions. For the applicant it was submitted that the issues of determination are:-

- Whether the court should grant stay of proceedings in SRM CC 428/2005 pending the hearing of this application and the appeal.
- Whether the applicant should be granted leave to appeal against the whole Judgment of Hon. Mr. A. K. Ithuku (SRM) delivered on 12/1/09.

It is submitted that the plaintiff passed away on 31/12/08 and the Judgment was delivered on 12/1/09. The respondent substituted the plaintiff on 14/2/14 and 27/10/17 took out a notice to show cause against the applicants requiring them to pay Kshs 620,393.70 or be committed to civil jail.

It is the contention by the applicant that upon the death of the plaintiff the suit abated and the respondent has no right to take out the notice to show cause and neither is she entitled to the benefits of the Judgment as provided under ***Section 2(1) of the Law Reform Act*** which states:-

> ***"Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case maybe, for the benefit of, his estate:***
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> ***Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery."***

The applicant relies on the Court of Appeal decision in ***Kiage Peter Wa Mochama & Another –v- Standard Chartered Bank Limited (2016) eKLR*** where it was stated:

" A preliminary point of law relating to survival of defamation suits has been raised and we are obliged to consider and determine this point of law before delving into the merits of the appeal."

In ***Hon. Emmanuel Karisa Maitha –v- The Nation Media Group Ltd & Another eKLR 2007,*** the High Court in a persuasive authority held:

> ***"…… This suit, being a defamation suit, by reasons of the proviso to Section 2(1) of the Law Reform Act (Cap 25), which is in mandatory terms, the suit does not survive the deceased plaintiff even if the plaintiff died after an interlocutory Judgment had been entered in his favour……"***
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> *The appellant submitted that a suit filed prior to the death of the deceased survives for the benefit of his estate. We are not persuaded for reasons that a plain reading of the proviso in* ***Section 2 (1)*** *of the* ***Law Reform Act*** *is explicit that all causes of action subsisting against or vested in the deceased in defamation do not survive for the benefit of the estate. In defamation law, the dead cannot be defamed.* ***Defamation suits do not survive the deceased because defamation is a personal action that cannot be assigned or brought on someone's behalf. The reason why defamation suits do not survive is that the right of action dies with the person and once you are dead, you are taken not to have a reputation in legal terms that is capable of being damaged.*** *The reputation of a person dies with him. In a comparative case from India, Justice R. Bassant in* ***Raju –v- Chacko, (2005) 4 KLT 197*** *aptly expressed:*
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> ***"A claim for compensation for defamation may not be maintainable in respect of defamation of a deceased person on the principle that a personal right of action dies with the person (action personalis moritum cum persona)".***
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> ***There is no liability for defamation of the dead either to the estate of the deceased or to the deceased's descendants or relatives.*** *Once a person has left the living, you can say anything you want about him. A reputation is as perishable as the person who earned it. The dead have no rights of reputation and can suffer no wrong.* ***In the instant case, the deceased having died on 24th August 1995, his claim for defamation does not survive for the benefit of his estate. Accordingly, we uphold the respondent's preliminary objection and see no reason for us to deal with the grounds of appeal relating to the claim for defamation."***

Based on the law and the Court of Appeal decision the applicants submit that there are sufficient reasons for this court to order stay of execution.

It is further submitted that the applicants will suffer substantial loss as they are currently not officials of the Union which they represented at the time when the letter in contention was addressed to the plaintiff. Further that there are sufficient reasons that the appeal will be successful and the respondent would not suffer any loss. Applicants relied on the case of ***Joseph Gitonga Kuria –v- Elizabeth Wambui***

Gitonga & Another (2016) eKLR where it was held:

> ***"….. The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted.(5)*** *What constitutes substantial loss was broadly discussed by* ***Gikonyo J*** *in the case of* ***James Wangalwa & Another –vs- Agnes Naliaka Cheseto(6)*** *where it was held inter alia that:-*
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> *"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under* ***Order 42 Rule 6 of the CPR****. This is because execution is a lawful process* ***as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein –vs- Chesoni,(7) …….. the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***
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> *..... The importance of complying with the said requirement in my view was well emphaised in* ***Machira T/A Machira & Co. Advocates –v- East African Standard (No. 2)(17)*** *where it was held that:-*
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> ***"to be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one part as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."***
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> *……. It should also be noted that the judgment in question is a money decree. In considering whether a money decree or a liquidated claim would render the success of an appeal nugatory, the Court of Appeal in the case of* ***Kenya Hotel Properties Ltd –vs- Willesden Properties Ltd (21)*** *had this to say:-*
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> ***"The decree is a money decree and normally the courts have felt hat the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not in a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all."***

On the issue whether leave to appeal should be granted it is submitted that the applicants were not to blame for the delay as they had instructed an Advocate to file the appeal and that is was not until 2014 that the plaintiff was substituted. That the Advocate they instructed had no practicing certificate a fact which they could not have known as they are laymen and his failure has caused them an injustice. It is submitted that this was a technicality which court should address under **Article 159(2) (d) of the Constitution and Section 1A & AB Civil Procedure Act** and strife to do substantial justice.

The applicants relied on The Supreme Court of Uganda of **Prof. Syed Huq –v- Islamic University in Kampala. (Supreme Court Civil Appeal No. 47 of 1995) (1997) UGSC 3 (6 November 1997)** held;

> ***"… I find nothing in the Provisions I have referred to which penalize an innocent litigant. That is why the Court would deny audience to an Advocate without a practicing certificate but should allow a litigant the opportunity to conduct this case Or engage another advocate…. I think that deeming as illegal documents prepared by an Advocate without practicing certificate amounts to a denial of justice to an innocent litigant who innocently engages the services of such an Advocate. A litigant would hardly inquire from an Advocate if the particular Advocate has a valid certificate. This is the business of the Courts and the Law Council. To say that litigants who engage Advocates without practicing certificate do so at the peril is harsh because the majority of our people would not know which Advocate i.e. not entitled to practice…"***

Justice Okongo in **Florence Mumbi Njie –v- Kefa Oketchi Muinde (2014) eKLR** in dismissing an application by the Defendant seeking an order that all pleadings filed by the Plaintiff's Advocate for failing to hold a current practicing certificate held:

> *"… The position in Kenya seems to be varied on the issue as to the validity of the pleadings prepared and filed by an advocate without a practicing certificate. One line of thought is that such pleadings are invalid null and void and of no legal effect. The other school of thought is that failure by an Advocate to take out a practicing certificate does not invalidate the pleadings drawn and filed in court by such Advocate on behalf of a party …..… 20. The rationale behind the position taken in England and by some Kenyan courts from the authorities that I have highlighted above is that it would be unjust to punish an innocent litigant for the mistake of his Advocate in which he is not a party …..*
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> *If I was to allow the defendant's present application it will mean that I will have to strike out the plaint that the plaintiff had filed herein together with all the other documents that the plaintiff's former Advocate who had no practicing certificate had drawn and filed herein. I will also have to if I was to allow the defendant's present application it will mean that I have to strike out the plaint that the plaintiff had filed herein together with all the other documents that the plaintiff's former Advocate who had no practicing certificate had drawn and filed herein. I will also have to strike out the proceedings that have so far taken place in this matter*

which includes the plaintiff's evidence and the evidence that was given by the defendant. The plaintiff will then have to go back to the drawing board. She will have to file a fresh suit against the defendant and go through the whole process again. The question that I have to ask myself is what would I have achieved at the end of the day? Multiplicity of suits, waste of judicial time and money. The application brought herein by the defendant is not intended in any way to resolve the dispute before the court between the plaintiff and the defendant. It is also not intended to vindicate any right that has been infringed. The defendant has not contended that he has suffered any injustice or that he is likely to do in future if the pleadings filed herein by the firm of Henry Kaburi & Co. Advocates are not struck out. ***I am of the opinion that if I was to allow the defendant's application, it would go contrary to the provisions of Articles 48, 50(1) and 159(2) (b) and (d) of the Constitution of Kenya, 2010 and sections 1A and 1B of the Civil Procedure Act, Cap 21, Laws of Kenya. ….. I am also of the opinion that to rule that a party who unknowingly engages an Advocate without a practicing certificate, does so, at his own risk of having his pleadings struck out would impede a right of access to justice which is guaranteed under Article 48 of the Constitution of Kenya."***

The applicants submit that they have given sufficient reasons for the delay in filing the appeal and fulfilled the requirements laid down in **Thuita Mwangi –v- Kenya Airways Ltd (2003) eKLR** where it was stated that the decision whether or not to extend time is discretionary considering length of delay, reason for delay amongst others. The applicant also relied on ***APA Insurance –v- Michael Kinyanjui Muturi (2016) eKLR*** where the court stated:-

"…. Though persuasive, the above decision speaks to this court in no uncertain terms that it is good precedent and I have therefore no reason to depart from such noble principles of law established by the courts over a period of time and which have withstood the test of times. I am further fortified by the decision and principles laid down in Factory Guards Limited –v- Abel Vundi Kitungi that the right of appeal should not be impeded as it is a constitutional right and the cornerstone of the rule of law. Where there is delay which is explained and the court accepts that explanation in order to render substantive justice and to facilitate access to justice for all by ensuring that deserving litigants are not shut out of the Judgment seat, such leave should be granted …."

It is further submitted by the applicant that the respondent will not suffer any prejudice as the suit abated upon the death of the plaintiff and there is no benefit for the estate. They pray that the application be allowed.

For the respondent it is submitted that the application has three main prayers, that is stay of execution pending hearing of the application and the intended appeal and leave to appeal out of time being the fundamental prayer. That the issue is whether the applicants have shown sufficient reason for not filing the appeal within time as mandatorily provided under ***Section 79 G of the Civil Procedure Act*** that appeal from the sub-ordinate court to the High Court shall be filed within 30 days from the date of the decree.

He submits that the court will consider the length of delay, the merits of the appeal, the explanation for the delay, the prejudice to the other party and importance with compliance with time limit.

It is further submitted that given the background of this matter, the application is an abuse of court process as it is based on falsehoods, none disclosure of material facts and meant to delay, subvert and/or completely frustrate the realization of the fruits of judgment of the lower court delivered way back on 12/1/09. That the applicants have not shown when they applied for decree or order. That it is not a good reason for applicants to say the respondent's husband had passed and there was no one to appeal against.

The respondent relies on decision by Hon. Lady Justice Wanjiru Karanja (as she then was) where she stated that the delivery of judgment by the Lower Court after plaintiff had died did not vitiate the judgment as the Magistrate was not aware of the death and the Judgment was after a full trial. That there was no appeal against the said Judgment.

It further submitted that the death of the plaintiff after judgment did not result on the abatement of the suit. **Code of Civil Procedure Vol – 111 16th Edition at Page 308 Mulla.** That in cases of defamation the decretal debt forms part of his estate.

The position, however, is different where a suit for defamation has resulted in a decree in favour of the plaintiff because in such a case the cause of action has merged in the decree and the decretal debt forms part of his estate and the appeal from the decree by the defendant becomes a question of benefit or detriment to the estate of the plaintiff- respondent which his legal representative is entitled to uphold and defend and is therefore entitled to be substituted in place of the deceased respondent – plaintiff.

The respondents submits that the delays and in action have not been explained and cited various cases where applications for leave to appeal out of time failed because the delays were not explained to the satisfaction of the court. The respondents urges the court to refuse the application.

I have considered the submissions and I find that there are two issues which arise. These are stay of execution, proceedings and leave to file appeal out of time.

1. Stay of Proceedings.

The applicant has sought for stay of proceedings pending hearing determination of the application and proposed appeal.

Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules 2010 provides as follows:-

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 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 of stay shall be made under sub rule (1) unless-

a. The court is satisfied that substantial loss may result to the applicant unless the order is made and 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

It has been well articulated in the submissions that stay is ordered at the discretion of the court and the court considers the reason for delay, length of delay and prejudice to the other party. In considering the application court will consider whether substantial loss may result, the application has been brought without unreasonable delay and such security as the court may order.

Refer to **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR**

The Court stated;

Having analysed the provisions of *Order 42 rule 6* of the *Rules*, it is clear to me that the said provisions only apply to applications for stay of execution of a decree or order issued by a court pending hearing of an appeal but the same do not apply to applications for stay of proceedings such as the application now before me…….

Having made that finding, it is obvious that *Order 42 rule 6(2)* cannot come to the aid of the applicant. The court must be guided by other considerations in making its decision whether or not to grant stay of proceedings as sought herein but then, what are those considerations?

In answering this question, I wish to borrow from the wisdom of Ringera J (as he then was) when he stated the following when confronted by a similar application in the case of *Global Tours &Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000*

"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously" (emphasis added)

To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

a) Whether the applicant has established that he/she has a prima facie arguable case.

b) Whether the application was filed expeditiously and

c) Whether the appeal would be rendered nugatory

Having considered the ground raised by the appellant, a substantial issue has been raised that the defamation suit did not survive the death of the plaintiff. This is well grounded in law under **Section 2(1) Law Reform Act** cited Supra and has been stated to be the law in a binding decision by the ***Court of Appeal in Mochama & Another –v- Standard Chartered Bank*** cited by the applicants. The law is well settled. The submissions by the respondent based on **Mulla on Code of Civil Procedure** is not binding. The decision by the Court of Appeal has clearly stated that it is not the Law. Section 2(1) Law Reform Act provides in mandatory terms that the suit for defamation does not survive the plaintiff. This must also apply to orders and Judgment in the suit.

The applicants are likely to suffer substantial loss if stay is not ordered as the decretal sum is substantial. The respondent will not suffer any prejudice in view of the issue that the defamation suit did not survive the plaintiff. They were office bearers who are no longer holding the positions and there is an application to commit them to civil jail. If stay is not ordered the appeal will be rendered nugatory.

The applicant's have shown that they have a prima facie case based on the ground that the suit abated and nothing survived the plaintiff. The applicants have demonstrated they moved with speed to file Judicial Review and also an appeal. It has also been demonstrated that the plaintiff was substitute in 2014 and in the intervening period they could not proceed as there was no party who they could file proceedings against. I am of the view that the applicants has made out a case for the court to exercise discretion and order a stay of proceedings as well as stay of execution pending appeal.

2. Filing an appeal out of time

Section 79G of the Civil Procedure Act deals with the time for filing appeals from subordinate courts and states:

> *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:*
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> *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.*

In **Paul Musili Wambua v Attorney General & 2 others [2015] eKLR**

The Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated the following;

> **…..it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.**

a) Length of delay and reasons thereof

Judgment was delivered on 12/01/2009 and by which time the plaintiff had passed away on 31/12/2008. The appellants were aggrieved but could not commence appeal until substitution of the deceased plaintiff was done. They were advised to file an application for judicial review on the basis that the judgment was a nullity since substitution had not been effected but the same was dismissed on 15/06/2009. On 14/02/2014, an order for substitution was issued thus granting them an opportunity to file an appeal. Immediately they instructed their advocates to file application seeking leave to file appeal out of time which was done on 20/02/2014.

However, they became aware that the principal partner in the law firm did not hold a practicing certificate and the respondent filed an application to strike out the application and the same was dismissed. The respondent proceeded to take out Notice to show cause which was coming up for directions on 27/10/2017.

The delay in filing the application was for about five years which though inordinate was duly explained by the applicants that they could not file an appeal when the plaintiff had passed away and it took about six years to substitute him. Instead, they filed a judicial review which unfortunately was dismissed. Thereafter, once the deceased was substituted, they immediately proceeded to file an application seeking leave to file an appeal which was again unfortunately dismissed because of lack of practicing certificate. In all these times, the applicants were vigilant in following up on their case. The applicants never abandoned nor did they give up in their quest for justice. The delay has been sufficiently explained and the court must exercise its discretion in their favour.

b) Chances of the appeal succeeding

The applicants raised the issue that the defamation suit did not survive the death of the plaintiff . Based on the law on the subject which I have quoted and the decision by the Court of Appeal in the case of Mochama supra. The applicants have an arguable case.

In view of the above, the applicants have proven their claim and deserve to be granted leave to appeal out of time.

I find that the application has merits. I allow it as prayed. I order as follows:-

> **a) There shall be stay of proceedings and execution in SRM CC 428/05 pending the hearing and determination of the intended appeal.**
>
> **b) Leave is granted to the applicants to file the appeal out of time. The appeal be filed within 30 days from today and the Notice of Appeal and Memorandum of Appeal annexed be deemed as duly filed and service be effected on the respondents.**
>
> **c) I award costs to the applicant.**

Dated at Kerugoya this 5th day of December 2018.

L. W. GITARI

JUDGE